BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of	DOCKET NO. A18-805
Kenneth Stanley Church	PETITIONERS' MOTION THAT
And	THE LAND USE COMMISSION
Joan Evelyn Hildal	(the APPROVING AGENCY)
	ACCORDING TO HAR 15-15-22 (f)
To determine the State Land Use District	issue a boundary determination for
border location separating the State	Approximately 3.4 Acres Of Land
Conservation District from the State	At Wailea, Island Of Hawaii, Tax
Agricultural District in the area of	Map Keys (3) 2-9-003; 029, 060
Approximately 3.4 Acres of Land which is	
identified by the ounty of Hawai'i as Tax	
Map Keys (3) 2-9-003; 029, 060 at Wailea,	
Island of Hawai'i	

PETITIONERS' **MOTION FOR A BOUNDARY DETERMINATION**

THAT THE LAND USE COMMISSION

ACCORDING TO HAR 15-15-22 (f)

issue a boundary determination for Approximately 3.4 Acres of Land

At Wailea, Island of Hawai'i, Tax Map Keys (3) 2-9-003; 029, 060

This Motion is intended to be part of Petition A18-805 (the "Petition"). Referenced exhibits found in this Mortion are already official LUC Documents that are included in the Petition. A list of the Petition exhibits is found in the last few pages of this Motion. Comes now, Kenneth Stanley Church and Joan Evelyn Hildal, husband and wife (the Petitioner(s)), joint and equal owners of the Property respectfully move the Land Use Commission of the State of Hawaii (the LUC) for a Motion that the LUC:

Determine the State Land use District border location separating the State Conservation District from the State Agricultural District in the area of the Property it applies to this Motion regarding the Property. The Property is comprised of approximately 3.4 acres of Prime agricultural (AG) land and is identified by the County of Hawaii as Tax Map Keys: (3) 2-9-003; 029; 060 at Wailea, Island Of Hawaii, *ref., Petition exhibit 10 (2015), County signed subdivision map*.

This motion is brought pursuant to HAR s/s 15-15-22,,,,,,,,,

> ***§15-15-22 Interpretation of district boundaries.***
> *(a) Except as otherwise provided in this chapter: (b) ..... (c) ..... (d)..... (e) .....*
> *(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.*

(**note:** This Motion will reference several ***exhibits*** to Petition A18-805 and ***The Guide to the Petition's*** text as all of these documents are already *Official LUC records*. The Petitioner(s) have provided both the State and County Offices of Planning with the required copies of this Motion also.)

BACKGROUND

In the time-line forward from Hawai'i Statehood, the adoption and/or forming of the State's Constitution, its HRStatutes, its HARules, its Agencies, its Commissions, the Department of Land and Natural Resources (DLNR), State and County Planning Offices, Land use Districts (including Official Maps, characterization of soils etc.) and State and County Plans (both Functional and General), the importance of agriculture (AG) and its preservation and promotion throughout the State has always been emphasized to receive

a very high priority by the State and County's administrative bodies. While there does not appear to be very much in the public record which guided land use planners following Statehood, that is directly relevant to this Motion, the Petitioner(s) have compiled the following in this Motion.....

Hawai'i State's Constitution's *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."*

A resulting Statute, HRS 205-2 resulted to effectuate the purposes of the State's Constitution

> ***HRS §205-2 Districting and classification of lands.*** *(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** ....*

The Property is ***contiguous*** to other AG land mauka and one other legal lot of record to the south. The Property and the contiguous lot to the south and the land area mauka is believed by the Petitioner(s) to have been identified by the County as a **single parcel**, TMK (3) 2-9-003 013 at Statehood through1992. The field lot was also comprised of several legal lots of record that lay on the mauka side of the Coastal Highway with a field use area comprised of 29.65 acre, *ref., Petition exhibit 22, field F31-B, lower right hand corner description block*. The Present day configuration of the Property is 4.659 acres. The 1969 Boundary Review and its subsequent adoption by the LUC effectively showed the field area that lay makai of the Coastal Highway to be **split into 2 field areas** generally being 9 acres and 4.6 acres. The 9 acre field appeared to remain in the State AG District and the makai field area appeared to be in the State Conservation District. The Property is comprised of 3.368 acres of the 4.6 acres.

Continuing with HRS 205-2.....

> *... 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**;*

This is a mandatory stipulation, the Property does have a ***high capacity for intensive cultivation*** The Property is classified in the ALISH classification system as ***Prime***. Particularly the word ***capacity*** refers to a characteristic of land and not a past, present or future use. AG ***capacity*** of land is irrelevant to whether the actual use, at any particular time, is for personal AG use or for Commercial AG use or its use is paused. Those are land uses and do not describe ***capacity*** for use. Also the term ***greatest possible protection*** when zoning land AG implies that the AG zoning of such land is of greater priority than Conservation zoning.

and,,,,,,,,,,,,,

(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.

In establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county.

"***shall give consideration***" does not imply a *mandatory* requirement that anything more than consideration be given. This Motion will evidence that it appears that when the State and County developed the first SLUD map, and the LUC adopted it, certain mandatory requirements of HRS-2 were relied upon but other mandatory requirements were not applied.

