Church - Hildal Petition A18 805 (the "Petition")

Petition for Boundary Amendment From the State Conservation District to the State Agricultural District

TMK's (3) 2-9-003; 029, 060

Guide supplement to the Petition (the "Guide")

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Introduction

Church and Hildal (the "Petitioner(s)") apologize to the Commissioners, the LUC administrative office and the State and County Offices of Planning for the large volume of the Petition, its exhibits and appendix(s).

The Property is small in size and its use for agriculture ("Ag.") could not justify the expense of using a professional to develop the Petition text. The Petitioner(s) have recognized that the Petition's volume, which lacked the organization that is normally found in professional petitions, may burden the various administrative authorities. Therefore the Petitioner(s) developed this Guide in order to bring the Petition into a better organized presentation of the supporting information that the Petitioner(s) believe may be most relevant to the Commissioner's considerations. None-the-less the main body of the Petition gives a more complete representation of the facts.

This Guide to the Petition describes that the Petitioner(s) have come to believe that a 1992 Interpretation (the "*Interpretation*") for an area which included the Property, by the Executive Officer of the LUC, did not fully conform to **mandatory** guidance when *Interpreting* a District Boundary, which is found in HRS 205 and HAR 15-15. The *Interpretation* described that the Property lies entirely within the State's Conservation District. The Petition and this Guide describe the basis of the Petitoner(s) belief that the *Interpretation* and the LUC's Official Boundary Map are inconsistent with **mandatory guidance** which is found in HRS 205 and HAR 15-15, and resultingly *"uncertainty remains", ref., HAR 15-15-22 (f)*. The Petition and this Guide describe that a corrective remedy is provided for in HAR

15-15-22 (f) that may eliminate the need for the Petitioned Boundary Amendment. This is covered in detail in Chapter 2 of this Guide.

On-the-other-hand if the Property, or any portion thereof, is Determined by the Commissioners to lie in the State's Conservation District the Petitioner(s) ask that the LUC continue its consideration of the Petition.

Because the Property is already a fully developed Ag. use Property with the seemed ***"Approval",*** of the DLNR, *which is described in Chapter 3, beginning on page 48 of this Guide*, it may raise the question, in the minds of the reader, why the requested zoning Determination and/or change of zoning is requested.

Please note: Bold, underline and *italicized* text, for both reference and emphasis, have been variably applied by the Petitioner(s) to quotes from Statutes, Rules, Petition exhibits and text in this Guide and the Petition. The intention is not to mislead but rather to emphasize and sometimes also to **assist the readers** in identifying specific text references that are subsequently repeated and particularly relevant to the evidenciary discussion.

The Petition and this Guide describe the Petitoner(s) reasoning that **viable** Ag. use of the Property is substantially impaired as long as the DLNR administers the use of the Property for Ag. and uses incidental and accessory to Ag. The Petitioner(s) ask that the Commissioners and the State and County Offices of Planning review the evidence provided in clauses 85-88 in this Guide. The *Interpreted* zoning of the Property has effectively.....

'*frustrated the distinct and reasonable investment-backed expectations*'

of the Petitioner(s),

note: *the italicized phrase above refers to text found in a Supreme Court Ruling which is described in more detail on page 19 which describes eminent domain and effective improper taking of land determining considerations and guidance to State lawmakers by the Court.*

Particularly also the Property's "***capacity*** *for intensive cultivation"* of Ag. crops **has increased** since the LUC's *official U.S.G.S. quadrangle map* (the "Official Map") was first adopted. The Ag. ***capacity*** of the Property increased **after** the 1992 *Interpretation*, *ref., Petition exhibit 18*. The Property's "*capacity for intensive cultivation"* **increased** by approximately **.9 acres** (*2.5 acres to 3.4 acres*) when the previous owners of the Property, the McCully(s), filled in a deep cut through the Property where a former rail road grade crossed the Property. The cut, which generally exceeded 10 ft. in depth, was filled in with top soil that was harvested from land contiguously mauka to the Property when that property was leveled for a large greenhouse, a residence, and a lawn area *ref., Petition exhibit* 22, *field map* and *Petition exhibit 51, County letter*.

Furthermore the Petitioner(s) are offering an incentive that a **buffer zone**, which does not presently exist, if the Petition is granted, an area separating the ocean-side pali from **cultivated soil areas** of the Property, would no longer be cultivated as part of the existing DLNR ***Allowed*** nonconforming Ag. use.

The Petitioner(s) emphasize that no new use of the Property is proposed nor is likely. The Property is already a fully developed Ag. use Property which includes a residence and a large storage and processing structure. The Petition, if allowed, offers a reduction in the intensity of the land's existing ***Allowed*** use that may be negative to the environment while maintaining (and preserving) a limited, yet continuing substantial, beneficial Ag. use of the *Prime* Ag. resources of the Property and the offered buffer zone area.

Also for quick reference.....

This Guide's Chapter 9, beginning on page 69 specifically references HAR 15-15 Subchapter 6 - *Application Requirements For Boundary Amendment Petitions, Section 15-15-50 -* *Form and contents of petition* on a rule by rule basis with references to page numbers in the main body of the Petition where the required elements of a Petition are described. **Any of the required information that does not clearly exist in the original Petition filing is found in this Guide's Chapter 9** beginning on page 86 of this Guide.

This Guide is organized into the following chapters for ease of reference and consideration.....

Guide Chapter 1 (beginning on page 20), describes the Petitioner(s) early Property experience and their DLNR experience seeking use of the Property, which began in 2014 after the Petitioner(s) purchased the Property, and an offered buffer zone which buffer zone is further discussed in chapter 7.

Guide Chapter 2 (beginning on page 31), describes the Petitioner(s) belief that the Property has been *Interpreted* by the Executive Officer of the LUC to be located entirely within the State's Conservation District in 1992 without proper consideration given to **mandatory guidance** that is described in HRS 205 and HAR 15-15.

Guide Chapter 3 (beginning on page 48), the *Interpretation* of the Property's zoning in Conservation makes it difficult for the Petitioner(s) to use and secure the ***Prime Ag. resources*** of the Property.

Guide Chapter 4 (beginning on page 61), describes the Property, the 7 lot subdivision in which the Property is located, the general area, current use, historical use and it also refers to a **Ka Pa'akai 0 Ka 'Ama assessment**.

Guide Chapter 5 (beginning on page 68), gives discussion and reference(s) to EA, FONSI, DLNR, SMA and the Community.

Guide Chapter 6 (beginning on page 70), Nonconforming Ag. use in the Conservation District is discussed.

Guide Chapter 7 (beginning on page 76), a previous petition for the area of the Property, McCully LUC petition A05 757, which was denied by the LUC, dissenting Commissioner(s) reasoning, and the Petitioner(s) offered **buffer zone**.

Guide Chapter 8 (beginning on page 82), some final comments.

Guide Chapter 9 (beginning on page 86), **HAR 15-15 Subchapter 6 - Application Requirements For Boundary Amendment petitions.**

The Property's area was formerly the makai end of a much larger sugar cane field dating from the 1850's, *ref., 1905 field map picture*. The Property's Ag. resources were classified as *Prime* around 1977 in the State's ALISH classification system, *ref., Petition exhibit 85, ALISH map* and *Petition exhibit 83, ALISH definition of Prime.....*

> *"Land which has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed according to modern farming methods.",*

The ALISH description refers to a land's ***capacity*** for Ag. use and not a past, current or future land use. The LUC's Official Map shows a line along the mauka boundary of the Property. The Property is also zoned A20a by the County.

While the text in this Guide and the Petition may be perceived by the reader to be critical of the DLNR's administration of the Property, the Petitioner(s) wish to make it clear to everyone that they acknowledge that the DLNR's role in protecting and preserving Conservation District land may become **controversial** which generally requires that the DLNR apply its Hawaii Administrative Rules to a very high interpretive standard. **While the Petition and this Guide may give the impression that the Petitioner(s) believe the DLNR's role in administering the Petitioner's use of the Property, for Ag. and uses incidental and accessory to Ag. may have been substantially improper, that is not always the case**.

The Petitioner(s) have, now after 6 years, since they first purchased the Property, come to recognize that even the DLNR may sometimes be ***confused*** regarding its discretionary administration of its own rules. Rather the information is given herein in order that the LUC and the State and County Offices of Planning understand the Petitioner(s) ***frustration, confusion*** and ***difficulties*** that they have encountered in developing and securing the ***Prime*** Ag. resources of the Property in a reasonable and timely way, which property rights have turned out to have always been protected in the State's Statutes.....

> *"**HRS 183C-5 Nonconforming uses.** 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....."*

The ***Allowed*** **resumption** of a nonconforming use in the Conservation District, was examined in 1991 by the State's Auditor and is described in his report to the Governor, *ref., Petition exhibit 69*. The Auditor's report resulted in the changes to the DLNR's former HAR 13-2 Rules which resulted in the new rules, HAR 13-5. HAR 13-5 specifically clarified that the **resumption** of a nonconforming use in the Conservation District, **even if interrupted for a period of years** was

always intended to be ***Allowed*** to continue in perpetuity when the Conservation District was overlaid on lands by the State yet that is exactly what has not happened in the case of the Property's use for agriculture. Mr. Lemmo's testimony to the BLNR in this regard is quoted a few paragraphs later herein.

The examples of communications between the Petitioner(s) and the DLNR's Office of Conservation and Coastal lands ("OCCL") that are exhibited to the Petition and described in item 87 of this Guide are given in order that the Commissioners may determine for themselves whether the Petitioner(s) use of the Property has been interfered with beyond what was contemplated in HRS 183C-5 ***statutory*** guidance when the Conservation District was first created. Even the OCCL's administration of its own rules can be described as highly ***confusing*** and result that **the use** of Conservation Districted land by a land owner may be delayed for years while the land owner seeks proper permission from the DLNR's OCCL to use their land for both ***Allowed*** and ***Allowable*** use.

The Petition and this Guide evidence that ***everyone is confused*** including the Petitioner(s), the previous property owners (the McCully(s)), the DLNR's administrative staff, the State and County Offices of Planning, the public at large, the professional land use community, realtors and even the LUC, *ref., the previous owners of the Property's very similar petition A05-757*.

The Petition and this Guide describe that Mr. Lemmo, the Administrator of the OCCL, personally inspected the Property as he accompanied LUC Commissioners in January of 2006 on a *"site visit"* and subsequently testified to the Commissioners his observations and recommendations to the LUC. That visit to the Property and Mr. Lemmo's testimony evidence that Sam Lemmo is aware that the Property was in Ag. use before the Conservation District appeared to have been first overlaid on it, *ref., Petition exhibit 3, Sam Lemmo*

testimony to the LUC, page 69, when having been asked by Commissioner Kanuha, Mr. Lemmo reply, lines 16-18.....

> *"I'm sure they were in ag use, yeah and then the conservation zoning occurred in **'64** I believe. So, yeah."*

And Mr. Lemmo was asked whether he was aware that the *original **1964** zoning of the Property was Ag. right up to the top of the ocean-side pali*. Mr. Lemmo replied.....

> *"I'm aware of that situation."*

The evidence confirms that Mr. Lemmo clearly understood that the Property was a historic Ag. use field when the Conservation District appeared to be overlaid on it. There exists considerable evidence that Mr. Lemmo and his ***staff*** were aware that the DLNR's rules ***Allowed*** that any previous use of land, before the Conservation District was overlaid on the land, continued to be ***Allowed***, or **resumed** if interrupted for a period of years, in perpetuity without any formal permit from the DLNR being required, *ref., Petition exhibit 118, **minutes** of BLNR meeting, beginning at the bottom of page 20.....*

> "*Mr. Lemmo conveyed under non-conforming uses we took this section from the back of our rule and moved it to the front of our rule which is an important provision. As you know the Statute 183C talks about the relevance of non-conforming uses **and how they shall be allowed to continue**. **This is in the Statute** and **staff** felt it needed to be up front in the rule."*

Mr. Lemmo began working to ammend the changes to its rules described above when he first became the administrator of the OCCL around 2003.

Again in another case.....*ref., exhibit 101, minutes of BLNR meeting, Feb. 9th, 2007, it's item K-1,* which was for **the resumption** of "*nonconforming*" residential and **agricultural** use of another property wherein the DLNR's OCCL's Administrator, Mr. Lemmo related to the BLNR……..

*"that it was approved that a parcel used for residential and **agriculture** purposes has the right to continue those uses as presumably **statute**."*

There also exists another case which is known to the Petitioner(s) as the ***Kamai family*** which case was after Mr. Lemmo became the Administrator of the OCCL and **before his 2006 testimony to the LUC.** In that case Mr. Lemmo oversaw the application of a fine against the ***Kamai*** family for the unpermitted **resumption** of nonconforming use of their land for Ag. even though the historic use of the land had been for Ag. During an appeal of that case the DLNR withdrew the fine and recognized the land owner's right to ***Allowed*** nonconforming Ag. use of that land.

It is very unfortunate that during Mr. Lemmo's testimony to the Commissioners, during the McCully(s) petition A05 757 which was to rezone the Property to the State's Ag. District, that he did not make the Commissioners aware that Ag. use of the Property was already ***Allowed*** without any formal permit requirements, according to HRS 205-2 (a) (3) and HAR 13-5-7's Nonconforming Use Rule.

Rather Mr. Lemmo described that the McCully(s) would need to apply for formal permits from the DLNR for their intended Ag. use of the land. Had the McCully(s) legal representatives and the Commissioners been made aware that Ag. use was already ***manditated*** by Statute to be ***Allowed*** on the Property, as will be described herein, the outcome of the McCully(s) petition may have been quite different.

The McCully(s) described their planned Ag. use of the Property for a residence and an orchid propagation, commercial greenhouse, while maintaining the general area of the Property as mowed lawn with landscape plantings of woody ornamentals. Such a use would have been **a much less intense Ag. use of the land than what was already *Allowed* in HAR 13-5, ie the cultivation of soils right up to the Ocean-side pali / bluff**.

The above examples clearly evidence that the OCCL had / has a clear understanding that Ag. use of land was provided to continue to be ***Allowed*** in the Conservation District without any formal permit being required, *ref., above quoted testimony by Sam Lemmo to the BLNR and two referenced examples where the OCCL allowed the resumption of historic Ag. use of land after the Conservation District was overlaid on land and HRS 183C-5.*

Like the McCully(s) experienced, over time, the Petitioner(s) recognized that the DLNR's OCCL was clearly resisting their use of the Property for Ag. which Mr. Lemmo and his ***staff*** clearly already understood to be an ***Allowed*** use.

The Petitioner(s) therefore seek the security that the Property is determined to lie in the State's Agricultural District in order that its use and the ***Prime Ag. resources*** of the Property are properly secured in perpetuity and ***confusion*** regarding the legal use of the Property for Ag. is clarified and resolved for everyone. The Property has very little, if any, of the sorts of resources that sets it apart from similar land witch is zoned in the State's Ag. District.

There exists a steep, high **State owned**, pali / bluff property that lies makai which separates the Property from the Ocean's shoreline. The Property's ***Prime*** Ag. resources are, by far, its most outstanding physical characteristic **and are similar to** the surrounding general Hamakua coastal Ag. area, including several very similar, former sugar cane field, **coastal properties that are variably and arbitrarily zoned** in the State's Agricultural and Conservation Districts.

The State's Constitution and its various Statutes and administrative Rules have created a ***confusing*** web which guide the State and the County's administrative authorities regarding land zoning and land use. This Guide describes that the Property's *Interpreted* Conservation District zoning result is that generally

*everyone is **confused**.* The Petitioner's *frustration* and ***confusion*** is not unique. The Prime Ag. resources of many similar near coastal properties are unused.

They have become breeding grounds for invasive species that spread to nearby properties. Such properties are often so overgrown so as to block scenic views oceanward from the Coastal Highway. Their unkept appearance of mainly non native and invasive species is negative to what may otherwise be described as scenic. Recently the State invested heavily to clear encroaching vegetation bordering the coastal highway. Tulip and Albiza trees lining such properties are a huge problem as they grow up through telephone and power lines.

The Petition and this Guide describe that the DLNR's reputation of enforcement through the application of very large fines for violations of its Rules and its onerous, slow and costly permitting process sometimes is the cause of the above described negative effects to the Department of Highways, utility service providers and land owners use of their land. Over the years the incremental increases to DLNR administered fines and permitting costs have become an important funding source for the DLNR. It is not unusual to see a property's inspection by the DLNR to result in multiple fines for various infractions of its Rules. Tree removal on Conservation land is generally discouraged by the OCCL and big fines are applied if it is done without a permit.

In the case of the Petitioner(s) their repeated letters, requesting permission for pretty much everything that they have done on the Property, in order to avoid being fined for possible infractions of DLNR Rules, have resulted in frustration of the DLNR, *ref., Petition exhibit 72, DLNR letter*.

The State's constitution has always described ***'preserving and promoting suitable Ag. lands for Ag. 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."*

and *ref., Article XI, Section 1, 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."…*

When the State created its various SLUDistricts the State's Statutes were particularly designed to be in recognition that the State had a very limited amount of land that had ***"a high capacity for intensive cultivation",*** *ref., HRS 205-2 (a) (3).* Much of the State's land did not have.....

*"the soil quality, growing season, and moisture supply needed to produce **sustained high yields of crops** economically when treated and managed according to modern farming methods", ref., ALISH definition of Prime Ag. land."*

The highest priority of the lawmakers was, very obviously, to provide for ***agricultural self-sufficiency*** in the State whether personal use or commercial.

Therefore HRS 205 and HAR 15-15 very clearly were designed to **first** guide the planners and administrators that Ag. zoning be applied to ***Prime*** Ag. land **preemptively** over all other zoning considerations, **even Conservation**! Subsequent Boundary changes were designed to be allowed to be made by the LUC through a very highly specified and formal administrative process. HRS 205 required that a reasonably compelling characteristic of land or public need, that is provided for in HAR 15-15's rules, would have to be assessed before ***Prime*** Ag. land could be redistricted. Even then HAR 15-15-20 first states.....

"Except as otherwise provided in this chapter"

Guide Chapter 2 clearly describes that it is ***otherwise provided in Chapter HAR 15-15 and HRS 205*** that ***Prime*** Ag. land was not to be rezoned without a compelling State or County need. ***Guide items 54 and 53*** describe that when the first Official Maps were created the general area where the Property is located was first described to be in the State's Ag. District right up to the tree line at the top of the coastal pali / bluff. By 1974 the SLUD line appeared to move inland to the mauka boundary of the former r.r. **without any recorded explanation**. HRS 205-2 (a) states.....

> *"There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts. The commission shall set standards for determining the boundaries of each district, provided that".....*

The resulting Statutes and Rules designated that the LUC and the State and County's Offices of Planning provide that the ***"greatest"*** zoning priority, ***Agricultural***, be applied to **land** if it has a ***"high capacity for intensive cultivation"*****,** *ref., HRS 205-2 (a)(3)...*

> *"In the establishment of the **boundaries** of Ag. districts the **greatest possible protection** shall be given to those lands with a **high capacity for intensive cultivation**;"*

and resultingly HRS 205-2 (a)(3) ***mandatory*** guidance that land *with a **high capacity for intensive cultivation*** is reflected in HAR 15-15-19 (1)*.....*

> *"It **shall** include lands with a high **capacity** for agricultural production".*

This Guide's Chapter 2 relies heavily that State law requires that a ***Rule*** which exceeds the scope of the ***Statute*** is not valid. In line with general principles of administrative law, the Hawaii Supreme Court has said that rules and regulations exceeding the scope of the statute they were designed to implement are not valid, *ref.,Stop H-3 Association et al, v. State of Hawaii Department of Transportation et al., Hawaii Reports, v. 68, 1985, p. 161.*

Particularly the Petition and this Guide will evidence.....

- that the Property is comprised of ***Prime*** Ag. land that has *a high* ***capacity*** *for Ag. production*,

- the Property is zoned A20a by the County,

- the Property has been in continuous Ag. production since around 1850,

- **the entire area of the Property was first shown, in the 1960's, on official LUC maps to lie in the State Ag. District,**

- the *official 1974 U.S.G.S. quadrangle map currently filed at the LUC* appeared to show the Property to lie in the Conservation District,

- no record exists that explains the apparent change in zoning,

- in 1992 the Executive Officer of the LUC *Interpreted* that the Property was Conservation zoned seemingly without proper regard to **mandatory guidance** which is found in HRS 205-2 (3), HAR 15-15-17, HAR 15-15-19(1).

It is often misunderstood that the use of Conservation Districted land has the highest priority for State and County administrators to apply but HRS 205 2(a) (3) and HAR 15-15-19 (1) clearly make the ***mandatory stipulation*** that ***Prime*** agriculturally suitable land ***shall*** receive the highest zoning priority to be Ag.

None-the-less the State and County's administrative agencies have often struggled to balance other guiding priorities of the State, and sometimes they seemingly have ***confused*** the State's desire to protect certain land through Conservation Districting **over the State's mandatory stipulation** that *land* with a **"*high capacity for intensive cultivation"***, be zoned Ag.

This has sometimes resulted in ***confusion*** for everyone. The State also provided that the LUC may subsequently rezone any land to another zone through a **prescribed process**, which includes Boundary Reviews, but even that would have to be measured against the physical characteristics of land, *ie. its Ag. suitability measured against HRS 205 2 (a) (3)and HAR 15-15-19 (1)* **mandatory** requirements or a compelling State or County need. There is no evidence in the State or County files that this ever occurred, , *ref., Petition exhibit 3, transcript of 2005-6 LUC A05 757 hearing, page, 88, lines 20-24.....*

> *"We don't know why the Conservation District boundary was extended to the old right-of-way. There is nothing that really explains that in any way. But it's clear that this is not a high resource land area, and it is clear that it was used for agriculture."*

In that regard, in the State's haste to initially establish the various SLU Districts the State sometimes created district lines on maps including its Official Maps without the Statute required consideration of the lands physical characteristics because it did not have the time or resources to evaluate properties on a case by case basis even though HRS 205 specifically required that a property's ***high capacity*** for Ag. use is to be treated with the greatest zoning priority over all

other zoning considerations.

Instead lines were drawn on maps which were ***generally*** believed to meet the State's districting goals and may be referred to when the LUC issues Boundary *interpretations*. This applies to the Property and existing testimony to the LUC that is provided in this Guide and the Petition by State and County authorities that clearly confirms this, *ref., exhibit 2, McCully(s) LUC Petition A05 757 hearing minutes, testimony of Laura Thielen, the director of the State Office of Planning, beginning on its page 114……...*

> *"But until that happens the reality is we're dealing with many areas of classification where there was not an independent analysis saying that this land belongs in this classification because of the attributes of this physical property."*

and a Legislative Bureau Document published by the University of Hawaii around 1969 and titled "PUBLIC LAND POLICY IN HAWAII: THE MULTIPLE USE APPROACH", states on its page bearing the number 1.....

> *"Yet because this legislation was drafted and enacted within such a short period and under less than optimal conditions, even its stoutest proponents admit that it requires revision."*

It is clear that the State and County Offices of Planning left the matter to be resolved subsequently which is what we are before the LUC presently to do.

The Petition and this Guide specifically point to the above quoted testimony to the LUC which evidences that careful review of the Property's Ag. characteristics in the 1960's **and thereafter** did not occur. Rather a generalization appears to have been applied. The Property's ***capacity*** for Ag. production, measured against HRS 205 2 (a) (3) and HAR 15-15-17 and -19 (1) was not applied initially or during subsequent general County and State Boundary Reviews. Particularly, following the adoption of the State's ALISH classification system in 1978, Boundary Reviews and LUC Boundary *interpretations* did not re-examine

SLUD lines on its Official Map measured against lands ***capacity*** for Ag. production, ie., its ***Prime*** Ag. resources. *Chapter 2 of this Guide gives a more detailed discussion of conflicting maps and lines on maps*)

Finally, in the case of the Property, the specific location of the boundary between Conservation and Agriculture Districts was only formally *Interpreted, ref. HAR 15-15-22,* in 1992, when the Executive Officer of the LUC issued an *Interpretation*, which *Interpreted* the entire area of the Property to lie in the Conservation District. That *Interpretation* does not appear to have properly considered the Property's Ag. characteristics.

Rather the *Interpretation* appears to have placed a higher priority on the border line that is shown on the *"official U.S.G.S. quadrangle map currently filed at the LUC"* (the "Official Map"). This is covered in detail in Guide Chapter 2.

The 1992 Interpretation*, ref. Petition exhibit 18,* cannot be viewed as **final**. Federal law provides that no official finding, determination, interpretation etc. by any Federal or State agency is **final** unless it specifically references in its text that it is **final** and provides remedies in law, if any exist, that may subsequently be applied for by an affected party. The 1992 Interpretation for the Property did not include the above described elements of instruction.

This Guide requests that the Commissioner(s) first Determine the correct zoning of the Property as ***"uncertainty remains"***, *ref., HAR 15-15-22(f)*.....

> *"(f) Whenever subsections (a), (b), (c), (d), or (e) cannot resolve an* ***uncertainty*** *concerning the location of any district line, the commission, upon* ***written application*** *or upon its own motion, shall determine the location of those district lines."*

The Petitioner(s) believe that until a **final** Boundary Determination is properly made by the Commissioners ***"uncertainty"*** remains regarding the Property's

zoning.

The Petition and this Guide, describe that the Petitioner(s) purchased ***Prime*** Ag. land, which ALISH classification and past use established that it had a "***high capacity"*** for ***"intense cultivation"*** of Ag. crops for over 150 years, *ref., HRS 205-2 (3), HAR 15-15-17* and *HAR 15-15-19 (1)* and *Petition exhibit 23, field manager, John Cross letter,* yet the Petitioner(s) suffered through years of delayed Ag. use, *frustration*, substantial and unnecessary costs, ***confusion*** and uncertainty resulting from the Property's *Interpreted* SLU Conservation District zoning. The Petitioner(s) eventually discovered that the DLNR's Statutes and resulting Rules described that they may use the Property for Ag. without any State or County permit being required *(this is identified more specifically in the Petition and later in Chapter 3 of this Guide).*

The Petitioner(s) seek to harmonize the County's existing A20-a, Agriculture zoning, for the Property and the Property's current use for Ag. in order to secure their Ag. investments in the Property and to eliminate ***frustration, confusion*** and ***uncertainty*** and the potential for future ***liability*** registered against the Petitioner(s), the Property or the Petitioner(s) heirs or successors, by the State, for their seemingly ***Allowed*** nonconforming Ag. use of the *Interpreted* Conservation Districted land, by resolving that the Property's Ag. use properly **conforms** with its State Land Use District ("**SLUD**") zoning.

The Petition and this Guide describe that **the Property is now fully developed** and there exists no particular characteristics of the Property that compellingly require that its zoning be *Interpreted* to be or remain SLU Conservation. The Petition and this Guide describe that other, nearby and very similar near coastal properties, are variably zoned Conservation and Agricultural and that Conservation zoning of the Property is inconsistent with the State's Constitution, HRS 205-2 (3), HAR 15-15-17, HAR 15-15-19 (1) and HAR 15-15-22 generally.

The Petition and this Guide describe that the Petitioner(s) '*distinct and reasonable investment-backed expectations'* to use the Property for Ag. have been '***frustrated'*** in a substantial and meaningful way **for a period measured in years**. Therefore the Petitioner(s) have filed the Petition and this Guide with the Land Use Commission in order to eliminate ***frustration and confusion*** in order to secure their investments in the Property and reduce the administrative burden of State and County authorities and the Petitioner(s) and to properly secure the ***Prime*** Ag. resources of the Property and the Petitioner(s) use of it for Ag. more clearly as an ***Allowed*** use in the way that the State always intended.

The Petitioners understand that the LUC and the State and County Office(s) of Planning are not the administrative bodies that are authorized to interpret or apply the DLNR's HRS 183C nor its HAR 13-5 Rules. References to HRS 183 C and HAR 13-5 are quoted in the Petition and this Guide for reference purposes in order that the Commissioner(s) and the State and County Office(s) of Planning may understand the Petitioner(s) *frustration* and difficulties in seeking to understand the Statutes and the Rules and conduct their land uses in compliance with the HARules and also to lawfully secure the Petitioner(s) Ag. use of the Property through DLNR administrated processes. The resulting uncertainty and ***frustration*** has impaired the current and future Ag. use of the Property and therefore is unfairly ***frustrating*** the Petitioner(s) property ownership rights.

The Petitioner(s) have suffered the **'*frustration of their distinct and reasonable investment-backed expectations'*** regarding the Property and have found it exceedingly difficult to develop the ***Prime*** Ag. resources of the Property in a timely, inexpensive, reasonably secure, sustainable and efficient manner. The above ***italicized*** reference is found in a Federal Supreme Court **unanimous ruling**, *ref., 2005 Lingle v. Chevron case.* The U.S. Supreme Court took the occasion to deliver a **tutorial on takings** jurisprudence, both regulatory

and physical. In particular, the Court reiterated a **standard** applicable to land development regulations, whether at the state or county level, based on previous holdings.....

> '*If a **regulation** only partially deprives a landowner of economically beneficial use, then the court must examine the character of the governmental regulation and its economic effect on the landowner, and **in** particular whether the law **frustrates the distinct or reasonable investment-backed expectations** of the regulated landowner.'*
>
> *ref., Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978)

Therefore the Petition and this Guide's descriptions are presented in order that the LUC, and the State and County Office(s) of Planning are presented with the facts and evidence in this regard in order that a just decision may result.

Please note : This Guide is divided into different Chapters in order that the consideration of the Petition be more efficient. Many text areas in one Chapter are repeated in subsequent Chapters and also in the main body of the Petition, in order to assist those that may consider the Petition and this Guide, to focus on the relevance of the text and highlights added which may be more broadly explained with references in earlier text.

Guide Chapter 1 the Petitioner(s) early Property experience, dealing with the DLNR and a proposed buffer zone which is further discussed in Guide Chapter 7.

1. During a period, which began in the early 1960(s) through 1974, the boundary shown on Official Maps which separated the State's Agricultural ("Ag.") and Conservation district relative to the Property was variable. (*refer to Chapter 2 for a more detailed discussion of conflicting maps and variable zoning*)

2. In 1992 the Executive Officer of the LUC issued an *Interpretation* (the "*Interpretation*") that the Property lies in the State's Conservation District, *ref., Petition exhibit 18, LUC letter.*

3. The Property is zoned A20a in the County's functional planning use zone*, ref., Petition exhibit 109, County letter.*

4. The Petitioner(s) state that they purchased TMK's (3) 2-9-003; 029, 060 **(**the **"Property"),** comprising an area of 3.4 acres and a contiguous lot ....013, to the south of the Property, in 2014, which 3 TMK lots comprised a **total** area of 4.6 acres, and which lots, were conditionally offered for sale as a single parcel of land by the former owners, the McCully(s).

5. In 2005 the McCully(s) filed a very similar petition to this Petition to rezone an area which included the above described 3 TMK lots from the State's Conservation District to the State's Agricultural District. That petition was denied by the LUC.

6. The Petitioner(s) state that after purchasing the three TMK lots they subsequently sold TMK (3) 2-9-003, 013 as it was surplus to the Petitioner(s) intended Ag. development plans for the Property. The redeemed funds were necessary to support the Petitioner(s) planned Ag. development of the Property.

7. The TMK lots that lie contiguously mauka to the Property lie in the State and County's Agricultural Districts.

8. The Property is located in a 7 TMK lot subdivision which is located in a coastal area between the coastal highway, mauka, a State owned high

pali/bluff and shoreline property makai, and thereafter the Pacific Ocean, *ref., Petition exhibit 10, County signed subdivision map.*

9. The Petitioner(s) state that it is not unusual for small properties, like the Property, to be zoned in the State Land Use ("**SLU**") Agricultural District.

10. The historic use of the Property for Ag., dated continuously from around 1850, and included the regular cultivation of the Property's **soils right up to the State owned ocean-side Pali/Bluff property**, *ref., Petition exhibit 2, LUC testimony by B. Nishimura, planning consultant, to the McCully petition A05 757 around 2005, page 33, lines 1-2.....*

"Yes. Cultivation occurred all the way up to the top of the pali."

and further confirmation of this can be seen on *Petition exhibit 22, an undated field map and exhibit 107, 1905 field map.*

11. During a period from 2014 to January of 2017 the Petitioner(s) sought that the DLNR ***Allow*** that the Petitioner(s) may resume Ag. use of the Property as an ***Allowed*** nonconforming use, *ref., HAR 13-5-7's Nonconforming Use Rule,* without any formal Conservation District Use Permit being required.

12. In January of 2017 the DLNR wrote a letter to the Petitioner(s) stating that it had previously ***Allowed*** that the Petitioner(s) may use the Property for nonconforming Ag. use, *ref., Petition exhibit 72, DLNR letter. (note the string of correspondence over 30 months in this regard is described in item 24 below.*

13. The Petition, if allowed, offers that a non-cultivated ***buffer zone*** be established separating the area of the ***Allowed*** cultivation of the Property's soils from the makai State owned pali / bluff property and the Ocean beyond. A buffer zone was also agreed to by the State and County Offices of Planning during the earlier described McCully(s) 2005 petition A05 757. The agreed to

a 40 ft. wide buffer zone is shown on a map, which includes the area of the Property, in *Petition exhibit 5a, its page 115*. The buffer zone is further discussed in Guide chapter 7.