At Statehood the Property, which was part of the ***3.2 acres*** of the Oceanside portion of a field that was part of a single TMK lot and that was part of a single large field of sugar cane that was located in the State's Agricultural District, *ref., Petition exhibit 22, Field map F31-B -* ***15.7 acres***, it was being utilized for *intense production of agricultural crops*, it

was located contiguously mauka of a State owned ocean-side bluff property. Subsequent to the State's first Boundary Review in 1969 it appeared on the State's Land Use Pattern Allocation Map (the SLUD Map) to lie in the State's Conservation District. The former RR lots, which were combined with the 3 Oceanside lots, formerly comprised an area of 1.056 acres. Following the purchase of the field area that lay makai of the Coastal Highway, the previous owners of the general field area, the McCully(s), filled in the former RR, which crossed the Property, with top soil that was harvested from the 4 contiguous lots to the Coastal Highway. Today this RR lots additional area also comprises Prime AG land and is part of the Property.

Following Statehood the Government set into motion a review of land use policy that led to the State's first Boundary Review in 1969, *ref.,.....*

PUBLIC LAND POLICY IN HAWAII:
THE MULTIPLE USE APPROACH

William V. Frame, Department of Political Science, Kenyon College
Robert H. Horwitz
Department of Political Science, Kenyon College
Report No.1, 1965 (Rev. 1969)
UNIVERSITY OF HAWAII, Honolulu, Hawaii 96822
The State Land Use Commission was created by Sess. Laws of Hawaii 1961, Act 187 and revised by Sess. Laws of Hawaii 1963.....

(excerpt from the bottom of the first page of Chapter 1).....

"A state land use commission has been charged with the protection of ***prime agricultural land*** *from urban encroachment, while tax measures have been devised, in part, to force idle land into productive use. This program of land legislation is probably one of the broadest and boldest ever undertaken by any American state. 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."*

The Property is comprised of Prime Agricultural land, *ref., Petition exhibits 85, ALISH Map and Petition exhibit 83, ALISH definition of Prime.* HRS 205 was the ultimate result of various subsequent laws. The present version of HRS 205-1 lists its historically progressive record as follows.....

[L 1963, c 205, pt of §2; Supp, §98H-1; HRS §205-1; am L 1975, c 193, §2; am L 1976, c 43, §1; gen ch 1985; am L 1987, c 336, §7; am L 1990, c 293, §8; gen ch 1993; am L 2006, c 296, §1]

The Petitioner(s) have found that the historical record of land use studies and resulting State laws sought to protect agricultural ("AG") land for AG and not for other purposes. HRS 205 specified that even the Conservation District was to be subordinated to AG if the land had *a "high capacity for intensive cultivation"* unless there existed a very compelling State or County need**.**

HRS 205-2(3) is subsequently reflected in the LUC's HAR 15-15-19.....

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

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

In 1977 the Land Use Commission ("LUC") adopted the Agricultural Lands of Importance to the State of Hawaii (the "ALISH Map") of land. The Property is shown of the ALISH map to be Prime AG land, ref., *Petition exhibit 85, ALISH Map and Petition exhibit 83, ALISH definition of Prime* .

While the various Hawaii Statutes and Rules do allow administrators to rezone land, a high bar was set in the Statutes and Rules before SLUD amendments were to be made but always the "greate*st possible protection",* in zoning considerations, was to favor AG. In effect **AG zoning was given a higher priority than Conservation zoning**, *ref., HRS 205-2 (3) quoted earlier.*

The Property's AG related characteristics and its historic use for AG does not appear, in any official record, to have been considered when it appeared to have been rezoned from

the State's AG District as a result of the first Boundary Review around 1969. Effectively, following 1969 the State Land Use District (the "SLUD") boundary amendment, a large coastal field area, which includes the area of the Property, was divided into 2 pieces with a large portion of the sugar cane field subsequently located on both sides of the SLUD line shown on the official SLUD map which appeared to separate the 2 sides, the makai portion into the State's Conservation District and the mauka portion remained in the State's AG District, *ref., Petition exhibit 18, Boundary Interpretation #92-48* ***and*** *Petition exhibit 22, field map.*

There already existed a strip of coastal,State owned, land that was located in the State's Conservation District since Statehood and that lay contiguously makai of all of the field, *ref., Petition exhibit 10, map*. The AG use of all of the field area for sugar cane production continued uninterrupted until 1992. Particularly the sugar cane agribusiness did not apply to the Department of Land and Natural Resources (the "DLNR") that they be ***allowed*** to continue the AG use of the field.

All of the way up and down the Hamakua coast where sugar cane farming existed, right up to the edge of the Coastal bluff, no sugar cane enterprise sought ***approval*** that the DLNR ***allow*** their continued use of the land for AG where the new SLUD line on the SLUD map appeared to show that the SLUD boundary had moved inland into the area of their fields, *ref., HAR 13-5-6*.....

> *§13-5-6 Penalty. (a) Any person, firm, government agency, or corporation violating any of the provisions of this chapter or permits issued pursuant thereto shall be punished as provided in chapter 183C, HRS.*
> *(b) .....*
> *(c) .....*
>
> *(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.*

When the sugar cane farming operation ended in the area of the Property in 1992, the McCully(s) purchased the area of field F31-B that lay makai of the Coastal Highway which comprised 10 legal lots of record (3 of which were narrow lots that comprised a former rail road ("RR") right of way. In 1992 the LUC issued Boundary Interpretation #92-48, *ref.,*

Petition exhibit 18, which showed the 3 RR lots and 3 lots makai lay in the State's Conservation District. The Property is comprised of 4 of those lots (2 RR lots and 2 Oceanside lots).

The McCully(s) petitioned the LUC, first A05 757 and again A09 783 to rezone the 3 Oceanside, makai lots from the State's Conservation District to the State's AG District. Petition A05 757 was supported by both the State and County Offices of Planning but it was narrowly denied by the LUC. Petition A09 783 was withdrawn by the McCully(s) after the State's Office of Planning (the "State's OP") submitted its written testimony to the LUC recommending that petition A09 783 be denied.

The State's OP written testimony is quoted ***in part*** below. This Motion describes, with evidence and facts that the State's OP written testimony **is substantially in error** as applied to the Property. Also verbal testimony to petition A05 757 is quoted herein under the name ***Thielen*** which also contradicts the State's OP***.*** Of some relevance the County Offices of Planning testimony is also found in *Petition exhibit 2a, by Norman Hayashi.* The following is an excerpt copy of the State's OP written testimony below, regarding the Property.

> (note) the Petitioner(s) have added their comments in **plain text** to the 2009 State's OP written testimony to petition A09-783, shown below in ***italicized text,*** where it is believed that the added comment may be particularly relevant to the Petitioner's Petition A18-805 as both petition(s) covered the area of the Property.

"Conservation District Designation of Coastal Lands in 1969 State Land Use District Boundary Review
The first State Land Use District Boundary Review completed in 1969 designated a band of coastal lands around each island in the Conservation District, ***if it was not already designated for Urban or Agricultural land use*** *when the first State Land Use District boundaries were established following the enactment of the State Land Use Law in 1961."*

> The Property ***was already designated for Agricultural land use*** at Statehood, *ref., Petition exhibit 3, transcript of 2005-6 LUC A05 757 hearing, page, 88, lines 20-24* and *State's OP testimony.* The Property was also already zoned A20-a by

the County. The Property did not front on the ocean. A State owned bluff/pali lot exists separating the Property from the high wash of the waves.

turning back now to the State's OP written testimony to LUC petition 09 783.....

"This action reflected strong public sentiment and support from interviews and surveys conducted at the time for recognition of the shoreline as a precious and high priority resource for Hawai 'i, deserving and warranting conservation. Two studies informed the designation of shoreline resources:

(1) a "Hawaii Seashore and Recreation Areas Survey" performed by the National Park Service in 1962; and
(2) a general development plan, "Hawaii's Shoreline," prepared by the State Department of Planning and Economic Development in 1964.

*The final boundaries were "the Land Use Commission's judgment as a result of considerable input of information from studies, **site inspections**, information received at the public hearings, **talks with landowners**, and the Commissioners own personal knowledge and experience." (Eckbo, Dean, Austin and Williams, 1969, pg. 85)."*

The Property lies at the end of the South Hilo District quadrangle. Coastal land in the contiguous coastal quadrangle to the north was zoned AG at Statehood and has remained AG ever since, *ref., Petition exhibit 17.* No record exists that a ***site inspection*** occurred regarding the Property nor is there any record that the State ever ***held a talk with the land owner***. If any public notice of the intended change in zoning was ever published in the local newspaper it is very obvious that the scale of the map would not have been sufficient to alert a property owner that a portion of their property was being rezoned.

Particularly no ***site inspection*** occurred, *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 120, lines 6-10……..*

> *"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."*

Following the above quoted Thielen's testimony, This Motion continues with a discussion of the State's OP analysis of the Property which generally describes that the Property qualifies to be in the State's AG District.

Even more confusing is that the top of the coastal pali remained the dividing line between Conservation and AG in the Papaaloa quadrangle, which quadrangle begins less than a mile to the north of the Property, *ref., Petition exhibit 17, Ninole boundary interpretation #07-19.....*

> *"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. For a more precise determination, the top of pali shall be located - in metes and bounds relative to subject parcels and with the additional locations of the SLU Agricultural I Conservation District as depicted on your attached boundary interpretation survey map."*

There does not appear to be any recorded reason why the South Hilo quadrangle was treated differently than the Papaaloa quadrangle. Both quadrangles had a history of sugar cane farming dating at Statehood and, in fact, much earlier than that. Both quadrangles are rated as Prime AG land in the ALISH classification system. Both quadrangles had a RR right of way crossing them in the area of the coastal bluff.....

turning back now to the State's OP written testimony to LUC petition 09 783.....