14. The DLNR's administrative office, the Office of Conservation and Coastal Land's ("OCCL"), manages the permitting of uses of Conservation Districted land.

15. The OCCL was aware that HRS 183C and HAR 13-5-7 provided for ***Allowed*** nonconforming Ag. use of land including the Property, *ref., Petition exhibit 118, **minutes** of BLNR meeting wherein Sam Lemmo gave testimony to the BLNR, beginning at the bottom of page 20 and continuing in the first paragraph of page 21.....*

> "*Mr. Lemmo conveyed under non-conforming uses we took this section from the back of our rule and moved it to the front of our rule which is an important provision. As you know the Statute 183C talks about the relevance of non-conforming uses **and how they shall be allowed to continue**. **This is in the Statute** and staff felt it needed to be up front in the rule."*

and again in another case.....*ref., exhibit 101, minutes of BLNR meeting, Feb. 9th, 2007, it's item K-1,* which was for "*nonconforming*" residential and **agricultural** use of another property wherein the DLNR's OCCL's Administrator, Mr. Lemmo related to the BLNR……..

> *"that it was approved that a parcel used for residential and **agriculture** purposes has the right to continue those uses as presumably **statute**."*

There also exists another case which is known to the Petitioner(s) as the ***Kamai family*** which case was after Mr. Lemmo became the Administrator of the OCCL. In that case Mr. Lemmo oversaw the application of a fine against the ***Kamai*** family for the unpermitted use of their land for Ag. even though the historic use of the land had been for Ag. During an appeal of that case the

DLNR withdrew the fine and recognized the land owner's right to ***Allowed*** nonconforming Ag. use of that land.

The OCCL's Administrator, Sam Lemmo, personally inspected the Property, in 2006, and he gave testimony to the LUC during petition A05 757 that he knew that the Property was a historic sugar cane field dating from a period beginning around 1850, *ref., Petition exhibit 3, Sam Lemmo testimony to the LUC, page 69, when having been asked by Commissioner Kanuha, Mr. Lemmo replied, lines 16-18.....*

> *"I'm sure they were in ag use, yeah and then the conservation zoning occurred in **'64** I believe. So, yeah."*

And Mr. Lemmo was asked whether he was aware that the *original **1964** zoning of the Property was Ag. right up to the top of the ocean-side pali*. Mr. Lemmo replied.....

> *"I'm aware of that situation."*

16. Therefore when the Petitioner(s) applied to be ***Allowed*** nonconforming Ag. use of the Property beginning in 2015 the above evidence provides that Mr. Lemmo should have been aware that the historic Ag. use of the Property qualified that it may be used for ***Allowed*** general Ag. use, *ref., HAR 13-5-7 Nonconforming Use Rule* without any formal Conservation District Use Permit ("CDUP") being required but rather a simple letter from the DLNR stating that Ag. use of the Property was ***Allowed*** according to HAR 13-5-7's Nonconforming Use Rule. None-the-less 30 months expired and hundreds of pages of correspondence were exchanged between the OCCL and the Petitioner(s) before the Ag. use was ***seemingly Allowed*** by the OCCL. Particularly the growing of *"sugar cane"* is not a defined land use which is all that the OCCL has ever formally determined to be Allowed, *ref., exhibit 76*.

17. Like the McCully(s), the Petitioner(s) use of their land for Ag. was strongly resisted by the OCCL even though the OCCL clearly understood that such a use could be resumed without any formal permit being required from the DLNR.

18. Beginning in early 2015 the OCCL required that the Petitioner(s) provide ***"proof"****. ref., Petition exhibit 52, OCCL letter, Jan. 2015,* that the Property qualified for nonconforming Ag. use before considering a request by the Petitioner(s), a Determination, *ref., HAR 13-5-30,* that the Petitioner(s) were already ***Allowed*** general nonconforming Ag. use of the Property without any permit being required according to HAR 13-5-7's Nonconforming Use Rule. Even after the Petitioner(s) provided the required ***"proof"***, *ref., Petition exhibit 40, Petitioner(s) request for a Determination,* the OCCL continued to not formally ***Allow*** that the Property qualified for **general** Nonconforming Ag. use of the Property (*the string of correspondence regarding this is exhibited in item 24 here after*).

19. The Petitioner(s) state that immediately following the purchase of the Property the Petitioner(s) began modest, personal Ag. use of the Property which use was properly secured through DLNR administered permitting processes.

20. The Petitioner(s) state that they have used ***reasonable*** effort, for a period beginning shortly after they first purchased the Property in 2014 through 2017, to **properly secure *formal and clear* *Approved* and more substantial and reasonably viable *Allowed* general** Ag. use of the Property through HAR 13-5-7's Nonconforming Use Rule. Also uses incidental and accessory to Ag. have been exceedingly difficult to achieve. The string of correspondence between the OCCL and the Petitioner(s) in item 24 has.....

'frustrated *the Petitioner(s) distinct and* ***reasonable*** *investment-backed expectations'****,***

and when such uses were ***Allowed*** sometimes the result was not, timely, ***reasonable***, ***formal*** or ***clear***. The Property's Interpreted Conservation District zoning has....

'***frustrated*** (and continues to ***frustrate***) *the distinct and reasonable investment-backed expectations'*

of the Petitioner(s), *ref., the 2005 Lingle v. Chevron case* which case resulted in a unanimous U.S. Supreme Court decision and the Court took the occasion to deliver a **tutorial on takings** jurisprudence, both **regulatory** and physical.....

'*If a* ***regulation*** *only partially deprives a landowner of economically beneficial use, then the court must examine the character of the governmental regulation and its* ***economic effect*** *on the landowner, and* ***in*** *particular whether the law* ***frustrates the distinct or reasonable*** *investment-backed expectations'*

21. The Petitioner(s) state that beginning in 2017 they began expanding their Ag. use of the Property without the **security of** a formal ***Permit***, a formal ***Determination*** nor a formal ***clear Approval*** issued by the DLNR for the expanded **general** Ag. use, believing that such use is ***Allowed*** by HAR 13-5-7 as a nonconforming use and further inquiries in this regard would only lead to more ***frustration*** for both the DLNR and the Petitioner(s) without a ***reasonable*** outcome. Following the CDUP for the Petitioner(s) residence, that was issued by the DLNR in early 2017, the Petitioner(s) believed that they had a short window of opportunity to expand their orchard and other Ag. species plantings while they waited for the County to issue the required building permit for the residence. Thereafter the Petitioner(s) knew that they

would be preoccupied with the construction of their residence. The Petitioner(s) knew that the orchard species would take several years to develop into the production of marketable fruit. Any further delay to planting of the orchard species trees would further reduce the '*economic effect of their planned agricultural use of the Property and further frustrate their distinct and reasonable investment-backed expectations"* for an additional several years.

22. HAR 13-5 clearly requires that a property owner ***apply*** for a nonconforming use, *ref., HAR 13-5-6 (d).....*

> *"**No** land use(s) shall be conducted in the conservation district unless a **permit or approval is first obtained** from the department or board."*

and HAR 13-5-7(f).....

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

23. The Petitioner(s) state that due to the DLNR's seemed obfuscation of formally ***Allowing*** nonconforming general Ag. use of the Property, for a prolonged period, measured in years, or issuing a formal ***determination*** that the Property qualified for ***Allowed*** **general** nonconforming Ag. use, the Petitioner(s) have suffered loss of ***income potential***, **insecurity**, **uncertainty** and ***frustration*** for an unreasonably prolonged period which is normally considered a statutory property ownership right.

24. The Petitioner(s) now seek the **security** that the Property be Determined **or** rezoned to lie in the State's Agricultural District in order that its use and the Ag. resources of the Property are properly secured and confusion and uncertainty regarding the use of the Property for Ag. is clarified and resolved and the potential for future liability registered against the Petitioner(s), the

Property or the Petitioner(s) heirs or successors, by the State, for such Ag. use be eliminated by effectively resolving that the Property's Ag. use properly conforms with its SLUDistrict zoning designation, *ref., Petition exhibits (letters of correspondence) in chronological order between the Petitioner(s) and the DLNR* seeking a ***Determination*** that they be ***Allowed*** general nonconforming Ag. use*,*

- *Exhibit 103, Jan. 8, 2015,* **first request** by Petitioner(s) that they be ***Allowed*** general nonconforming Ag. use of the Property*,*

- *Exhibit 52, January 28, 2015,* OCCL reply *'provide proof',*

- *Exhibit 40 Sept. 15, 2015,* Petitioner(s) first Formal request for a Determination that the Property qualified for general nonconforming Ag. use,

- *Exhibit 53, Oct. 16, 2015,* OCCL response to the Petitioner(s) *'OK grow sugar cane'* (which was never requested by the Petitioner(s) in exhibit 40)*,*

- *Exhibit 54, Oct. 18, 2015,* Petitioner(s) repeat request in exhibit 40*,*

- *Exhibit 74, Nov. 9, 2015,* OCCL reply *'OCCL wants more information',*

- *Exhibit 55, Jan. 8, 2016,* OCCL requires *'Proof '* of historical Ag. use*,*

- *Exhibit 73, Dec. 27, 2016,* **Particular attention is drawn to the phrase *"you have determined"*** which is quite different than ***"the DLNR has determined"*** and the Dec. date,

- *Exhibit 77, Jan. 4, 2017, Petitioner(s) request that* ***the OCCL refer the requested Determination to the BLNR****,*

- *Exhibit 72, Jan 27, 2017, DLNR letter to the Petitioners.* **Particular attention is drawn to the phrase(s) *"All of your requests to make use of your land have been approved either by the Department or the Board of Land and Natural Resources (Board).***

  For example"..... "(5) Agreement over the continuance of non-conforming agricultural uses" which is found in *Petition exhibit 73* but prefaced with the term ***"you have determined"*** and not an official ***DLNR Determination***.....

and.....

also note that, unlike most official letters from the DLNR to the Petitioner(s) **the letter was not copied to any authorities outside the DLNR** (which caused the Petitioner(s) further ***'uncertainty, frustration'*** and ***'confusion'***).

None-the-less the Petitioner(s) did not explore the matter further with the DLNR as the letter clearly showed them that the DLNR had grown frustrated with the Petitioner(s) repeated requests.

25. The Petitioner(s) state that this Guide to the Petition and the main body of the Petition, the Petition's exhibits and appendix(s), describe the basis for the Petitioner(s) **belief** *(as stated above)* and therefore, beginning approximately 30 months after purchasing the Property the Petitioner(s) began to expand their **general** Ag. use of the Property **without the security of a formal *Approval*** or **formal *Determination* by the DLNR that they were doing so *legally*,** *ref., HAR 13-5-7(f).....*

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

26. The Petitioners state that this Guide, the Petition, its exhibits and appendix(s) describe that their attempts to secure ***Allowed*** Ag. land use through DLNR administrative processes often resulted in ***frustration,*** confusion and uncertainty resulting from the DLNR's contradiction of previous advice and recorded evidence and Rules, obfuscation of their inquiries which OCCL replies often left questions, that were posed in the Petitioner(s) correspondence, **which lack of reply further resulted in an endless cycle of letter writing and submission of documents** which caused a very significant delay in the Petitioner(s) Ag. use of the Property for a period measured in years and which delay, was caused by the DLNR not issuing the ***determination*** or ***Approval*** of the Ag. use of the Property **and** the LUC's *1992 Interpretation* that the Property lies in the State's Conservation District.

27. The Petitioner(s) state that the DLNR's administration of the Petitioner(s) ***application*** that general nonconforming Ag. use of the Property be formally ***Allowed*** is not supported in HRS 183C, HRS 205, HAR 13-5, HAR 15-15 and furthermore which administrative effect is inconsistent with the State's Constitution..

    The Petitioner(s) have come to recognize that it is not the authority for the LUC to give particular consideration to the applicability of HRS 183c nor HAR 13-5. These are the authority of the DLNR. While the Petition has a considerable discussion regarding this we are not presenting further discussion in this regard for examination and finding by the LUC. We believe that it is sufficient to say that item 24. above provides the evidence that the Petitioner(s) have relied upon in developing ***Allowed*** general nonconforming Ag. use of the Property. Subsequent to the letters discussed in item 24. the Petitioner(s) advised the DLNR and the public at large (*ref., OEQC published EA and FONSI, Petition exhibit 7)* during the period 2016- 2017 that they were

expanding their general Ag. use of the Property. The OEQC notice took the form of a draft and final EA, a FONSI by the DLNR and a CDUA for a residence all of which were published according to DLNR stipulated guidelines and specifically described the Petitioner(s) general, **seemingly *Allowed*** nonconforming Ag. use of the Property, *ref., Petition exhibit 38, CDUA HA 3767, and Petition exhibit 7, EA and FONSI.* Similarly the Petitioner(s) advised the public during these LUC proceedings.

Guide Chapter 2 The Property appears to have been zoned Conservation inconsistent with mandatory provisions in HRS 205 and HAR 15-15 as it was shown on the Official Map around 1974 (which reasoning is provided in this Chapter) and subsequently *"Interpreted"* by the Executive Officer of the LUC to be Conservation, incorrectly, in 1992, *ref., Petition exhibit 18, Interpretation letter and this Petition Guide Chapter 2***.**

28. The Petitioners state that ***"uncertainty remains"***, and request that the Commissioners first '***determine the correct location of the district lines***' *ref., HAR 15-15-22 (f).....*

> *"Whenever subsections **(a)**, (b), (c), (d), or (e) cannot resolve an uncertainty concerning the location of any district line, the commission, upon written application or upon ·its own motion, shall **determine the location of those district lines**"*

HAR 15-15-22 *Interpretation of district boundaries* gives guidance to the LUC's Executive Officer and the Commissioner(s) when making a Interpretation.

29. HAR 15-15-22 (f), quoted in item 28. above makes it very clear that all of HAR 15-15 is to be considered and not just the Official District Map. HAR 15-15-22 ***(a)*** very clearly instructs.....

" Except as otherwise provided in this chapter"

effectively HAR 15-15-22 (a) (1) states.....

'A district name or letter appearing on the land use district map applies throughout the whole area bounded by the district boundary lines 'Except as otherwise provided in this chapter'

30. It is "***otherwise provided in this chapter***" - HAR §15-15-17 Districts; district maps rule (a) **clearly first states**.....

" (a) ***In order to effectuate the purposes of chapter 205, HRS****, all the lands in the State shall be divided and placed into one of the four land use districts:*

(1) "U" urban district; (2) "A" agricultural district; (3) "C" conservation district; or, (4) · "R" rural district.

(b) The boundaries of land use districts are shown on the maps entitled "Land Use District Boundaries, dated December 20, 1974," as amended, maintained and under the custody of the commission."

31. HAR 15-15-17 is **no**t prefixed with the term....

"Except as otherwise provided in this chapter:"

32. HAR 15-15-17 (a), above, clearly points back to HRS 205-2 (a) (3).....

"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".*

33. HRS 205-2 (3)'s **mandatory** instruction is reflected in HAR 15-15-19 Agricultural District Rule (1)'s **mandatory** guidance....

"It shall include lands with a high capacity for agricultural production;"

34. The mandatory guidance(s) shown above do not appear to have been followed when the Official Map was created, however HAR 15-15 gos on to describe that it is the boundary interpretation that establishes the zoning of land and not just the Official Map. The guidance for a boundary interpretation also are prefixed with the instruction *" Except as otherwise provided in this chapter"* as described below. Laura Thielens testimony, in several paragraphs below, also explains this.

35. The LUC's Executive Officer's 1992 *Interpretation*, *ref., Petition exhibit 18,* appears to have given a higher priority to the LUC's Official Map when *Interpreting* the boundary without applying the mandatory guidance found in HRS 205 2 (a) (3) and resulting rules HAR 15-15-17 and HAR 15-15-19 (1) which rules were intended to be ***mandatory***, non-discretionary, guidance. The LUC's Official Map does not define the location of a District Boundary. It is the *Interpretation* / Determination that defines the boundary location and that *Interpretation* / Determination is subject to ***mandatory*** guidance found in the earlier quoted HAR 5-15-17 and HRS 205 and HAR 15-15-19.

36. Furthermore both HRS 205 2 (a) (3) and HAR 15-15-19 (1) refer to *capacity* of land for Ag. use when determining zoning and not a past, current or intended land use.