"As stated in the 1969 Eckbo, Dem1, Austin and Willimns' State Land Use Districts and Regulations Review,

"Recognition that the shoreline is a zone rather than a line has been the basis for recommending that the designation of the Conservation District be inland from the line wave of action at varying distances related to topography and other use factors." (F.ckbo et al, 1969, pg.86)

***Four major conditions were used in preparing the new Conservation District boundaries in shoreline areas**:*

*Where a plantation road, farm road, access way or public road exists **at the edge of the agricultural use** within reasonable proximity to the shoreline, it was used as the boundary between the Agriculture and Conservation Districts."*

This *State's OP condition #1* does not apply to the Property, no ***farm road exists at the edge of the agricultural use****,* the AG use extended to the makai Property boundary, which is the top of the coastal bluff, the mauka boundary comprised the former RR. The former RR became a farm road after the closing of the RR around 1947, which RR did exist and **ran through the middle of field**. Effectively the new undefined line on the SLUDistrict map, following the first Boundary Review and amendment, divided the AG use field area of Field F-31-b, that lay mauka of the Costal Highway, into two fields with substantial AG use crop production continuing uninterrupted on both sides of the line. The former RR appears to have been used as the dividing line.

Where a vegetation line such as a windbreak or row of trees more clearly marks the edge of the agricultural practice, this was used.

This *State's OP condition #2* should have been applied but was not, *a vegetation line such as a windbreak* and *row of trees clearly marks the edge of the agricultural practice* and the Property's makai boundary.

*In cases where the shoreline is bounded by steep cliffs or a pali, the **top of the ridge was used**.*

This *State's OP condition #3* should have been applied but was not (it does appear to have been applied in the Papaaloa quadrangle however)**. *The top of the ridge was* not *used*** however it does appear to have been used as a ***condition*** in the Papaaloa quadrangle.

Where no readily identifiable physical boundary such as any of the above could be determined, a line 300 feet inland of the line of wave action was used." (Eckbo et al, 1969, pg. 86)

*In addition, **the Conservation District boundary excluded those coastal areas that were in agricultural use** at the time.*

Clearly this ***State's OP condition #4*** was not applied.

Clearly this was not applied. The described State's OP policy ***Conditions*** generally and particularly the last one, shown above, appears to reflect HRS 205-2(3) and HAR

15-15-19(a). The South Hilo quadrangle is a clear example that the State's OP policy was not generally applied but it was generally applied in the Papaaloa quadrangle. The historical use of the Property dating from the 1850's was for the intense production of agricultural crops. HRS 205-2(3) states a ***mandatory stipulation***, in fact it states that AG zoning be applied as the "***greatest possible***" priority by the LUC, and this is reflected in HAR 15-15-19(a) which reflects that this is a ***mandatory stipulation***. Contrary to popular belief AG zoning of land suitable for the *intense production of AG crops* is stipulated to have a **greater** priority than Conservation districting. This is reflected also in the State's Constitution's *section 11.3 Agricultural lads* which is quoted earlier above.

turning back now State's OP written testimony to LUC petition 09 783.....

*OP Exhibit 2 illustrates that while the general pattern was to draw the Conservation District boundary along the pali, there was considerable deviation from this standard, including in the vicinity of the Petition Area, which **likely** reflected other factors such as a road or in the case of the Petition Area, the railway right-of-way. OP Exhibit 10 illustrates the proposed Conservation District boundary and final boundary adopted in 1969 in the immediate vicinity of the Petition Area.*

Again this was not applied in the Papaaloa quadrangle, which begins less than 1 mile north of the Property and the SLUD map only shows an undefined line on a map which is subject to subsequent interpretation by the LUC according to HAR 15-15-22. HAR 15-15-22 points back to all of HAR 15-15 and HAR 15-15-17 points back to HRS 205-2 also for inclusion in a Boundary Interpretation for authority.

In summary rezoning of the Property, if , in fact, it actually legally occurred following the first Boundary Review in1969, it conflicts with the laws, rules and the above referenced State's OP ***policies*** at the time. It is a matter of evidence that the Property was in intense AG production and the County's zoning, which continues to this day, is A20a. The evidence is that the Property was never inspected and the apparent rezoning does not appear to comply with HRS 205, HAR 15-15 nor the State's OP policy guidelines that are

quoted above. It is also noted that the LUC relied heavily on the State's OP petitioned boundary change recommendation and evidence following the 1969 Boundary Review.

The Petitioners are aware that Conservation Districting of land does not preclude Prime AG land use for AG. The DLNR's Rules, HAR 13-5, lists AG as an ***allowable*** use. An added layer of seeking permission for ***allowed*** use or conditional permitting is provided for in the DLNR's laws and rules. Nonconforming AG use of land is also provided for HAR 13-5-7 however HAR 13-5-6 (d) requires an ***approval*** *is first obtained from the department*.....

> *(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.*

Seeking to be ***allowed*** nonconforming AG use of historic AG use land was never intended by the lawmakers to require years of submitted applications, additional filing fees, costly studies and continuing uncertainty which has been the case regarding the Petitioner(s) uses of the Property for AG **yet that is exactly what has happened.** The Guide to the Petition's chapters 1 and 3 and 6 clearly evidence that **viable** AG use of the Petitioner(s) Property is not possible in the Conservation District.

Chapters 1 and 3 and 6 of the Guide to the Petition describe and refer to referenced evidence that, in the case of the Petitioned Property, its use for AG, whether allowed or allowable was strongly resisted by the DLNR despite the facts that.....

1. it had been in the intense production of AG since a period beginning the mid-1850(s),

2. it had a high capacity for intensive cultivation,

3. it did not lie contiguous to the high wash of the waves,

4. there existed a substantial State owned ocean-side bluff property that lay between the Property and the Pacific Ocean,

5. the Property is and was first zoned AG by both the State and the County,

6. subsequent to the first Boundary Review, late in the 1960(s), the Property appears on the SLUD map to have been rezoned into the Conservation District,

7. AG production appeared to have been provided in the Conservation District rules to be ***allowed*** to continue without any formal permit from the DLNR being required,

8. the DLNR's rules provide a very large administrative difference in form of application, fees, EA's etc. between land uses that are ***allowed*** vs. ***allowable***

9. an ***allowed*** use is one that only requires that an ***approval*** is obtained..... "*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",*

10. former land uses, before Conservation zoning, were intended to be ***allowed*** to continue without a formal conditional DLNR permit being required according to HAR 13-5-7's nonconforming use rule, however an ***approval*** must *first be obtained from the department,*

11. the Property continued in the production of sugar cane crops continuously from the 1850(s) through 1992,

12. in 2014 the Petitioner(s) purchased the Property and began to develop/resume its AG use using the DLNR's more formal permitting process,

13. the Petitioner(s) submitted various applications and requested ***approvals*** and ***determinations*** to the DLNR for AG uses and uses incidental and/or accessory to the AG use of the Property for a period measured in years without a final resolve to the application,

14. the Guide to the Petition Chapter 1, pages 7-9 evidence that the DLNR's OCCL was very well aware that the Petitioner(s) nonconforming AG use of the Property should have been ***allowed*** yet it took over 2 years, fees, hundreds of pages of submitted application text and in the end, the evidence is, that the only the nonconforming AG use that was ever allowed by the DLNR was *resumption of the growing of sugar cane* which was never ***applied*** for by the Petitioner(s), *ref., Petition exhibits 40, 52, 53, 54, 55, 72, 73, 74, 75, 76 and 77,*

15. after suffering numerous delays, costs, indeterminate results, over a period measured in years, hundreds of pages of submitted application text, repeated studies, the Petitioner(s) have come to the conclusion that the Property's use for AG and uses incident and/or accessory to AG has been severely restricted resulting from the Conservation Districting to the point that ***viable*** AG use of the Property is not legally possible so long as the Property is held to lie in the Conservation District and uncertainty remains,

16. through this Motion, or the Petition, the Petitioner(s) seek that the Property's zoning status be the AG District or determine that it always has been zoned AG and to harmonize its use and its zoning in order to secure the Petitioner(s) investments in the Property and eliminate any confusion that may exist,

17. the Property has always been zoned A20-a by the County,

The Petitioner(s) seek to.....

- harmonize the Property's AG use with (1) its County zoning, (2) with its characteristics and resources, (3) with its State District zoning,

- legally and clearly establish and secure the Property's use and uses incidental and/or accessory to the AG use to be consistent with both State and County zoning,

- secure the Petitioner(s) investments in AG and eliminate continuing confusion regarding its State zoning status,

- eliminate uncertainty for the Petitioner(s) and confusion for everyone.

This Motion proposes two different **approaches** to correctly ***Interpret*** the Property's SLUDistrict status. This Motion will explain that both **approaches** to this Motion hold that the Official SLUD map, that was adopted by the LUC and the State's Agencies, is not the final authority to be relied upon by the LUC when making a Boundary Interpretation as provided for in HAR 15-15-22 which points back for guidance and authority to all of HAR 15-15 and HRS 205-2.

THE Petitioner(s) do not dispute that the Official SLUD map depicts the area of the Property to appear to lay makai of the SLUD **line** (in the Conservation District) which **line** is shown on the map as an undefined **line** on a map. It is only after a survey map of the Property, with a meets and bounds description, is submitted and correctly ***Interpreted*** and applied according to HAR 15-15-22, all of HAR 15-15 and HRS 205-2 that the District line may be ***determined*** to be final. A ***determination*** of whether the Official SLUD map is the compelling reason for a Boundary Interpretation that places the Property in the SLUD Conservation District applies to both cases that are described for consideration by the LUC relevant to this Motion is discussed further below.

(Particularly the Petitioner(s) state that the evidence is clear that random lines drawn across official maps cannot be the final authority that is relied up to designate a SLUD boundary. This is a central theme that is developed in this Motion and is argued by the Petitioner(s) to be considered by the LUC to be particularly relevant to this Motion).....

- The Official SLUD Map shows an undefined boundary line which **appears** to show the Property lies in the State's Conservation District.

- The County planners thinking at the time is exhibited in *Petition exhibit 3, Norman Hayashi, County Representative, testimony to the LUC petition hearing A05 757, 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."*

- 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.

- In another comparison the County's SMA map shows **the entire area of the Subdivision's 7 lots** leading from the Coastal Highway lying mauka to the Ocean makai, where the Property is located, to be located in the SMA, yet the County subsequently interpreted that only the 3 ocean-side lots (including the Property) are in the SMA, *ref., Petition exhibits 33, 34 and 109, County SMA determinations* but it has also issued determinations that the 4 mauka lots lie outside the SMA.