37. The State's constitution has always described *'preserving and promoting suitable Ag. lands for Ag. 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."*

and *ref., Article XI, Section 1, 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."…

38. The Petition and this Guide to the Petition clearly evidence that the Property's *Interpreted* Conservation District zoning did not result in the *promotion* of the Ag. use of the Property *in furtherance of the self-sufficiency of the State*. This is evidenced in detail in Guide item(s) 24. and 87.

39. The evidence is that the most outstanding ***natural resource*** of the Property **by far** is its '***high capacity for intensive cultivation,*** *the production of Ag. crops'* which is a matter of historical record **and** the Property's resources are described as ***"Prime"*** on the ALISH Map, *ref., Petition exhibit 85, ALISH map dating from around 1978,*

40. Petition exhibit 83, ALISH definition of ***Prime*** is*.....*

"Land which has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed according to modern farming methods."

41. The ALISH definition of ***Prime*** clearly describes characteristics of land that has the ***capacity*** for the *intense* production of *high volumes* of agricultural crops.

42. Both HRS 205 and HAR 15-15 go on to describe the sorts of uses that are **allowed after land is already zoned Ag.** but that is irrelevant to the initial zoning of land and subsequent *Interpretation* of District Boundaries and therefore the Petitioner(s) believe that it is not directly related to the

Petitioned rezoning or the requested Determination by the Commissioners regarding the correct zoning of the Property.

43. Testimony to the LUC around 2005 **<u>further</u> provides direct evidence** that the Property's physical characteristics were never considered when the first Official Map was adopted by the LUC around 1974 or at any time subsequent to that, *ref., exhibit 2, McCully(s) 2005 Petition A05 757 hearing transcript, testimony of Laura Thielen, the director of the State Office of Planning, beginning on its page 114……...*

> *"But until that happens the reality is we're dealing with many areas of classification where there was not an independent analysis saying that this land belongs in this classification because of the attributes of this physical property."*

and a Legislative Bureau Document published by the University of Hawaii around 1969 and titled "PUBLIC LAND POLICY IN HAWAII: THE MULTIPLE USE APPROACH", states on its page bearing the number 1.....

> *"Yet because this legislation was drafted and enacted within such a short period and under less than optimal conditions, even its stoutest proponents admit that it requires revision."*

44. Significant to the Petition and this Guide **<u>until 1992</u> it was un*determined*** (*not yet **"Interpreted")** by the Executive Officer of the LUC)* whether the Property lies in the State Agricultural District or the State Conservation District. While an Official Map did exist, HAR 15-15's Subchapter 2 required that a *Interpretation* by the Executive Officer of the Commission **<u>or</u>**, if *'uncertainty remained'*, a *Boundary Determination* by the LUC's Commissioners **<u>first apply all</u> of the LUC's Chapter 15's Rules and not just HAR 15-15-22 (a) (1)** which refers to the district line on the Official Map.

45. HAR 15-15 makes it very clear that the Official Map **is not the final authority** or the instruction *'Except as otherwise provided in this chapter'* would not be found throughout the District Boundary subchaper of HAR 15-15 which begins at HAR 15-15-17 (which is not prefixed with the instruction). A discussion regarding the applicability of maps is found in Guide items later herein however the LUC's **web site** has a maps section which particularly clarifies that the LUC's Official Boundaries Map is not the final authority. That maps section of the LUC's **web site is** prefaced with the following.....

> *"A variety of maps generated by our State Geographic Information System (GIS) showing State Land Use District boundaries for individual islands, selected district boundary amendments by docket, selected State Special Permits by docket, and Important Agricultural Lands (IAL) declaratory rulings by docket.*
>
> *These maps were produced by the Land Use Commission (LUC) for informational purposes only. These maps and all the information contained within shall not be used for Interpretation. The authoritative boundary lines between State Land Use District Boundaries are found on the official U.S.G.S. quadrangle maps currently filed at the LUC* ***and may be further defined by officially-recognized LUC Boundary Interpretations supported by metes and bounds descriptions."***

46. Even if '*the authoritative boundary lines between State Land Use District Boundaries* that *are found on the official U.S.G.S. quadrangle maps currently filed at the LUC'* are first held to be final, the maps were created without proper regard to HRS 205 and HAR 15-15's mandatory guidance which brings into question their validity. Federal law also provides that no official finding, determination, interpretation (*and by extension the Official Map*) by any Federal or State agency is final unless it specifically references in its text (*or, in the case of the Official Map*) that it is final and provides remedies in law, if any exist, that may subsequently be applied for by an affected party. The 1992 Interpretation for the Property did not include the above described elements of instruction nor did the adoption of the Official

Map result after the land owner was properly informed and due process prescribed and allowed by the State.

47. State Law mandates that Rules which conflict with the Statute are not valid, *ref.,Stop H-3 Association et al, v. State of Hawaii Department of Transportation et al., Hawaii Reports, v. 68, 1985, p. 161.*

48. As described throughout this Guide Chapter 2 ***Boundary Interpretations*** are to be *interprete*d or *determined* based on more than the Official Map but rather all of HRS 15-15 which is to effect the purpose of HRS 205 and particularly HRS 205-2 (3).....

> *"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 HAR 15-15-19 Agricultural District Rule (1)....

> *"It* ***shall*** *include lands with a high* ***capacity*** *for agricultural production;"*

49. The Petition, its exhibits and this Guide evidence that the Property has "*a high* ***capacity*** *for agricultural production;"* and that ***capacity*** increased even more around **1992** when the deep cut through the area of the Property, which facilitated the former r.r., was filled in with top soil that was mined on a contiguous property which lies mauka to the Property.

50. It is the *Interpretation* or the Boundary Determination that establishes the zone in which a Property lies and not an un-described line drawn on the Official Map. The Official Map is only to be used as guidance. That did not happen until 1992 when the *Interpretation* was issued. The *Interpretation* occurred long after the first Official Map was adopted by the LUC which the

evidence herein shows to be inconsistent with HRS 205 and HAR 15-15. The above quoted testimony by Thielen in 2005, to the Commissioners, very clearly confirms that the Property's ***capacity*** for Ag. production was never considered.

51. As it respects more recent Boundary reviews by the State and County and resulting maps, these simply reflected previous maps as no change was recorded on new Official Maps since the first 1974 Official Map.

52. During petition hearings A05 757 (*testimony to which are exhibited to the Petition as exhibit(s) 2, 2a, 3,14, 16*) it was established that the Property **first lie mauka** of the Conservation District *ref., Petition exhibit 3, transcript of LUC hearing, page, 88, lines 15-20*.....

> *"It's our belief and as indicated on the record that the guideline for identifying the Conservation District mauka boundary was the tree line on the bluffs. This has been taken from* ***the records of the LUC*** *at the time that they established the district boundaries."*

53. Apparently a subsequent Official Map, dated around 1974, **appeared to show** the mauka boundary of the Conservation District to be further inland along the mauka r.r. property line which lies contiguous to the Property's former mauka boundary. While during the LUC petition A05 757, which included the area of the Property, attempts were made to discover the apparent change, none was discovered, *ref., Petition exhibit 3, transcript of LUC hearing, page, 88, lines 20-24.....*

> *"We don't know why the Conservation District boundary was extended to the old right-of-way. There is nothing that really explains that in any way. But it's clear that this is not a high resource land area, and it is clear that it was used for agriculture."*

54. The Petitioner(s) have identified above that in the 1960(s) the general area of the Property was first identified to lie outside of the Conservation District.

Apparently that was followed by an Official Map, dated December 20, 1974 which was adopted by LUC showing the boundary line to appear to have moved considerably inland from the top of the coastal bluff *(without explanation discovered during the McCully's 2005-6 petition A05 757)* and which showed the Property to appear to be located in the Conservation District. Apparently no boundary amendment occurred and due process does not appear to have occurred regarding the apparent change.

55. During the entire **period** beginning at the time the Conservation District was first established until present the Property continued to have the ***Prime,*** *ref., the ALISH definition,* ***capacity*** for Ag. production.

56. The Petitioner(s) investigated whether the land owner, during that **period**, was ever properly informed that the Property was being zoned into the State's Conservation District or subsequently re-districted through a boundary amendment. Mr. John Cross, the field manager for the property owner up until 1992, subsequently maintained considerable plantation records at the Plantation Museum after the agribusiness ceased operation. No record existed in the agribusiness's file for the Property described that the agribusiness had been advised that any change in zoning had occurred. Nor was the agribusiness required to file an **application** with the DLNR for nonconforming Ag. use, which is required in the DLNR's rules, ref., HAR 13-5-6 .....

> *"(d) No land use(s) shall be conducted in the conservation district unless a* ***permit or approval*** *is first obtained from the department or board."*

57. Similarly the County's TMK file for the area of the Property does not contain any record that any change in zoning had occurred. Even if a boundary review occurred and resulted in a new Official Map before 1992, the earlier evidenced Thielens testimony to the LUC during petition A05 757, clearly

evidences that the Prime Ag. ***'capacity'*** of the Property was never properly considered, which is a mandatory requirement in HRS 205 and HAR 15-15, *ref., exhibit 2, McCully(s) Petition A05 757 hearing minutes, testimony of Laura Thielen, the director of the State Office of Planning, beginning on its page 114……...*

> *"But until that happens the reality is we're dealing with many areas of classification where there was not an independent analysis saying that this land belongs in this classification because of the attributes of this physical property."*

58. As described previously, in this Guide Chapter 2, an Interpretation is stipulated to conform to all of Chapter HAR 15-15 and by extension HRS 205 and not just the Official Map and the Official Map is required to have been developed according to all of Chapter HAR 15-15 and by extension HRS 205, particularly mandatory guidance. The Official Map does not conform to the mandatory guidance found in Chapter HAR 15-15 and by extension HRS 205. No explanation exists in the State or County's files or the property owners files for the current apparent zoning. Therefore, as it relates to the Property, the District Line on the Official Map cannot be correct nor be *Interpreted* to be correct. Therefore *"uncertainty remains"*, *ref., HAR 15-15-22 (f) and Petition exhibit 18, 1992 Interpretation.*

59. Clearly a SLUD boundary is established when a ***meets and bounds description*** that is referenced to a surveyor's map is officially recorded as a Interpretation by the Executive Officer of the LUC or a Boundary Determination by the LUC Commissioner(s), *ref., HAR 15-15-22 Interpretation of district boundaries* Rule which gives guidance in this regard. The Petitioner(s) again draw particular attention to guidance given in the first section of *HAR 15-15-22* which states.....

> ***"(a) Except as otherwise provided in this chapter:"***

This was discussed in detail earlier in this Guide Chapter 2.

60. The Petitioner(s) state that similarly the County's General Plan map and SMA map have lines on them which **appear to be** the dividing lines between County planning districts but require an interpretation / determination in order to establish where a boundary **legally** lies, *ref., Petition exhibit 3, Norman Hayashi, County Representative, testimony to the LUC, page 86, lines 11-18.....*

    "I just want to make the clarification regarding the Petitioner's exhibit, Exhibit 12. Although these are maps that were drawn on our, the county's GIS system they should be used for planning purposes only. It's not site specific as to the boundary, location of the boundaries.

    These maps were originally drawn and the database came from the State Office of Planning."

61. If a boundary line on any Official LUC Map was final it would not be provided that subsequent Interpretation of a District Boundary be required, rather such lines are provided as guidance which is to be measured against other guidance which is also found in HAR 15-15 and HRS 205.

62. In another comparison the County's functional plan map refers to TMK lots which TMK lots are already identified on County approved official surveyor's maps for each property located therein which are also succinctly described in meets and bounds descriptions.

63. In another comparison the County's SMA map shows the entire area of the Subdivision's 7 lots, where the Property is located, are located in the SMA yet it subsequently interpreted that only the 3 ocean-side lots (including the Property) are in the SMA, *ref., Petition exhibit 109, County SMA*

determination.

64. The Petitioner(s) state that they discussed the issue of lines on maps with a County Planning Department representative, Jeff Darrow, who stated that except in the case that such lines were shown on officially recognized surveyor maps which are filed with the County and specified in meets and bounds, the location of the boundaries on other County maps remained undetermined and subject to interpretation.

65. The DLNR also requires that an official LUC boundary interpretation exist when a property owner applies for land uses that appear on the States Official Map to lie on or contiguous to the Conservation District.

66. The Petitioner(s) also provide in this Guide a boundary interpretation for a very similar near coastal property that lies to the north of the Property, *ref., Petition exhibit 17, March 3, **2008**, 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. 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."*

67. The sugar cane agribusiness's use of the Property for the continuous, ***intense*** production of Ag. crops continued until 1992 without any permit or approval issued by the DLNR. The Petitioner(s) Ag. use of the Property is, and always has been, for their personal *self-sufficiency* and for intended resale in local markets and on-line. The Petition and this guide to the Petition evidences that the DLNR, in the case of the Property, did not ***"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", *ref., earlier quoted State Of Hawai'i Constitution.* During the period from the early 1960's to 1992 the DLNR seemingly ignored the Ag. use of the Property and the use of many similar near coastal properties, that were in ***intense*** Ag. production, irrespective of what the Official Map may have showed. However when the Petitioner(s) requested that they be ***Allowed*** to grow Ag. plants their requests were met by a clear resistance to such use by the DLNR's OCCL for a prolonged period and has never been formally resolved since.

68. The State's Constitution and its various Statutes and resulting administrative Rules have created a ***confusing*** web which are provided to guide the State and County's administrative authorities regarding land zoning and *land use*. This Guide to the Petition describes that sometimes ***"everyone is confused"***. The State has designated that its agencies, particularly the LUC and the State and County's administrators, provide that the ***"greatest"*** zoning priority, Ag., to be applied to *land* that has a ***"high capacity for intensive cultivation",*** *ref., HRS 205-2(a) (3)* which is reflected in *HAR 15-15-19 (1).....*

*"It **shall** include lands with a high **capacity** for agricultural production"*

None-the-less the State and County's administrative agencies have often struggled to balance other guiding priorities of the State, and sometimes have ***confused*** the State's desire to protect certain land through Conservation zoning over the State's preemptive requirement that *land* with a ***"high capacity for intensive cultivation"*** be zoned Ag.

It is very clear that the State never intended that ***Prime*** Ag. land be zoned Conservation. The State's elected representatives made this very clear, when they adopted into law HRS 205 and particularly HRS 205-2 (a) (3), that their administrators apply the ***greatest possible protection*** to the very

limited land available in the State that was highly suited for ***intense*** Ag. production to be zoned in the State's Agricultural District....

> *"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**;"*

The law makers believed that the agricultural self sufficiency of the State was to have the ***greatest possible protection*** priority when land zoning considerations were applied.

69. It is also very clear that ***"everyone is confused"*** because this guidance was not always followed. Rather administrators drew undefined lines on maps without consideration of the land's Ag. suitability, which lines were generally believed to meet the State and County's districting goals **leaving the interpretation of the exact location of a district boundary to future administratively applied processes, ie.** *Interpretations* / Determinations. The Petitioner(s) believe that is the case for the Property.

70. A Legislative Bureau Document published by the University of Hawaii around 1969 and titled "PUBLIC LAND POLICY IN HAWAII: THE MULTIPLE USE APPROACH, states on its page bearing the #1.....

> *"Yet because this legislation was drafted and enacted within such a short period and under less than optimal conditions, even its stoutest proponents admit that it requires revision."*

71. As quoted earlier in this Guide testimony to the LUC around 2005 further confirms that the Property's physical Ag. characteristics were never considered when the first Official Map was adopted around 1974 or at any time subsequent to that, *ref., exhibit 2, McCully(s) Petition A05 757 hearing*

minutes, testimony of Laura Thielen, the director of the State Office of Planning, beginning on its page 114……...

> *"But until that happens the reality is we're dealing with many areas of classification where there was not an independent analysis saying that this land belongs in this classification because of the attributes of this physical property."*

The Petition and its Guide describe that the Petitioner(s) purchased *Prime* Ag. land, an open field area, which always had a high ***capacity*** for Ag. production. The Property was described as ***Prime*** in the State's land classification system around 1977 and had been used for sustained ***"intense cultivation"*** of Ag. crops for over 150 years, yet the Petitioner(s) suffered through years of delayed use and uncertainty that they may use their Property for general Ag. use due to the Property's administration by the DLNR.

72. When a SLUD Boundary's location is Interpreted according to HAR 15-15's Subchapter 2 ESTABLISHMENT OF STATE LAND USE DISTRICTS, which begins with.... §15-15-17 Districts; district maps.....

> *"(a) In order to effectuate the **purposes of chapter 205**, HRS, all the lands in the State shall be divided and placed into one of 'the four land use districts" ,*

it is a ***mandatory*** requirement, in HRS 205 and HAR 15-15, that the land's Ag. characteristics become part of the Interpretation, particularly if the land is known to be ***Prime***.