- The Petitioner(s) discussed the issue of lines on County 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 with described meets and bounds, the location of the boundaries on County maps remained undetermined and subject to interpretation'.*

- Significant to this Motion, **until 1992, it was un*determined*** (*not yet **"Interpreted")** by the Executive Officer of the LUC)* whether the Property lay in the State Agricultural District or the State Conservation District. While the Official SLUD Map did exist since at least 1974, HAR 15-15's Subchapter 2 required that an *Interpretation* by the Executive Officer of the Commission **or**, if ***'uncertainty remained'***, a *Boundary Determination* by the LUC's Commissioners **first apply all of the LUC's Chapter 15's Rules, HRS 205-2 and not just HAR 15-15-22 (a) (1)** which refers to the district line on the Official Map.

- 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 *'Except as otherwise provided in this chapter'*). The LUC's **web site** has a maps section which particularly clarifies that the LUC's Official SLUD 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."

In the first case, if the Property was effectively rezoned from the State's Agricultural District following the first district boundary review around 1969, which initial Agricultural zoning was recorded at Statehood, the rezoning was inconsistent with **mandatory** provisions in HRS 205 and HAR 15-15 **and** the ***State's OP' 4 conditions*** quoted earlier in its written testimony to petition A09 783 and therefore the rezoning was improper and therefore this Motion requests that the zoning of the Property be ***Determined*** to remain unchanged since Statehood.

In the second case to this Motion, The Petitioner(s) state that even if the Property appears to lie makai of the SLUD line on the Official SLUD Map and the Executive Officer of the LUC issued the LUC's 1992 Boundary Interpretation #92-48, *ref., Petition exhibit 17,* based on that map the Petitioner(s) state that *uncertainty remains* as to the correct zoning of the Property according to HAR ***§15-15-22 Interpretation of district boundaries.....***

(a) ***Except as otherwise provided in this chapter****: (b) ..... (c) ..... (d)..... (e) ..... (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.*

Particularly an undefined line on a map is not an official boundary as was described earlier in this Motion and it is ***otherwise provided in chapter HAR 15-15*** and HRS 205-2.

New information is presented throughout this Motion that warrants further consideration for the Boundary Interpretation of the Property's zoning by *the*

commission, upon written application or upon its own motion, shall determine the location of those district lines according to all of HAR 15-15 and HRS 205-2. The Petitioner(s) did file a *written application* with the LUC in **June of 2020** that the *commission determine the location of those district lines* however that request has not been scheduled to be heard. Therefore the Petitioner(s) have filed this Motion for the LUC's consideration.

HAR 15-15-22 first states.....

> *§15-15-22 Interpretation of district boundaries.*
> *(a)* ***Except as otherwise provided in this chapter:***

The above rule points to all of HAR 15-15 which in turn points back to HRS 205-2...

> ***§205-2 Districting and classification of lands.*** *(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****; and;*
>
> *(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.*
>
> *In establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county.*

HRS 205-2 (3) makes it clear that when the LUC *establishes the boundaries of agricultural districts the* ***greatest possible*** *protection* ***shall*** *be given to those lands with a* ***high capacity for intensive cultivation.*** No other Districting of land priority was to be given a higher priority, **not even Conservation**.

Capacity is a quality of the resources of the land and not a past, present or future use. AG capaity of land is irrelevant to whether the actual use, at any particular time, is for personal AG use or for Commercial AG use nor whether the use is for personal AG or commercial AG.

The evidence is that the Property was first zoned AG following Statehood. It was only after the 1969 Boundary Review that the SLUD Map appeared to show the Property to lie in the Conservation District.

In 1977 the LUC adopted the ALISH map which showed the Property to be ***Prime*** AG land.

Comes now the Petitioner(s) with additional information that appears not to have been considered by the Executive Officer of the LUC in 1992 when he issued Boundary Interpretation #92-48.

- *Petition exhibit 22, field map F31-B* **and** *Petition exhibit 107, a 1905 field map* both show the area of the Property to be in AG use. It is a fact that the Property was used intensively for AG production through to 1992 and *Petition exhibit 23, letter from John Cross*, the former field manager, which describes the AG use of the Property.

- Petition *exhibit 85, ALISH map* shows the AG resources of the Property to be ***Prime*** 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.",*

- Petition exhibit 10, a County stamped 2015 survey map of the Property,
- Petition exhibit 9, a meets and bounds description of the Property,
- As discussed earlier herein the Property was part of a large field area. The field was located contiguously mauka of a State owned ocean-side bluff property. Subsequent

to the State's first Boundary Review in 1969 the Property appeared on the State's Land Use Pattern Allocation Map (the SLUD map) to lie in the State's Conservation District. The former RR lots were combined with their respective Oceanside lots in 2013 by the Petitioner(s). Following the purchase of the field area that lay makai of the Coastal Highway in 1992, the McCully(s) filled in the former RR with top soil that was harvested from the 4 contiguous lots to the Coastal Highway. Today this additional area also comprises Prime AG land and is part of the Property. Effectively **the Prime AG area of the Property has increased since the 1992 Boundary Interpretation due to the filling in of the former RR land.**

- The State's OP submitted written testimony to the LUC as part of McCully petition A09 783 which, in part, described its reasoning that was applied when the 1969 Boundary Amendment review occurred. The State's OP written testimony was quoted earier in this Motion and is quoted ***in part*** below again. This Motion describes, with evidence and facts that the State's OP written testimony **was substantially in error** as applied to the development of the SLUD Map in the area of the Property. Also verbal testimony to petition A05 757 is quoted herein under the name ***Thielen.*** Of some relevance the County Offices of Planning testimony is also found in *Petition exhibit 2a, by Norman Hayashi.* The following is an excerpt copy of the State's OP written testimony below, regarding the Property.