73. *HRS 205 does not have a purpose description, however* **§205-2 Districting and classification of lands** states...

> *"(a) There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for*

inclusion in one of these four major districts. The commission shall set standards for determining the boundaries of each district, provided that:

"(1).....urban districts.....

(2).....rural districts.....

(3) 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;"***

(4) In the establishment of the boundaries of conservation districts, the "forest and water reserve zones" provided in Act 234, section 2, Session Laws of Hawaii 1957, are renamed "conservation districts" and, effective as of ***July 11, 1961, the boundaries of the forest and water reserve zones theretofore established pursuant to Act 234, section 2, Session Laws of Hawaii 1957, shall constitute the boundaries of the conservation districts;*** *provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission."*

74. The Petitioner(s) also point to the following evidenciary references and exhibits that evidence that the Property's historical use was for ***intense*** Ag. use...

ref., Petition exhibit 2, LUC testimony by B. Nishimura, planning consultant, testimony to the McCully petition A05 757 around 2005, page 33, lines 1-2.....

"Yes. Cultivation occurred all the way up to the top of the pali."

ref., Petition exhibit 22, undated field map,

ref., Petition exhibit 23, letter from John Cross, the former field manager,

ref., Petition exhibit 107, historical 1905 field map,

ref., Petition exhibit 110, undated historical field map found in the County's TMK file for the Property.

75. The Petitioner(s) state that beginning in 2017 they reasoned that rather than

continuing to request that the DLNR formally ***Determine*** or ***Allow*** that the Property qualified for ***Allowed*** Ag. nonconforming use without a formal permit being required, the best path forward would be to file the Petition with the LUC in order to rezone the Property to the Ag. District **or** the LUC issue a new Boundary Determination properly identifying that the Property exists in the Ag. District which the Petitioner(s) believe would properly secure their expanding Ag. use. The Petitioner(s) desire to.....

- limit the potential for liability, that may be administered by the State's DLNR, either in the near and long term, against either the Petitioner(s) nonconforming Ag. use of the Property or their successors use, and

- secure the Petitioner(s) investments and efforts in the Ag. use of the Property and uses incidental and accessory to such Ag. use, and

- properly secure the Petitioner(s) long time goal of viable Ag. land use and self sufficiency, and

- properly secure the ***Prime*** Ag. resources of the Property, and

- eliminate ***confusion*** by County and State Government officials, the community at large, the owners of properties in the Subdivision, community and state organizations, the professional land use community, realtors and the Petitioner(s).

76. The Petitioner(s) state that they do not intend to mislead the Commissioners, the Property is relatively small in size and thus its economic potential for Ag. use is similarly modest. None-the-less the Property has the ***capacity*** for the intense production of Ag. crops and that is all that HRS 205 and HAR 15-15 stipulate to be a ***mandatory*** consideration when zoning land in the State Ag. District. The ***Prime*** Ag. resources of the Property exist and furthermore Ag.

use of the Property also exists. The Ag. use is substantial and it represents a long term investment in, and commitment of, the Property to both personal and commercial Ag. use by the Petitioner(s).

77. As is earlier described in this Guide the Property's "***capacity*** *for intensive cultivation"* of Ag. crops **has increased** since the Official Map and the1977 ALISH map were adopted. The ***capacity*** further increased the Property's "*capacity for intensive cultivation"* by approximately .9 acres (2.5 acres to 3.4 acres) when a cut through the land, which facilitated the former r.r. which crossed the Property, was filled in, *ref., Petition exhibit* 22, *field map* and *Petition exhibit 51, County letter*.

78. The relatively small size of the Property resulted from a much larger parcel of Ag. use land was subdivided in order to facilitate two public use transportation corridors (see item 79), *ref., Petition exhibit 107, field map.*

79. Effectively 3 large, historical, field lots leading makai from the former coastal highway at the village of Wailea, due to the establishment of the r.r. and the present coastal highway, became several more legal lots of record which included the Property.

80. Finally it cannot be held that the existing 1992 Interpretation is final because it was not appealed in a timely way because it does not have the elements required in law that it be a final decision. Federal law requires that any final ruling has to also state remedies that may be available that may allow an appeal of any such final decision, *ref., Petition exhibit 18, Interpretation.*

Guide Chapter 3 Current apparent zoning in Conservation makes it difficult and *confusing* for the Petitioner(s) to use and secure the Prime Ag. resources of the Property.

81. In order that the Commissioner(s), the State and County Offices of Planning better understand the Petitioner(s) request that it be established that the Property lies in the State's Agricultural District instead of the existing situation where the existing LUC's 1992 *Interpretation* has resulted that the Petitioner(s) have had to direct all of their land use applications first through the DLNR's **very formal approval process** the following examples of the Petitioner(s) DLNR experience over the last 6 years is provided.

82. The administration of DLNR permits and hearings, if necessary, are all administered and conducted through/at the DLNR's office on Oahu. This results in a considerable **added burden of cost** and ***delay*** for land uses such as Ag. uses and uses incidental and accessory to the Ag. use that would not result if the Property was zoned Agricultural which would then transfer administration of the Property to the local County District Planning Office in Hilo which is a short distance from the Petitioner(s) residence on the Property and much easier and accessible for informal discussions and the filing of applications.

83. The Property's *Interpreted* Conservation zoning has '***frustrated*** (and continues to ***frustrate***) *the distinct and reasonable investment-backed expectations'* of the Petitioner(s), *ref., the 2005 Lingle v. Chevron case resulted in a unanimous U.S. Supreme Court decision and the Court took the occasion to deliver a* ***tutorial on takings*** *jurisprudence, both* ***regulatory*** *and physical.....*

> '*If a* ***regulation*** *only partially deprives a landowner of economically beneficial use, then the court must examine the character of the governmental regulation and its* ***economic effect*** *on the landowner, and* ***in*** *particular whether the law* ***frustrates the distinct or reasonable investment-backed expectations*** *of the regulated landowner',*

84. The Petitioner(s) state that their concerns are not fanciful, **the concerns are based on the Petitioner(s) real experience** in their seeking guidance, permits, approvals and determinations through DLNR administered processes during a period between 2014 to 2017 (see Guide item 87 below). Comparatively the Petitioner(s) experience regarding the County's administrative processes do not require huge filing application documents and fees and the County's processes are efficient and result in minimal delay and formal certainty of planned uses. The County's Planning Department is on the same island as the Property and the County's Planning office is close by and unlike the DLNR the County encourages informal planning discussions.

85. The Petitioner(s) have always formally sought approvals from the DLNR for planned land uses. The Petitioner(s) have been told by an elected State legislator that the DLNR is required to self fund by the State. Resultingly enormous fines are applies against land owners if they do not get approval by the DLNR for even the slightest land uses, *eg.....*

> *'no solid object may be placed on land for a period exceeding 30 days without a permit or approval', ref. HAR 13-5-2, Definition of "land use".*

Clearly a viable Ag. use of the Property is not reasonably possible if every time the Petitioner(s) place *'a solid object on land for a period exceeding 30 days without a permit or approval'* may result in sanctioning. Ag. use, by its very nature is dynamic and results in changed plans and changing application of management tools and practices. A land owner cannot reasonably be required to submit endless applications and filing fees to the DLNR and wait for its Approval for Ag. uses of land. Due to the above stated ***confusion*** *and the variable and discretionary administration of the rules by the DLNR's OCCL,* the Petitioner(s) have submitted thousands of pages of applications

and the like to the DLNR in order that they not be in violation of the DLNR's Rules. Resultanly the DLNR has become frustrated with the frequency of the Petitioner(s) written requests of it, *ref., Petition exhibit 72, DLNR letter.*

86. The owner of the mauka lot, which is contiguous to the Property, witnessed that, during a period when the Petitioner(s) were off island, a team of several DLNR staff trespassed onto the Property and conducted an extensive examination of the Property for a reason(s) unknown to the Petitioner(s). The witness related that he was rather impressed that at least one of **the DLNR's staff wore a loaded handgun.**

87. The Petitioner(s) make the following bulliteted statements which highlight examples of the Petitioner(s) experience in seeking permits and approvals from the DLNR including for very small, personal Ag. uses and an accessory structure to the Ag. use that are described in more detail in the Petition, its exhibits and appendix(s) in order to evidence to the Commissioners that the Petitioner(s) belief that securing **viable Ag. use** of the Property cannot be reasonably accomplished through DLNR administered processes and therefore the Petition and this Guide identify that the Property's SLUD zoning be Agricultural is a reasonable request.

- shortly after the Petitioner(s) purchased the Property in 2014 they were advised by the DLNR to ***formally*** put questions that the Petitioner(s) may have in writing and not to rely on ***informal*** conversations nor ***emails*** exchanged with DLNR staff, *ref., Petition exhibit 58, its page 2, OCCL staff person, Kimberly Mills **email**.....*

  "I suggest all communication be written with signature and mailed to the highlighted address below."

  Comparatively the County encourages informal planning discussions.

- When the Petitioner(s) formally applied for a permit for a small, personal use garden on the former field area of the Property, which area was regularly mowed field grasses, the submission of the application was tedious in detail. Once the application was *'accepted for processing'* it took several weeks before the Petitioner(s) heard back from the OCCL. The Petitioner(s) were first ***Allowed*** to only grow native and endemic garden plants in a small 2,000 sq. ft. area as that was all that the Rules were described by the OCCL to ***Allow***.

- That ***Application*** required a ***filing fee***.

- After suffering further cost and delay which ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)*** and the further exchange of additional correspondence the Petitioner(s) were informally ***Allowed*** to grow common garden plants.

  Comparatively the County encourages informal planning discussions and Ag. use of Ag. zoned land is allowed without any discussions what-so-ever.

- In another case when the Petitioner(s) requested ***Approval*** to plant 12 small fruit trees on the Property they were required to submit a detailed permit ***Application*** to plant the trees on a small portion of the very large, regularly mowed, grassy field area which existed on the Property, the ***Application*** was required to include tree species identification and planned location of the trees on a site plan map of the Property.

- That ***Application*** required a ***filing fee***.

- After suffering further cost and delay which ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)*** the Petitioner(s) were required to describe in, great detail, what they intended to

do with the single shovel full of dirt that they removed from each of 12 small planned planting holes on the former field area of the Property which had a history of cultivation of its soils and more recently was comparable to a regularly mowed area of field grasses.

Comparatively the County encourages informal planning discussions and Ag. use of Ag. zoned land is allowed without any discussions what-so-ever.

- In another example the Petitioner(s) filed an ***Application*** to combine and re-subdivide the 3 TMK lot ***parcels*** into 3 legal lots of record, in order to eliminate 3 former R.R. lots which crossed the Property which would allow the more efficient use of the land area (*ie. setback rules etc.*), which CDUA was supported by an earlier, professional, botanical study of the Property. That Application caused suffering further ***cost*** and ***delay*** which ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)*** for a considerable period.

- That application required ***a filing fee***.

- The Petitioner(s) were required to hire a professional to conduct a new botanical study of the Property, even though they had submitted a reasonably current professional botanical study, at a cost of some **$1,000** before that permit ***Application*** was ***accepted for processing*** by the OCCL.

- The OCCL stated reasoning for requiring the new botanical study was that...

  'bird(s) may have flown over the area and dropped seeds of an endangered plant species that may now be growing and need protection'

  on land that was regularly mowed on a weekly basis.

- The Petitioner(s) explained to the OCCL that any soil disturbance that may occur due to the ***Applied*** for land use was to occur in the grassy open, former field, area which they regularly mowed and that the combine and re-subdivide would not result in the destruction of plants, none-the-less a new study was insisted upon.

  Comparatively the County encourages informal planning discussions and the elimination of former r.r. lots is a County zoning priority.

- In another example the Petitioner(s) negotiated with the OCCL, resulting in a ***delay*** which ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)delay*** , a permit ***Application*** for an Ag. storage and processing structure which administrative process **exceeded one year**. The Petitioner(s) identified to the OCCL that they had considerable Ag. use equipment, including a tractor, which needed a storage place. That Application also resulted in ***added cost,*** and considerable ***delay of use.***

  The County does not even require that a building permit be required for such a structure in its Ag. district.

- That application required a ***filing fee***.

- The OCCL **denied** the ***Application****, ref., Petition exhibit 43, OCCL letter,* for the structure. The OCCL later stated that all that was needed was a small garden shed (*the type typically found at stores in Hilo*), *ref., Petition exhibit 105, OCCL letter,* and finally the OCCL's administrator wrote to the Petitioner(s) stating that ***'there existed no Rule that would allow an appeal of its decision to deny the permit application for the accessory structure'****, ref., Petition exhibit 50, bottom of page 2 email, where OCCL inserted its comments into questions from the Petitioner(s) earlier email.*

- The Petitioner(s) read the Rules and found the OCCL's Administrator's denial of an appeal process was not correct.

- The Petitioner(s) **formally** appealed that their application for the accessory structure be referred to the BLNR for its consideration, *ref., Petition exhibit 106, Petitioner(s) letter of appeal*.

- Upon the DLNR receiving the Petitioner(s) Site Plan Approval ("SPA") *Application* to reconsider the OCCL's denial that the accessory structure be allowed, the OCCL, issued a letter ***denying* that it had *denied*** the SPA application even though it had denied it **and returned the application fee**, *ref., Petition exhibit 105, paragraph 3, page 2, OCCL lett*er. After another letter was submitted by the Petitioner(s) the OCCL did allow the SPA ***Application*** forward to the BLNR **with the OCCL's very strong recommendation that the application be denied**, *ref., Petition exhibit 35, OCCL staff recommendation.*

- After the Petitioner(s) suffered further ***delay*** and ***added costs*** the BLNR considered the Petitioner(s) ***Application*** and testimony and the OCCL staff recommendation to deny the request and the OCCL's testimony and determined that the ***Application*** was reasonable and ***Allowable*** in the Rules and ordered that the OCCL issue the permit which was subsequently issued by the OCCL. (*note: the BLNR hearing resulted in the Petitioner(s) to **suffer further delay** and added significant travel and lodging **costs** in order that they may defend their **Application***).

- The permit for the accessory structure was particularly time consuming and expensive to realize as it required that the Petitioner(s) travel to Oahu in order to attend the BLNR meeting as the DLNR does not conduct such meetings outside of Oahu.

- In the case of the Petitioner(s) ***Application*** for a formal ***Determination*** that their nonconforming Ag. use of the Property was ***Allowed*** in the Rules, the OCCL first ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)*** as the OCCL required that the Petitioner(s) supply evidenciary proof that the Property's use for Ag. predated its Conservation District zoning, *ref., Petition exhibit 52, OCCL letter*.

- After a ***delay*** of close to one year, during which period the Petitioner(s) conducted research and gathered the specified ***"proof"*** (*which was difficult to find*), the Petitioner(s) supplied the required ***proof*** to the OCCL in the form of the OCCL specified pictures and maps and the Petitioner(s) also supplied a letter from the former sugar cane field manager, *ref., exhibit 43, letter*, evidencing that the Property's use historically had been for Ag. use, *ref. Petition exhibit 40, application.*

- Once the application was *'accepted for processing'* by the DLNR's OCCL, further ***delay*** occurred while the OCCL considered the ***approval application***. HAR 13-5-6.....

  *"(d) No land use(s) shall be conducted in the conservation district unless a **permit or approval** is first obtained from the department or board."*

  The DLNR's OCCL's Administrator was very well aware that the historical use of the Property, dating from around 1850 to 1992 was in Ag. use, *ref., Petition exhibit 3, Sam Lemmo testimony to the LUC, page 69, when having been asked by Commissioner Kanuha, Mr. Lemmo replied, lines 16-18.....*

  *"I'm sure they were in ag use, yeah and then the conservation zoning occurred in **'64** I believe. So, yeah."*

And Mr. Lemmo was asked whether he was aware that the *original **1964** zoning of the Property was Ag. right up to the top of the ocean-side pali*. Mr. Lemmo replied.....

"I'm aware of that situation."

- After reviewing the evidence that the Petitioner(s) submitted to the OCCL of the historical Ag. use of the Property the OCCL issued a ***Determination*** that the Petitioner(s) may grow ***'sugar cane'*** **which was never requested** by the Petitioner(s), *ref., Petition exhibit 53, OCCL letter*.

- Suffering further ***delay*** the Petitioner(s) continued to ***appeal***, in the form of letters exchanged between the Petitioner(s) and the OCCL that they be ***Allowed*** nonconforming Ag. use of the Property as is provided for in HAR 13-5-7's Nonconforming Use Rule.....

  - *Exhibit 103, Jan. 8, 2015,* first request by Petitioner(s),
  - *Exhibit 52, January 28, 2015,* OCCL reply *'provide proof',*
  - *Exhibit 40 Sept. 15, 2015,* Petitioner(s) first Formal request for a Determination,
  - *Exhibit 53, Oct. 16, 2015,* OCCL response *'OK grow sugar cane' (which was never requested in exhibit 40),*
  - *Exhibit 54, Oct. 18, 2015,* Petitioner(s) repeat request in exhibit 40,
  - *Exhibit 74, Nov. 9, 2015,* OCCL reply *'wants more information',*
  - *Exhibit 55, Jan. 8, 2016,* OCCL requires *'Proof '*of historical Ag. use,

- *Exhibit 73, Dec. 27, 2016,* **Particular attention is drawn to the phrase *"you have determined"*** which is found in exhibit 73, and the Dec. date,

- *Exhibit 77, Jan. 4, 2017,*

- ***Exhibit 72, Jan 27, 2017,* Particular attention is drawn to the phrase(s) *"All of your requests to make use of your land have been approved either by the Department of the Board of Land and Natural Resources (Board). For example"..... "(5) Agreement over the continuance of non-conforming agricultural uses"*** which letter is found as ***Petition exhibit 72*.**

- As stated above the DLNR did, after a period exceeding **2 years of *delayed use*** which ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)*** since the Petitioner(s) first asked that they be ***Allowed*** Ag. use, the DLNR issued a letter stating that it had ***previously Allowed*** nonconforming Ag. use, *ref., Petition exhibit 72, DLNR letter*.

Comparatively the County encourages informal planning discussions and Ag. use of Ag. zoned land is allowed without any discussions what-so-ever.

- The Petitioner(s) state that they examined their records and the County's file for the Property and determined that no formal ***Determination*** was ever received by either the Petitioner(s) or the County other than a ***Determination 'that they may grow sugar cane',*** *ref., Petition exhibit 53,* which was never requested.

- That particular ***Application*** period exceeded two years of ***delayed land use***, resulted in hundreds of pages of submitted text and considerably ***delayed*** the

Petitioner(s) development of the Ag. resources of the Property, added cost and use of the Property.

- In another case the Petitioner(s) filed a CDUA with the DLNR for a "***farm dwelling"*** which they believed was an Allowable use as Sam Lemmo had testified to the LUC during petition A05 757 that a "*farm dwelling"* may be allowed on the Property, *ref., Petition exhibit 36, minutes of meetings, top of page 10*.....

> *"Mr. Lemmo described the CDUA process and stated that if you have a legal lot of record and it is greater than 10,000 square feet in size, located in a subzone that single family residences are identified in, then you can apply for a permit to build a house or* ***farm dwelling****."*

- The permit for the residence was particularly time consuming and expensive to realize as it required that the Petitioner(s) travel to Oahu in order to attend the BLNR meeting and defend their application as the DLNR does not conduct such meetings outside of Oahu and they had clearly identified that the residence was necessary to support the ***Allowed*** on-going nonconforming Ag. use of the Property.

- That ***Application*** was comprised of hundreds of pages of required text and multiple copies of each and also an EA and FONSI.

- The ***Application*** for a ***farm dwelling*** was rejected stating, in part, *ref., Petition exhibit 62, DLNR letter*.....

> '*You have identified your proposed use as a "farm dwelling." However, based on the description that you have provided, it appears that you are proposing to construct an SFR. Our rules identify an SFR as an identified use. Our rules do not identify a "farm dwelling" as an identified land use. Therefore, we suggest that you identify your proposed use as an SFR in your application*.',

- The Petitioner(s) re-drafted the entire CDUA, EA and FONSI eliminating the term *farm dwelling* and substituting instead the term *single family residence* and **resubmitted the required hundreds of pages of text in required multiple copies including its supporting EA**.

- That CDUA was processed and a CDUP for a residence was eventually issued, *ref., Petition exhibit 12, CDUP HA 3767.*

  Comparatively the County encourages informal planning discussions and no enormous application with supporting studies, EA or FONSI are believed to be required for a *farm dwelling* in the County's Ag. district so-long-as the Property is also zoned in the State's Ag. district.

88. The above bulleted examples describe various forms of formal Permits, Approvals, Determinations and the like sought by the Petitioner(s) from the DLNR over a period of 30 months in order that they may develop the ***Prime*** Ag. resources of the Property and uses incidental and accessory to such use which ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)*** that the Petitioner(s) had made in the Property and resulted **in a much greater cost burden and delayed land uses** that would not have existed if the land was zoned in the State's Agricultural District.

    Finally the Ag. use of the Property has never been formally resolved.

89. As was earlier described the State's constitution describes ***preserving*** *and* ***promoting*** ***suitable Ag. lands for Ag. 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."*

90. The DLNR *has not promoted diversified agriculture* and has not *assured the availability of the Property for Ag. use* and therefore the Petitioner(s) believe that their request that the Property be described as SLUD Agricultural is reasonable and now it is up to the Commissioners.

91. The Petitioner(s) state that, other than nonconforming use, the DLNR's Rules specify that the use of the Property for Ag. and particularly commercial Ag. would require a CDUP, which is a BLNR discretionary ***Approval*** requiring several studies, an EIS, public hearings etc. resulting in a cost to the Petitioner(s) that would make the securing of a CDUP for commercial Ag. use of the Property prohibitively expensive, *ref., Petition exhibit 14, Sam Lemmo testimony to the LUC in 2006, page 74.....*

"cost up to $40.000"

and on line 11.....

"It can get fairly expensive."

92. The Petitioner(s) state that the DLNR *has not promoted diversified agriculture* and has not reasonably ***assured the availability of the Property for Ag. use.***

Guide Chapter 4 - the Property, the 7 lot subdivision, the general area, current use, historical use, Ka Pa'akai 0 Ka 'Ama assessment .

93. Early in 2017 the DLNR issued a CDUP and FONSI for the Petitioner(s) planned residence which was described by them in the CDUP, EA and FONSI to be necessary to support their expanding, ***Allowed***, nonconforming Ag. use of the Property, *ref., Petition exhibit 12 CDUP HA 3767.*

94. The EA for the planned residence described in some 40 places the Petitioner(s) intention and belief that they may expand their Ag. use of the Property as an ***Allowed*** nonconforming use, *ref., Petition exhibit 7*.

95. The Petitioner(s) state that now, after 6 years have expired since they first purchased the Property, and after incurring considerable costs and delayed land uses which ***frustrated the distinct or reasonable investment-backed expectations of the Petitioner(s)*** use of the Property the Property now consists of fully developed Ag. use land including two existing accessory structures, however uncertainty remains in official records regarding the legal Ag. use of the Property.

96. The Property is ***'near oceanside',*** a State owned shoreline property exists, comprising an Oceanside Bluff / Pali of variable width and height and an inaccessible shoreline consisting of intermittent sections of wave washed boulder fields which State owned property separates the Property from the ocean makai, *ref., Petition exhibit 99* and *70 pictures*, no beach area exists, *ref., Petition exhibit 2, LUC testimony, page 26, lines 1-5* and *Petition exhibit 10, County signed subdivision map of the Property*.

97. Public access to the shoreline area in the general vicinity of the Property exists with KoleKole park to the south and Hakalau park to the north, separated by a distance of approximately 1 mile, *ref. Petition exhibit 2, LUC testimony, page 29, line 10 through page 30, line 5.*

98. Similar shoreline and near shoreline properties leading northward from Hilo all along the Hamakua coast are variably zoned by the State as Ag. and Conservation often with no historical recorded explanation for the variable zoning *ref., Petition exhibit 3, transcript LUC hearing for the Property, page 154, lines 8-14*. Particularly, also, a very similar coastal property, that lies a short distance to the north of the Property, was issued a Boundary Interpretation describing the top of the coastal bluff to be the makai boundary between the State's Ag. and Conservation Districts *ref., Petition exhibit 17, Ninole Interpretation*.

99. The Petitioner(s) state that at the location of the Property the coastal Bluff / Pali is steep and impassible and averages over 100 ft. in height.

100. The Property lies between the former r.r. lots mauka boundary and the State owned coastal Pali/Bluff property makai, *ref., Petition exhibit 18, LUC Interpretation.*

101. The Petitioner(s) state that the Property is located in a 7 TMK lot subdivision **(the, "Subdivision")** of privately owned land, 14+ miles north of Hilo, which Subdivision has a total area of about 13+ acres, 4 of the TMK lots are in the State Agricultural District and 3 of the TMK lots are in the Conservation District *ref., Petition exhibit 18, LUC Boundary Interpretation*.

102. The Subdivision lies between the **present** coastal highway, mauka, and the State owned coastal Bluff/Pali property, makai, *ref., Petition exhibit 18, field map and Petition exhibit 25, aerial picture*.

103. The Petitioner(s) state that the 7 lots in the Subdivision did not result from the action of a property developer but rather two public use transportation

corridors crossed **three** larger, historical field lots, *ref., Petition exhibit 107, 1905 historical map of cane fields* **and** *Petition exhibit 110 field map.*

104. The **former** coastal highway passed through the plantation village of Wailea which highway and town was contiguous to the historic field lots makai, *ref., 1905 historical map*.

105. The Petitioner(s) state that effectively 3 historic contiguous large field lots, dating from the 1850's, extended from the **former** coastal highway at Wailea all of the way down to the coastal Bluff/Pali makai.

106. The 3 plantation field lots of some 30 acres became many more legal lots of record which then included r.r. and highway right of way lots and resulted in many more field lots in between, *ref., Petition exhibits 107 and 110.*

107. The Subdivision is surrounded by a large rural area, commonly referred to as the Hamakua Ag. district which is comprised of small, former plantation towns, and large open spaces which open spaces generally have a current use, and long history, of ***intense Ag.*** production of field crops and livestock production, *ref., Petition exhibit 108, travel brochure* and *exhibit 29, copy of text from local publication.*

108. The entire Hamakua Ag. district area, including the Property, is generally classified as ***"Prime Agricultural land"*** in the ALISH classification system, *ref., Petition exhibits 83 and 85* and the County zoning is A 20a.

As described the **13 acre** area of the Subdivision, where the Property is located, was historically part of a larger ***commercial Ag. use*** field of **30+ acres,** *ref., Petition exhibit 107, historical map,* where continuous cropping occurred for around 150 years which included the intermittent cultivation of the field's soils right up to the top of the coastal Bluff / Pali, resulting in bare

soil areas and substantially increased soil erosion oceanward, *ref., Petition exhibit 3, transcript LUC hearing for the Property, page 154, lines 8-14* and *ref., Petition exhibit 2, LUC testimony by B. Nishimura, planning consultant, testimony to the McCully petition A05 757 around 2005, page 33, lines 1-2.....*

"Yes. Cultivation occurred all the way up to the top of the pali."

109. The 7 lot Subdivision has a single vehicle access point to the **new** Coastal Highway, *ref., Petition exhibit 92 pictures.*

110. The Petitioner(s) state that security gates, on the described access roads block public access to the Subdivision.

111. At the point of access to the Subdivision from the Coastal Highway **no views exist toward the ocean** as the highway is cut deeply through a hillside in the area as the highway rises northward leading away from the Kolekole bridge crossing, *ref., Petition exhibit 92 pictures* and *Petition exhibit 2, LUC testimony, page 33, lines 3-13*.

112. The Petitioner(s) state that the former field manager (until 1992) described to them that public access was restricted to the field area, which now comprises the subdivision's area, and by extension access to the coastal Bluff / Pali was not allowed, since around 1950 as the sugar cane field operation makai of the new Coastal Highway became a **plant breeding and seed development field** for the sugar cane farming operation.

113. The former much larger 30 acre field was historically bounded by the **old** coastal highway, which highway lies intermittently further mauka than the present coastal highway, and passes through the plantation town of Wailea.

At that time the highway lie mauka and the Pacific Ocean makai of the larger 30 acre field, *ref., Petition exhibit 107, picture of historical field map*.

114. Kolekole gulch is located to the south of the Subdivision and a small intermittent stream, borders the northern side of the Property to the north. Hakalau gulch and Hakalau village lie approximately 1/3 of a mile further to the north of the Property.

115. A large Ag. property (a single legal lot of record) of some 30+ acres separating the Property from Hakalau village lies to the north of the subdivision. The center of the intermittent stream is the southern border of that property. That property's area comprises all of the area between the present coastal highway mauka and the coastal Bluff / Pali makai. Since sugar cane farming ceased on it in 1992 it appears to have been used intermittently for cattle grazing. Most of the area of the property is open, grassy and regularly mowed with a line of bamboo and weedy, woody invasive species which often compromise the telephone line leading along the highway. There also exist a line of woody plants along the coastal pali makai, a dense woody area at its northern border with the town of Hakalau and the area in between is grassland. The line of bamboo and weedy woody growth mauka blocks all views towards the ocean from the highway. That property was formerly comprised of several legal lots of record but in a period immediately following the cessation of sugar cane farming the owner combined the lots into a single legal lot of record. The former railroad, which crosses the Property, also bisected this property south to north. The Official Map shows an undefined wavy line crossing that property with the area makai of the line shown as Conservation and the mauka area is shown as Ag. The County's zoning for that property is also A20a. There does not appear to be a LUC boundary interpretation for this property. It is conceivable that the border between the Conservation and Ag. districts will be the top of the coastal bluff/pali as the ALISH map also shows the property to be Prime Ag.

land when / if a boundary interpretation is ever issued by the LUC as there presently only exist the described, defined border lines for the property, one along the highway and the other along coastal pali.

116. The Property's former r.r. '*legal lots of record',* which were located in the Subdivision, were combined into the 3 makai field lots by the Petitioner(s), *ref., Petition exhibit 15, CDUP HA 3735* and *County approved subdivision map, ref., Petition exhibit 10*.

117. The Petitioner(s) state that they are a retired couple with a small pension income.

118. Presently the Subdivision consists of 7 *legal lots of record* which is now consistent with the County's record of 7 TMK lots which 7 lots are owned by 5 different parties, which 5 includes the Petitioner(s).

119. A professional cultural, archaeological and historical study (*part of Petition exhibit 1*) of the Property as well as two professional botanical studies (*Petition exhibit 32*) and a professional's review of historical coastal erosion (*Petition exhibit 24*) were conducted and nothing of particular concern, that needed protection by the State, existed.

120. The Petitioner(s) state that the archaeological study meets the standards for a **Ka Pa'akai 0 Ka 'Ama assessment** which is discussed in more detail beginning on *Petition page 269.*

121. A large ***commercial Ag. use greenhouse***, which employs several people, and an owners residence exists on one lot **contiguously** mauka of the Property's two lots, *ref., Petition exhibit 25, picture*.

122. The Petitioner(s) state that the balance of the Subdivision's 4 lots have one residence and remain generally unused open field areas with a cover crop of regularly mowed grasses however, the Petitioner(s) state that one new residence is in the early stages of development, *ref., Petition exhibit 25, picture*.

Guide Chapter 5 EA, FONSI, DLNR, SMA and the Community

123. There exists a property owners association, comprising 5 owners of the 7 lots in the Subdivision, and bylaws for the Subdivision in which the Property is located, *ref., Petition exhibit 8, agreement*.

124. The Petitioner(s) state that they informed all of the property owners in the Subdivision in 2016 and again in 2017, 2018, 2019, at annual, formal, Subdivision property owner's meetings, regarding the Petitioner(s) development of the Property as a ***commercial Ag. use*** property and that such was an ***"Allowed"*** use, *ref., HAR 13-5-7's Nonconforming Use Rule* and the owners of lots in the Subdivision were aware that the Property appeared to be zoned Conservation by the State and Ag. by the County. Minutes of those meetings are filed with State Authorities annually.

125. The bylaws of the owners association allow Ag. use (whether for personal or commercial) and dwellings and accessory structures on the Subdivision's lots, *ref., Petition exhibit 8, agreement*.

126. The Petitioners state that no objections by any Subdivision property owners **for the Ag. use of the Property** were registered during the described owners association annual formal meetings.

127. The Petitioner(s) state that the property owners unanimously and formally approved, **in writing**, the Petitioner(s) plans to build **a structure accessory**

to the Ag. use and a residence on the Property., *ref., Petition exhibits 113 and 114.*

128. The Petitioners state that during the 2018 Subdivision property owners meeting the Petitioner(s) advised the lot owners that they had filed a Petition with the LUC that the Property be rezoned into the State's Agricultural District and advised that anyone interested may contact the LUC and/or follow the Petition on the LUC's website or contact the Petitioner(s) directly. **No objections or comments or concerns regarding the Petition** were raised by anyone at that meeting nor have any owners contacted the Petitioner(s) for details or updates.