  (note) the Petitioner(s) have added their comments in **plain text** to the 2009 State's OP written testimony to petition A09-783, shown below in ***italicized text,*** where it is believed that the added comment may be particularly relevant to this Motion and the Petitioner's Petition A18-805 as both petition(s) covered the area of the Property.

"Conservation District Designation of Coastal Lands in 1969 State Land Use District Boundary Review

The first State Land Use District Boundary Review completed in 1969 designated a band of coastal lands around each island in the Conservation District, ***if it was not already designated for Urban or Agricultural land use*** *when the fist State Land Use District boundaries were established following the enactment of the State Land Use Law in 1961."*

The Property ***was already designated for Agricultural land use*** at Statehood, *ref., Petition exhibit 3, transcript of 2005-6 LUC A05 757 hearing, page, 88, lines 20-24* and *State's OP testimony.* The Property was also already zoned A20-a by the County. The Property did not front on the ocean. A State owned bluff/pali lot exists separating the Property from the high wash of the waves that is zoned Conservation ie. '*a band of coastal lands'.*

turning back now State's OP written testimony to LUC petition A09 783.....

"This action reflected strong public sentiment and support from interviews and surveys conducted at the time for recognition of the shoreline as a precious and high priority resource for Hawai 'i, deserving and warranting conservation. Two studies informed the designation of shoreline resources:

(1) a "Hawaii Seashore and Recreation Areas Survey" performed by the National Park Service in 1962; and
(2) a general development plan, "Hawaii's Shoreline," prepared by the State Department of Planning and Economic Development in 1964.

*The final boundaries were "the Land Use Commission's judgment as a result of considerable input of information from studies, **site inspections**, information received at the public hearings, **talks with landowners**, and the Commissioners' own personal knowledge and experience." (Eckbo, Dean, Austin and Williams, 1969, pg. 85)."*

The Property lies at the end of the South Hilo District quadrangle, *ref., Petition exhibit 102, Quadrangle map.* Coastal land in the contiguous coastal quadrangle to the north was zoned AG at Statehood and has remained AG ever since, *ref., Petition exhibit 17, Boundary Interpretation #07-19.* No record exists that a ***site inspection*** occurred regarding the Property nor is there any record that the State ever ***held a talk with the land owner***. If any public notice of the intended change in zoning was ever published in the local newspaper it is very obvious that the scale of the map would not have been sufficient to alert a property owner that a portion of their property was being rezoned.

Particularly no ***site inspection*** occurred, *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 120, lines 6-10.……...*

> *“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.”*

Following the above quote Thielen's testimony continues with a discussion of the State's OP analysis of the Property which generally describes that the Property qualifies to be in the State's AG District.

Even more confusing is that the top of the coastal pali remained the dividing line between Conservation and AG in the Papaaloa quadrangle, which begins less than a mile to the north of the Property, *ref., Petition exhibit 17, Ninole boundary interpretation #07-19.....*

> *"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. For a more precise determination, the top of pali shall be located - in metes and bounds relative to subject parcels and with the additional locations of the SLU Agricultural I Conservation District as depicted on your attached boundary interpretation survey map."*

There does not appear to be any recorded reason why the South Hilo quadrangle was treated differently than the Papaaloa quadrangle. Both quadrangles had a history of sugar cane farming dating at Statehood and, in fact, much earlier than that. Both quadrangles are rated as Prime AG land in the ALISH classification system. Both quadrangles had a RR right of way crossing them in the area of the coastal bluff.....

turning back now State's OP written testimony to LUC petition 09 783.....

"As stated in the 1969 Eckbo, Dem1, Austin and Willimns' State Land Use Districts and Regulations Review,

"Recognition that the shoreline is a zone rather than a line has been the basis for recommending that the designation of the Conservation District be inland from the 'line wave of action' at varying distances related to topography and other use factors." (F.ckbo et al, 1969, pg.86)

Four major conditions were used in preparing the new Conservation District boundaries in shoreline areas*:*

*Where a plantation road, farm road, access way or public road exists **at the edge of the agricultural use** within reasonable proximity to the shoreline, it was used as the boundary between the Agriculture and Conservation Districts."*

> **This *State's OP condition #1* does not apply to the Property**, no ***farm road exists at the edge of the agricultural use***, the AG use extended to the makai Property boundary, which is the top of the coastal bluff, the mauka boundary comprised the former RR. The farm road, which did exist, **ran through the middle of field** that comprised the area of the field that lay makai of the Coastal Highway. Effectively the new undefined line on the SLUDistrict map, following the first Boundary Review and amendment, divided the AG use field area of Field F-31-b that lay makai of the Coastal Highway into two fields with substantial AG use crop production continuing uninterrupted on both sides of the line. The former ***farm road*** *(RR)'s* mauka boundary appears to have been used as the dividing line however.

Where a vegetation line such as a windbreak or row of trees more clearly marks the edge of the agricultural practice, this was used.

> **This *State's OP condition #2* should have been applied but was not**, *a vegetation line such as a windbreak* and *row of trees clearly marks the edge of the agricultural practice* and the Property's makai boundary.

*In cases where the shoreline is bounded by steep cliffs or a pali, the **top of the ridge was used**.*

> **This *State's OP condition #3* should have been applied but was not** (it does appear to have been applied in the Papaaloa quadrangle however)**. *The top of the ridge was* not *used*** however it does appear to have been used as a ***condition*** in the Papaaloa quadrangle.

Where no readily identifiable physical boundary such as any of the above could be determined, a line 300 feet inland of the line of wave action was used." (Eckbo et al, 1969, pg. 86)

*In addition, **the Conservation District boundary excluded those coastal areas that were in agricultural use** at the time.*

Clearly this *State's OP condition #4* was not applied. The described State's OP policy **(conditions 1-4)** generally and particularly **condition 4**, shown above, appears to reflect HRS 205-2(3) and HAR 15-15-19(a). The South Hilo quadrangle is a clear example that the State's OP policy **(conditions 1-4)** was not generally applied but it was generally applied in the Papaaloa quadrangle. The historical use of the Property dating from the 1850's was for the intense production of agricultural crops. HRS 205-2(3) states a ***mandatory stipulation***, in fact it states that AG zoning be applied as the "***greatest possible***" priority by the LUC, and this is reflected in HAR 15-15-19(a) which reflects that this is a ***mandatory stipulation***. Contrary to popular belief AG zoning of land suitable for the *intense production of AG crops* is stipulated to have a **greater** priority than Conservation districting. This is reflected also in the State's Constitution's *section 11.3 Agricultural lads* which is quoted earlier above.

turning back now State's OP written testimony to LUC petition 09 783.....

*OP Exhibit 2 illustrates that while the general pattern was to draw the Conservation District boundary along the pali, there was considerable deviation from this standard, including in the vicinity of the Petition Area, which **likely** reflected other factors such as a road or in the case of the Petition Area, the railway right-of-way. OP Exhibit 10 illustrates the proposed Conservation District boundary and final boundary adopted in 1969 in the immediate vicinity of the Petition Area.*

Again this was not applied in the Papaaloa quadrangle, which begins less than 1 mile north of the Property and the SLUD map only shows an undefined line on a map which is subject to subsequent interpretation by the LUC according to HAR 15-15-22. HAR 15-15-22 points back to all of HAR 15-15 and HAR 15-15-17 points back to HRS 205-2 also for inclusion in a Boundary Interpretation for considered authority.

In summary rezoning of the Property, **if in fact**, it actually legally occurred following the first Boundary Review in1969, conflicted with the laws, rules and the above referenced **State's OP policy conditions 1-4** at the time. It is a matter of evidence that the Property

was in ***intense AG production*** and the County's zoning, which continues to this day, is A20a. The evidence is that the Property was never inspected and the apparent rezoning does not appear to comply with HRS 205-2, HAR 15-15 nor the **State's OP polices** that are quoted above. It is not consistent with the characteristics of the Property, its historic use for AG and not the Satet's laws and the LUC's Rules. It is also noted that the LUC relied heavily on the State's OP petitioned boundary change analysis described in its ***conditions 1-4*** for the 1969 Boundary Review.

In summary of ***the second case*** presented in this Motion the Petitioner(s) humbly request a final Boundary Determination for the Property by the Commissioner(s) with full consideration of the information provided herein.

DATED; Hakalau, Hawaii, August 14, 2018
Kenneth Stanley Church _____

and

Joan Evelyn Hildal _____

The following exhibits, that may be required exhibits to a Boundary Interpretation according to HAR 15-15-22 which are relevant to this Motion, are attached to Petition A18 805 and are already official LUC records and are therefore not required to be attached to this motion according to HAR 15-15-22 (d).....

(d) The executive officer may use all applicable commission records in determining district boundaries..

Additional copies of the print, including a reproducible master map of the print or an electronic copy in a recognized format of the executive officer's designation; and

See Petition exhibit 10, a current County signed subdivision map and exhibit 9, a meets and bounds description of the Property. Electronic copies and hard copies have already been supplied to the LUC and the State and County OP.

> *Additional information such as, but not limited to, tax map key maps, topographic maps, aerial photographs, certified shoreline surveys, and subdivision maps relating to the boundary interpretation.*
>
> *The executive officer may employ, or require that the party requesting the boundary interpretation employ, at its sole expense, a registered professional land surveyor to prepare a map for interpretation.*

See.....

exhibit 85, ALISH map

exhibit 91, topographical map

exhibit 98, TMK map

the SLUD map is shown below

re: certified shoreline surveys, the Property is not a shoreline property, there exists a State owned, Oceanside bluff property that lies contiguously makai of the Property.

The Petitioner(s) are aware that exhibit 10's Property map does not mirror the former McCully map, ref., Petition exhibit 18, 1992 Boundary Interpretation map which has been raised previously by the LUC's administration staff. The Petitioner(s) met with another surveyor and requested a new survey. That surveyor said a new survey was unnecessarily and his may would not mirror either the former McCully survey nor the Petitioner(s) survey either. The surveyor advised that each map is a stand alone document and is not required to mirror previous surveys.

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