129. When the BLNR reviewed the Petitioner(s) application for the Ag. use accessory structure, *ref., shown in part in Petition exhibit 41,* for the Property it was determined that no EA and FONSI would be required as there already existed a 2005 FONSI for a residence on the Property, *ref., Petition exhibit 42, minutes of BLNR meeting and exhibit 1, 2005 EA and FONSI*, which was planned but never built by the previous land owner. The BLNR ordered that the OCCL issue a permit for the construction of the accessory structure, *ref., Petition exhibit 11, Permit SPA HA 16-4.*

130. No particular concern was raised by the public during the EA review process **for the Petitioner's planned residence** on the Property which EA did not result in a concern or objection to the residence or the additionally described Ag. use of the Property being recorded and the DLNR issued a FONSI for the residence wherein the EA for the residence **described in some 40 places the Petitioner(s) nonconforming Ag. use of the Property** and the need for an on-site residence in-order-for the Petitioner(s) to manage the Ag. use, *ref., Petition exhibit 7, EA and FONSI.*

131. No particular concern was raised by the public during the EA review process **for the Petition** that the Property be rezoned to the State's Agricultural District.

132. The Petitioner(s) state that they are not aware that any concern or comment negative to the Petitioned rezoning has been raised by either **the County, the area's elected representative to the County, the State Office of Planning nor the DLNR**.

The Petitioners state that the County's SMA map shows the entire 7 lot Subdivision within the SMA zone.

133. The County Determined that the Property is in the SMA and issued a **SMA Determination** that the Ag. use of the Property, including cultivation of its soils, was not in conflict with the SMA Rules and did not require a SMA Permit, *ref., Petition exhibit 109, County letter.*

Guide Chapter 6 Nonconforming Ag. use in the Conservation District

134. The Petitioner(s) state that they interviewed John Cross, the field manager in charge of the field, which comprised the area of the Subdivision, for the sugar cane agribusiness. Mr. Cross advised that the agribusiness continued after the State appeared to have overlaid the Conservation District on the Property, *ref., Official Map, dated December 20, 1974,* and he stated a belief that there did not exist any communications in the agribusiness's files from either the State or County regarding the seemed overlay and stated that everyone knew that Ag. was intended to continue uninterrupted on Conservation Districted land as an ***Allowed*** use.

135. The Petitioner(s) state that Mr. Cross told them that the Property had a "*high capacity for intensive cultivation"* of Ag. crops as the soils, the Property's topography and the climate were ideal for Ag. use.

136. The DLNR's OCCL was aware that HRS 183C and HAR 13-5-7 provided for ***Allowed*** nonconforming Ag. use, *ref., Petition exhibit 118, August, 2011,* ***minutes*** *of BLNR meeting wherein Sam Lemmo gave testimony to the BLNR, beginning at the bottom of page 20 and continuing in the first paragraph of page 21.....*

> "*Mr. Lemmo conveyed under non-conforming uses we took this section from the back of our rule and moved it to the front of our rule which is an important provision. As you know the Statute 183C talks about the relevance of non-conforming uses* ***and how they shall be allowed to continue****.* ***This is in the Statute*** *and staff felt it needed to be up front in the rule."*

and again in another case.....*ref., exhibit 101, minutes of BLNR meeting, Feb. 9th, 2007, it's item K-1,* which was for "*nonconforming*" residential and **agricultural** use of another property wherein the DLNR's OCCL's Administrator, Mr. Lemmo related to the BLNR……..

> *"that it was approved that a parcel used for residential and* ***agriculture*** *purposes has the right to continue those uses as presumably* ***statute****."*

There also exists another case which is known to the Petitioner(s) as the ***Kamai family*** which case was after Mr. Lemmo became the Administrator of the OCCL. In that case Mr. Lemmo oversaw the application of a fine against the ***Kamai*** family for the unpermitted use of their land for Ag. even though the historic use of the land had been for Ag. During an appeal of that case the DLNR withdrew the fine and recognized the land owner's right to ***Allowed*** nonconforming Ag. use of that land.

The OCCL's Administrator, Sam Lemmo, personally inspected the Property, in 2006, and he gave testimony to the LUC during petition A05 757 that he knew that the Property was a historic sugar cane field dating from a period beginning around 1850, *ref., Petition exhibit 3, Sam Lemmo testimony to the LUC, page 69, when having been asked by Commissioner Kanuha, Mr. Lemmo replied, lines 16-18.....*

> *"I'm sure they were in ag use, yeah and then the conservation zoning occurred in **'64** I believe. So, yeah."*

And Mr. Lemmo was asked whether he was aware that the *original **1964** zoning of the Property was Ag. right up to the top of the ocean-side pali*. Mr. Lemmo replied.....

> *"I'm aware of that situation."*

137. Beginning in **2016** the Petitioner(s) formally applied to the OCCL that they be ***Allowed*** nonconforming Ag. use of the Property, *ref., Petition exhibit 40*.

138. The OCCL replied that they may grow the specific crop ***'sugar cane'*** which was never requested in the application, *ref., Petition exhibit 53, OCCL letter.*

139. The Petitioner(s) state that over a period of several years the Petitioner(s) requested that the OCCL ***'formally Allow'*** general nonconforming Ag. use of the Property without a result satisfactory to them.

140. HAR 13-5-6(d) states...

> *(d) No land use(s) shall be conducted in the conservation district **unless a permit or approval** is first obtained from the department or board.*

and HAR 13-5-7 Nonconforming use Rule, (f) also appears to describe that some unspecified form of *'application'* is required for *nonconforming* use of Conservation Districted lands,

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

141. The County issued a formal Determination that, as it respects HRStatutes and HARules which it administers, Ag., including the cultivation of the Property's soils right up to the Bluff / Pali, is an ***"Allowed"*** land use, without any formal permitting or approval by the County required, *ref., Petition exhibit 109, County letter.*

142. The Petitioner(s) state that they sought a formal Determination, *ref., HAR 13-5-30,* from the DLNR that the Property qualifies for ***"Allowed" nonconforming*** Ag. use, for a prolonged period, without a result which was satisfactory to them.

143. The Petitioner(s) state that the DLNR's administration of the Property has ***frustrated the distinct and reasonable investment-backed expectations*** that the Petitioner(s) had since they purchased the Property in 2014.

144. The final letter from the DLNR regarding their applied for nonconforming Ag. use of the Property did not properly secure the Petitioner(s) investments in the Ag. use of the Property nor their investments in structures accessory to the Ag. use, *ref., Petition exhibit 72, DLNR letter.*

145. The final letter from the DLNR regarding the Petitioner(s) applied for nonconforming Ag. use of the Property did not indicate that the letter was

copied to the State and County Offices of Planning and the Island's representative member to the BLNR, *ref., Petition exhibit 72, DLNR letter.*

146. The Petitioner(s) have noted the DLNR's reluctance to formally allow and evidence its allowing of nonconforming Ag. use of the Property and formally evidencing of it to the County etc. This has resulted in the Petitioner(s) continuing uncertainty and the filing of the Petition.

147. The Petitioner(s) have come to conclude that the DLNR, almost always, first avoids Allowing nonconforming use of land by denying such applications and the Petitioner(s) experience described in the Petition and this Guide evidence that **if** the OCCL is pressed further it obfuscates its advice to land owners that effectively delays or denies such nonconforming use.

The Petitioner(s) had discussed their DLNR experience, regarding Ag. use of Conservation District land with another land owner in the general area of the Property, who also owns land that is zoned A20a by the County which was a former Ag. use property before the Conservation District was overlaid on it. That property is also classified as ***Prime*** in the LUC's ALISH classification system. When that land owner inquired at the OCCL in January of 2020, the OCCL's administrative senior staff person, Tiger Mills, advised the land owner that *'because the Ag. land use had lapsed for a period greater than one year HAR 13-5 did not allow that the Ag. use may be resumed without a formal CDUPermit.'*

While the **LUC's** HAR Chapter15-15 has such a Rule the **DLNR's** HAR Chapter 13-5 does not and the OCCL is clearly aware that nonconforming use of former Ag. land is an ***Allowed*** use in the Conservation District. The Petitioner(s) believe that the DLNR's administration of Prime Ag. land is in direct conflict with the State's Constitution.The State's constitution has always

described *'preserving and **promoting** **suitable Ag. lands for Ag. 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."*

and.....

*ref., Petition exhibit 118, August, 2011, **minutes** of BLNR meeting wherein Sam Lemmo gave testimony to the BLNR, beginning at the bottom of page 20 and continuing in the first paragraph of page 21.....*

> "*Mr. Lemmo conveyed under non-conforming uses we took this section from the back of our rule and moved it to the front of our rule which is an important provision. As you know the Statute 183C talks about the relevance of non-conforming uses **and how they shall be allowed to continue**. **This is in the Statute** and **staff** felt it needed to be up front in the rule."*

148. OCCL "**staff**" includes Tiger Mills and Sam Lemmo.

149. The Petitioner(s), very clear, OCCL experience described in item 24, Chapter 1 of this Guide, when combined with other examples that are identified in the Petition as well as the above examples clearly show that the DLNR does not ***promote*** that suitable Ag. land be used for Ag. by reducing the burden of land use ***Approvals*** and/or CDUApplications of administrative requirements which are eased through the provision in HAR 13-5-7's nonconforming use Rule. **The State always intended that Ag. use of land, particularly *Prime* Ag. land, when it overlaid the Conservation District on land was not to suffer administrative processes subsequently that would interfere substantially with such use yet that is what has been the Petitioner(s) direct experience.** Therefore the Petitioner(s) hold that the

Petition is properly placed with the LUC and deserves a favorable ruling by the LUC.

150. In 2018 the Petitioner(s) examined the County's TMK files for the Property and confirmed that the DLNR did not copy the *exhibited 72* letter from the DLNR to the County. Subsequently the Petitioner(s) provided a copy of the letter to the County which was subsequently returned to them and not placed in the TMK file as it had not been supplied to them by the DLNR. The Petitioner(s) again submitted the letter to the County and requested that it be placed in the TMK file. It is not known by the Petitioner(s) whether it was placed in the file.

151. As has been repeatedly stated herein "uncertainty remains" and the Petitioner(s) do not understand the confusion and seemed obstruction to varying degrees of their seemingly ***Allowed*** Ag. use of the Property at all levels of the State and County.

Guide Chapter 7 McCully LUC petition A05 757, A05 757 denied by the LUC, dissenting Commissioner(s) reasoning, Buffer Zone offered by the Petitioners and County LUPAG classification for the Property as "Open"

152. In 2005, the former owners of the Property, the McCully(s), filed a similar petition with the LUC, petition A05 757, that the three Oceanside TMK lots in the Subdivision be rezoned into the State's Agricultural District.

153. That Petition was denied as two commissioners voted against and five voted to accept, *ref., Petition exhibit 27, McCully(s) appeal to LUC.*

154. The Petitioner(s) state that the 2005 petition A05 757 for the Property to be rezoned from the Conservation District to the State Agricultural District was supported by both the County and State Offices of Planning with a stipulated

40 ft. wide buffer zone being provided to separate the McCully(s) planned land uses from the top of the bluff, *ref. transcript of LUC petition hearings, exhibit 3, page 110, lines 4-7 and page 114, lines 9-12* and.....

*ref., Petition Exhibit 5a, LUC petition A09 783 LUC petition, **map** of the Property showing a 40 ft. wide buffer zone, on its page 115.* (note: petition A09 783 was abandoned by the applicant before it was heard by the LUC)

155. During the LUC hearings for petition A05 757 the administrator of the OCCL, Sam Lemmo, testified that.....

> ***'that the property was undeveloped** and if the petition were allowed **the DLNR would recommend that a 40 ft. wide buffer zone be established along the Property's makai boundary'*** (the Oceanside bluff)*., ref., transcript testimony is found in Petition exhibit 3, Transcript 5-4-2006, Volume 1, Hawaii, on it's pages 69 to 77*

and Mr. Lemmo also described that the DLNR would like to continue to control the permitted structural uses of the Property in order to secure their placement at a reasonable distance from the coastal Bluff/Pali.

156. The Petition provides for a buffer zone, if allowed, and the existing structures and their placement on the Property **have already been negotiated and agreed to and formally permitted by the DLNR and the County Planning Department**.

157. The two dissenting commissioners, during petition hearing for A05 757, described concerns.....

- the 3 TMK lots were undeveloped,

- the owner appeared to be a property developer,

- the potential for erosion existed,

- the safe placement of future structures on the property,

ref., Petition exhibit 27, transcript of LUC meeting.

158. The Petitioner(s) state that **the expressed concerns**, by the two dissenting Commissioners during LUC petition A05 757, **are no longer applicable to the Property** as the existing residence and Ag. storage and processing structure already have been fully approved by the State and County and the Petitioner(s) believe that they are ***Allowed*** to use the Property for general Ag. use whether the Property is rezoned or not.

159. The Petitioner(s) state that the original overlay of an undefined line on a map in the early 1960's, that did not show the Property to be in the Conservation District, during petition hearings A05 757 (which are exhibited to the Petition as *exhibit(s) 2, 2a, 3,14, 16*) it was established that the Property **first lie mauka** of the Conservation District *,ref., Petition exhibit 3, transcript of LUC hearing, page, 88, lines 15-20*.....

> *"It's our belief and as indicated on the record that the guideline for identifying the Conservation District mauka boundary was the tree line on the bluffs. This has been taken from the **records of the LUC** at the time that they established the district boundaries."*

This was followed by a subsequent Official Map*, dated December 20, **1974*** adopted by LUC which appeared to show the Property to be located in the Conservation District.

This was then followed by the ALISH map adopted by the LUC in **1977** generally appearing to describe the area including the Property to have Ag. qualities that are ***"Prime"*** and then finally the LUC formally ***Interpreted*** that

the Property was located in the Conservation District in **1992**. All during that 30 year period the Property's use existed in intense Ag. use producing high volumes of Ag. crops, its soils were periodically cultivated contiguously to the Property's makai Oceanside boundary, as it had for over 100 years earlier and no boundary amendment was ever applied for or ***Allowed*** nor does there exist anything in the State's, the County's nor the owners of the Property's files that explained the change nor that due process for a boundary adjustment occurred.

160. The Petitioner(s) state that neither the County nor the State have indicated, to the Petitioner(s), consideration for any public purpose use of the Property and during LUC petition A05 757 hearing in 2005-6, County representative Norman Hayashi, testified that the County's consideration when zoning the Property *"Open"* in its General Plan was because *'basically it was a shoreline property'* and he also explained that the County reasoned that ***'shoreline properties that were already Conservation Districted zoned'*** were then, for that reasoning alone, described it as *'Open'* in its General Plan and similarly the State Office of Planning testimony, at that same hearing, was not able to offer any explanation of why the Property appeared to be re-zoned in the Conservation District.

161. As stated earlier a Legislative Bureau Document exists which was published by the University of Hawaii around 1969 and titled "PUBLIC LAND POLICY IN HAWAII: THE MULTIPLE USE APPROACH, states on its page bearing the #1.....

> *"Yet because this legislation was drafted and enacted within such a short period and under less than optimal conditions, even its stoutest proponents admit that it requires revision."*

Testimony by Laura Thielen further confirmed, *ref., exhibit 2, McCully(s) Petition A05 757 hearing minutes, testimony of Laura Thielen, the director of the State Office of Planning, beginning on its page 114……...*

> *"But until that happens the reality is we're dealing with many areas of classification where there was not an independent analysis saying that this land belongs in this classification because of the attributes of this physical property."*

162. The State's constitution describes *preserving and* ***promoting*** ***suitable Ag. lands for Ag. uses*** in its *section 11.3* ***Agricultural lands……..***

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

163. The Petitioner(s) state that the State Office of Planning, the DLNR and the LUC are all agencies of the State and bound by the *section 11.3* described above and it is therefore now incumbent on the LUC to ***promote*** ***suitable Ag. lands for Ag. uses*** and ***increase Ag. self-sufficiency*** *and assure the availability of agriculturally suitable lands* by determining that the SLUD boundary reflects that the Property lies in the State's Ag. District.

164. The Petitioner(s) state that they have sought to properly secure their Ag. use of the Property and investments therein through DLNR processes for a period measured in years, application fees paid and thousands of pages of submitted documents, delays - with a result that is formally inconclusive and unsatisfactory to them.

165. The Petitioner(s) state that the DLNR does not appear to have a clear, evenly applied, policy regarding ***grandfathered*** rights, particularly Ag. use, on privately owned properties that appear to have been overlaid by the

Conservation District, *ref., this Guide, the entire Petition, its exhibits and appendix(s)* that is consistent with its HAR 13-5-7's Nonconforming Use Rule.

166. The States Statutes and Rules regarding grandfathered nonconforming use of Conservation Districted land has been examined in great detail and confirmed by the State's Auditor General in a report to the Governor in 1992 which report has particularly given confidence to the Petitioner(s) that continued Ag. use, including commercial Ag. use, of the Property is ***"Allowed"***, *ref., Petition exhibit 69, Auditor's Report*.

167. The Petitioners state that the ***seemingly Allowed*** nonconforming Ag. use status of the Property has resulted in ***confusion*** for ....

- State and County Administration officials - resulting in past and ongoing waste of scarce government resources,
- the LUC (*ie. the former property owners similar 2005 LUC petition A05 757),*
- professionals that assist the public in land use and zoning issues,
- Real Estate agents,
- the general community,
- adjacent land owners and
- the Petitioner(s).

The Petitioner(s) state that **everyone is *confused*.**

The Petitioner(s) state that the ***confusion*** has resulted in....

- the Petitioner(s) delayed Ag. land use,

- loss of income,

- wasted resources,

- frustration and the submission of thousands of pages of correspondence and the like,

- continuing uncertainty regarding the Petitioner(s) land use rights,

- if the Interpreted zoning is left uncorrected the potential that the Property's ***Prime*** Ag. resources may not be properly secured.

168. The Petitioner(s) have now filed the Petition with the LUC to Determine that the Property or a portion thereof lies within the SLUD Ag. District.

169. The Petitioner(s) offer an incentive to the Commissioners to grant the Petition, **particularly in the interest of offering an added level of protection to the environment** that may not otherwise result regarding the cultivation of soils in the area adjacent to the Property's makai boundary, the Petition offers an improvement to the potential of a negative effect to the environment - a ***"buffer zone"*** separating the *seemingly* ***Allowed*** cultivated soil area of the Property from the makai State owned Bluff/Pali property and the ocean and its reefs below which ***"buffer zone"*** would be maintained in grasses and Ag. use plants such as woody orchard species and the like that do not require regular cultivation and exposed soil conditions.

Guide Chapter 8 Some final comments

170. The Petitioner(s) state that the quantity of the Petition and this Guide is meant to clearly establish, beyond reasonable doubt, that the Petitioner(s) have used reasonable effort to secure, what they believe is, their ***Allowed*** Ag. use of the Property, including commercial Ag. use, within its *Interpreted* zoning in the Conservation District through DLNR administration processes without a satisfactory result.

171. The Petitioner(s) state that in order to avoid the potential for DLNR applied fines and in order to properly **secure** the Petitioner(s) investments of time, effort and money in the Property **and** to secure the ***Prime Ag. resources*** of the Property for today and the future **and** to reduce the potential for erosion of soils and Ag. use chemicals on to the Oceanside Bluff / Pali and the ocean and its reefs below **and** to eliminate ***confusion*** at various Government agency levels, the professional community, the general community, the immediate neighborhood and the Petitioner(s), **and** to prevent further wasted scarce Government financial resources the Petitioner(s) now seek that the LUC Determine the Property to lie in the SLU Agricultural District in order that its use and zoning are consistent and easily understood by everyone, the Property's Ag. resources be protected and preserved in land use zoning law and the environmental benefits from an additional protection that does not currently exist.

172. The Petitioner(s) request that the $5,000 filing fee for the Petition be reimbursed to the Petitioner(s) as they have used appropriate due diligence securing the Property's use for Ag. through the appropriate administrative State and County authorities without success and *uncertainty remains*.

173. The Petitioner(s) state that the potential for Ag. related income from the Property is relatively small **and** the Petitioner(s) believe that the LUC's

administrative office erred when it ***"Interpreted"*** that the Property lies in the Conservation District.

174. The Petitioner(s) describe that they have tried hard to work within the DLNR's Rules and only after exhausting all reasonable effort, over a period measured in years, have they now turned to the LUC - the past expenses of securing DLNR permits and the existing burden of Petition filing fees, costs for court reporter's transcripts and other costs of the proceedings is already significant and believed to be an unwarranted burden.

175. The Petitioner(s) state that.....

- no new land use is likely nor is contemplated, Ag. use exists and accessory structures to Ag. exist,

- petition A05 757 was supported by both the State and County Offices of Planning,

- information regarding the Petitioned rezoning has been posted on the LUC's website for over two years,

- the Petitioner's mailed out an advisory, to the official LUC mailing list of over 200 parties, which described the Petitioned rezoning which resulted in no relevant response by anyone (one party did respond asking '*why did you send this to me?'.*

- the Petitioner's have informed Subdivision property owners describing the Petitioned rezoning which resulted in no stated opposition,

- the Petitioner(s) have made various County agencies, divisions, representatives and the like aware by describing the Petitioned rezoning, no one raised concerns or stated opposition,

- the DLNR has been advised of the Petitioned rezoning which has not yet stated opposition,

- the State Office of Planning has been advised of the Petitioned rezoning which has not yet stated opposition,

- the Petitioner(s) EA for the Petitioned rezoning was properly posted on the OEQC's web site which did not raise comments or opposition,

- an earlier EA and FONSI for a residence accessory to the Ag. use of the Property was properly posted on the OEQC's web site which did not raise any comment opposing the EA/FONSI,the DLNR issued the above referenced FONSI that the Property's use for a residence to support the nonconforming Ag. use of the Property would have *No Significant Impact*, and

- **no comments have ever been received by the Petitioner(s) from anyone that expressed opposition to the Ag. use of the Property nor that the Petitioned SLUD amendment be allowed.**

176. The Petitioner(s) emphasize that no new use of the Property is proposed nor is likely. The Property is already a fully developed Ag. use Property. The Petition, if allowed, offers a reduction in the intensity of the land's use that may be negative to the environment while maintaining (and preserving) a more limited yet continuing beneficial Ag. use of the *Prime* Ag. resources of the Property and the offered buffer zone area.

Guide Chapter 9 - HAR 15-15 Subchapter 6 - APPLICATION

REQUIREMENTS FOR BOUNDARY AMENDMENT PETITIONS

Section 15-15-50 - Form and contents of petition

(a) *The form of the petition for boundary amendment shall conform to the requirements of subchapters 5 and 6. All petitions shall:*

(1) *State clearly and concisely the authorization or relief sought; and*

The Petition describes that the Petitioner(s) seek to have the Property rezoned from the State's Conservation District to the State's Agriculture District or Determined to already lie in the State's Agriculture District.

(2) *Cite by appropriate reference the statutory provision or other authority under which commission authorization or relief is sought.*

Described on Petition Page 128

(b) *For petitions to reclassify properties from the conservation district to any other district, the petition shall not be deemed a proper filing unless an approved environmental impact statement or finding of no significant impact is approved or accepted by the commission for the proposed boundary amendment request. Such approved or accepted environmental impact statement or finding of no significant impact shall be filed with and be part of the petition for boundary amendment. Notwithstanding any rule to the contrary, the processes provided by subsections (e) and (f) shall not commence until this subsection is satisfied.*

A draft EA was submitted to the LUC on March 13, 2019. Subsequently the LUC issued an Anticipated Finding Of No Significant Impact and forwarded the draft EA to the OEQC on December 23, 2019. The period for public comment ended on January 23, 2020. No public comment was received. Subsequently the State Office of Planning issued a comment letter to the LUC which confirmed various

aspects of the Petition and draft EA. No State Office of Planning comments were unfavorable to the Petitioned rezoning nor did it necessitate that the Petitioner(s) issue a written response to it. On June 8, 2020 the Petitioner(s) submitted a final EA / proposed FONSI to the LUC and the State Office of Planning and County Office of Planning and Windward Planning Commission. The LUC considered the final EA / proposed FONSI on June 25, 2020 and issued a FONSI.

(c) *The following information shall also be provided in each petition for boundary amendment:*

(1) *The exact legal name of each petitioner and the location of the principal place of business and if an applicant is a corporation, trust, or association, or other legal entity, the state in which the petitioner was organized or incorporated;*

Described on Petition Page 131

(2) *The name, title, and address of the person to whom correspondence or communications in regard to the petition are to be addressed;*

Described on Petition Page 131-132

The Petition's EA and final EA/proposed FONSI describes that the Petitioner(s) met with the County's elected district representative **Valarie Poindexter,** the Community's elected representative **and** sponsor of the Plan, to discuss the Petitioned rezoning - **see Page 202** of the final EA/proposed FONSI for a description of what was discussed at the meeting. Ms. Poindexter affirmed that the Hamakua Plan described Ag. and Ag. self-sufficiency in the district as one of the ***Prime*** focuses of the Plan. Ms. Poindexter described that the Petition *'seemed'* to be in compliance and she did not raise any particular concern regarding the Petitioned rezoning.

At the time of filing the Petition the County's General Plan describes the Property as *"Open", ref., Petition exhibit 5a, its page 14, map,* however its is zoned Ag. A20a in the County's functional plan. The Petition describes that considerable testimony to the LUC during the **2005** McCully(s) petition for the same Property by **County staff representative Norman Hayashi** explained that while the Property is zoned **Open** by the County in its General Plan, the County **does allow Ag.** in its Open district, *ref., **Petition exhibit 2a** beginning on its page 5 through to the end of his testimony to the LUC by Hayashi*. A Petitioner(s) analysis/comments regarding County representative Hayashi's testimony is found on **pages 19-25** of the final EA and proposed FONSI.

Hayashi went on to describe that the County generally did not particularly consider coastal Hamakua area property's existing uses nor their existing Ag. use or ***Prime*** Ag. resources and values, when they were described as "Open" in its General Plan. He stated, rather, that the County's General Plan description was intended to reflect the apparent existing Conservation District zoning.

Hayashi's testimony described his belief that the ***"Prime"*** Ag. resources of the Property were not particularly considered when the State overlaid the Conservation District on lands which further confirms the Petitioner(s) assertion that the Property's ***Prime*** Ag. values were never considered.

Further confirming Mr. Hayashi's testimony, how the State zoned land, is found in a Legislative Bureau Document published by the University of Hawaii around 1969 and titled "PUBLIC LAND POLICY IN HAWAII: THE MULTIPLE USE APPROACH, states on its page bearing the #1.....

> *"Yet because this legislation was drafted and enacted within such a short period and under less than optimal conditions, even its stoutest proponents admit that it **requires revision**."*

Such case-by-case analysis of properties like the Property has never occurred and any ***'required revision'*** , if applicable, has never occurred, *ref., the 1978 ALISH Map* and the Testimony by Laura Thielen further confirmed this, *ref., exhibit 2, McCully(s) Petition A05 757 hearing minutes, testimony of Laura Thielen, the director of the State Office of Planning, beginning on its page 114……...*

> *"But until that happens the reality is we're dealing with many areas of classification where there was not an independent analysis saying that this land belongs in this classification because of the attributes of this physical property."*

The Petition describes that the Petitioner(s) believe that the only zoning designations and policies, and proposed amendments required is that the Property be rezoned from the Conservation District to the State's Agricultural District or be Determined to already lie in the State's Ag. District.

(20) *Petitioners submitting petitions for boundary amendment to the urban district shall also represent that development of the subject property in accordance with the demonstrated need therefor will be accomplished before ten years after the date of commission approval. In the event full urban development cannot substantially be completed within such period, the petitioner shall also submit a schedule for development of the total of such project in increments together with a map identifying the location of each increment, each such increment to be completed within no more than a ten-year period;*

Not applicable

(21) *A written disclosure and analysis addressing Hawaiian customary and traditional rights under Article XII, section 7 of the Hawaii State Constitution;*

Petition Pages 255-259

(22) *Any written comments received by the petitioner from governmental and nongovernmental agencies, organizations, or individuals in regards to the proposed boundary amendment;*

Petition page 259 and State and County comment ltrs. exhibit(s) 26 and 27 to the FONSI

(23) *A copy of the notification of petition filing pursuant to subsection (d);*

notification of petition filing was filed with the LUC and is included in the main file of the Petition

(24) *A statement and analysis pursuant to section 226-109, HRS, addressing climate change related threats to the* ***proposed*** *development and* ***proposed*** *mitigation measures. The statement and analysis shall address, but not be limited to, the following issues:*

The Petition Describes that No new use is *proposed* nor is likely.

(A) *The impacts of sea level rise on the proposed development;*

The Petition Describes that No new use is *proposed* nor is likely.

(B) *Infrastructure adaptations to address the impacts of climate change including sewer, water and roadway improvements;*

The Petition Describes that no new use is *proposed* nor is likely.

(C) *The overall carbon footprint of the* ***proposed*** *development and any mitigation measures or carbon footprint reductions proposed; and*

The Petition Describes that no new use is *proposed* nor is likely.

(D) *The location of the* ***proposed*** *development and the threats imposed to the proposed development by sea level rise, based on the maps and information contained in the Hawaii Sea Level Rise Vulnerability Adaptation report and the proposed mitigation measures taken to address those impacts.*

The Petition Describes that no new use is ***proposed* nor is likely.**

(25) *A statement and analysis addressing the* ***proposed*** *development's adherence to sustainability principles and priority guidelines and climate change issues as contained in section 226-108, HRS, the Hawaii State Plan (Sustainability), and smart growth principles, including, but not limited to:*

(A) *Walkability;*

The Petition Describes that no new use is ***proposed* nor is likely.**

(B) *Accessibility to alternate forms of transportation;*

The Petition Describes that no new use is ***proposed* nor is likely.**

(C) *Transit oriented development opportunities;*

The Petition Describes that no new use is ***proposed* nor is likely.**

(D) *Green infrastructure, including water recharge and reuse and water recycling;*

The Petition Describes that no new use is ***proposed* nor is likely.**

(E) *Mitigation of heat island effects; and,*

The Petition Describes that no new use is ***proposed* nor is likely.**

(F) *Urban Ag. opportunities,*

The Petition Describes that no new use is ***proposed* nor is likely.**

(d) *The petitioner shall send a notification of petition filing to persons included on a mailing list provided by the chief clerk. The notification of petition filing shall be in a form as prescribed by the executive officer, and shall include, but not be limited to, the following information:*

(1) *Petitioner's name and mailing address;*

(2) *Landowner's name;*

(3) *Tax map key identification of the property requested for boundary amendment;*

(4) *Location of the property;*

(5) *Requested boundary amendment and approximate acreage;*

(6) *Proposed use of the property;*

(7) *A statement that detailed information on the petition may be obtained by reviewing the petition and maps on file at the office of the commission or the respective county planning department or at the commission's website;*

(8) *A statement that informs potential interveners on the mailing list provided by the commission that they may file a notice of intent to intervene with the commission within thirty days of the date of the notification of petition filing pursuant to section 15-15-52(b);*

(9) *A statement that informs the general public to contact the office of the commission for information on participating in the hearing; and*

(10) *A location map depicting the petition area. The notification of petition filing shall be sent to all persons on the mailing list on the same day that the petition is filed with the commission. The petitioner shall submit to the commission an affidavit that the petitioner has sent the notification of petition filing pursuant to this subsection,*

The notification of petition filing was sent to the Official LUC mailing list.

Notification of petition filing and the required Affidavit were filed with the LUC and is included in the main file of the Petition

(e) *The executive officer shall receive and complete a review of the petition for completeness within thirty days of the filing of the petition. The provisions herein, however, are subject to the requirements of subsection (b) on petitions for reclassification of conservation district lands.*

(f) *Upon completion of the review pursuant to subsection (e), the executive officer shall determine whether the petition is a proper filing and is accepted for processing. The petition shall be deemed a proper filing if the items required in subsections (a), (b), (c), and (d) have been submitted. The petition may be deemed defective by the executive officer if any of the items required in subsections (a), (b), (c), or (d) have not been submitted. If the petition is deemed defective, the executive officer shall notify the petitioner of the determination and the reasons for the determination. The petition may be deemed as a proper filing upon review of the additional information submitted and upon determination by the executive officer, and the date the petition will be deemed a proper filing will be the date the executive officer determines the defects have been cured. The executive officer will file a notice of proper filing and mail the notice to the petitioner, the State office of planning, the county planning agency, and to persons who have filed a notice of intent to intervene. The executive officer's determination is subject to review in accordance with section 15-15-41. The provisions herein, however, are subject to the requirements of section 15-15-50(b) on petitions for boundary amendment of conservation district lands.*

(g) *The petitioner has a continuing obligation to update the information submitted in the petition prior to and during the pendency of the hearing on the petition.*

The Petitioner(s) swear and affirm that the information contained in the Petition and this Guide to the Petition are true to the best of their knowledge.

Signed

Kenneth Stanley Church and Joan Evelyn Hildal

This _____ day of _____ 2020