

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
ROBERT E. & CHRISTINE M. STENGLE )  
For a Declaratory Order Clarifying )  
and Correcting the Boundary )  
Interpretations of the Land Use )  
Commission under Boundary )  
Interpretation No. 98-36 Dated )  
October 29, 1998, and Boundary )  
Interpretation No. 98-50 Dated )  
January 12, 1999 )

DOCKET NO. DR99-21

DECLARATORY ORDER

This is to certify that this is a true and correct  
copy of the document on file in the office of the  
State Land Use Commission, Honolulu, Hawaii.

MAR 24 1999

Date

by

Executive Officer

DECLARATORY ORDER

LAND USE COMMISSION  
STATE OF HAWAII  
1999 MAR 24 A 11:02

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAI'I

In the Matter of the Petition of	)	DOCKET NO. DR99-21
	)	
ROBERT E. & CHRISTINE M. STENGLE	)	DECLARATORY ORDER
	)	
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January 12, 1999	)	
_____	)	

DECLARATORY ORDER

PETITIONERS' INTEREST

Robert E. and Christine M. Stengle ("Petitioners") filed a Petition for Declaratory Order, pursuant to sections 15-15-98 and 15-15-22(f), Hawai'i Administrative Rules ("HAR"). Petitioners are the owners in fee simple of approximately 9.44 acres of land located at the 20 mile marker on the Hawai'i Belt Road along the Hamakua Coast in the village of Ninole, North Hilo, Hawai'i, and identified as TMK 3-2-03: 23 and 41 ("Property").

Petitioner filed the instant Petition for Declaratory Order "for a declaratory order clarifying and correcting the boundary interpretations dated October 29, 1998 in Boundary Interpretation No. 98-36 and dated January 12, 1999 in Boundary Interpretation No. 98-50."

## FINDINGS OF FACT

### PROCEDURAL MATTERS

1. On January 27, 1999, Petitioners filed their Petition for Declaratory Order and Petitioners' Memorandum in Support of Petition for Declaratory Order.

2. On February 24, 1999, the Office of Planning ("OP") filed its Testimony of the Office of Planning. OP commented that based on the information provided, it had no objections to Petitioners' request; however, OP noted that its position should not be interpreted to mean that "Top of Pali" was the public policy relative to the Agricultural and Conservation District boundary in all cases.

3. By letter dated February 22, 1999, received on February 24, 1999, the Department of Land and Natural Resources stated that it had no comments regarding the Petition for Declaratory Order.

### POSITION OF PETITIONERS

4. Petitioners contend that the Land Use Commission ("Commission") should interpret the boundary between the Agricultural District and Conservation District at the ridge (pali) top, as determined by Petitioners' topographical survey map of the Property. Petitioners argue that this would be in compliance and consistent with i) the 1969 Five-Year Boundary Review report entitled "State of Hawaii Land Use Districts and Regulations Review"; ii) the overall purpose of Chapter 205, Hawai'i Revised Statutes ("HRS"); and iii) the basis and intent

of the Commission when the district boundaries were established for the Property in 1969.

5. Petitioners state that using the ridge top as the basis for the location of the Agricultural and Conservation District boundary would place approximately 46,699 square feet currently designated within the Conservation District and containing a macadamia nut orchard into the Agricultural District and place approximately 22,888 square feet currently designated within the Agricultural District and containing stream beds and a waterfall into the Conservation District.

6. Petitioners state that a declaratory order clarifying the Agricultural and Conservation District boundary as being the ridge top is necessary to enable Petitioners to avoid uncertainty in their property rights.

#### DESCRIPTION AND BACKGROUND OF THE PROPERTY

7. The Property in question is currently identified as TMK 3-2-03: 23 and 41. Parcel 23 is approximately 1.36 acres and Parcel 41 is approximately 8.077 acres.

8. Parcel 23 is located within the Agricultural District and Parcel 41 is located within the Agricultural and Conservation Districts, as represented by the State Land Use District Boundaries Map, H-59 (Papaaloa). The Agricultural and Conservation District boundaries relative to the Property were established in the 1969 Five-Year Boundary Review. The Commission adopted the State Land Use District Boundaries Maps following the Review as the then official maps of the Commission, with an effective date of August 4, 1969.



9. The Property is located at the 20 mile marker on the Hawai'i Belt Road along the Hamakua Coast in the village of Ninole, North Hilo, Hawai'i.

10. The Property was historically cultivated in sugarcane. There is no evidence in the record indicating the specific areas within the Property that were cultivated in sugarcane. The Property was converted to a macadamia nut orchard in 1982.

11. By letter dated September 2, 1998, Petitioners requested a boundary interpretation to determine the location of the Agricultural and Conservation District boundary on the Property with the Commission. Boundary Interpretation No. 98-36 dated October 29, 1998, was subsequently prepared on Tax Map 3-2-03. Parcel 23 was determined to be located entirely within the Agricultural District and Parcel 41 was determined to be located within the Agricultural and Conservation Districts, with the boundary separating the two districts generally following the top of the ridge or pali.

12. Staff based its determination of the parcels' land use designation on an enlargement of the Commission's State Land Use District Boundaries Map, H-59 (Papaaloa), which represented the Agricultural and Conservation District boundary as following the 200-foot contour line, and upon review of the "State of Hawaii Land Use Districts and Regulations Review" prepared by Eckbo, Dean, Austin & Williams to document the recommendations and actions in the 1969 Five-Year Boundary Review. The report reflected that along the Hamakua Coast of the island of Hawai'i,

the Conservation District boundary was to follow the top of the ridge or pali. Areas in agricultural use at that time were excluded.

13. Staff informed Petitioners that for a more precise location of the Agricultural and Conservation District boundary, a topographical survey map with contour lines represented and the top of the pali identified in metes and bounds would be required.

14. By letter dated December 2, 1998, Petitioners requested another boundary interpretation for the Property. Boundary Interpretation No. 98-50 dated January 12, 1999, was subsequently prepared on Petitioners' topographical survey map, which delineated the top of the pali in metes and bounds and represented an approximate location of the 200-foot contour line. Staff determined that Petitioners' representation of the top of the pali did not conform with that shown on the Commission's State Land Use District Boundaries Map, H-59 (Papaaloa).

15. In order to be consistent with the location of the Agricultural and Conservation District boundary represented on the State Land Use District Boundaries Map, H-59, Staff delineated a boundary approximately following the 200-foot contour line as depicted on Petitioners' topographical survey map.

16. Petitioners originally purchased the Property in 1982 with the intention of building a house on the Property and retiring there. Petitioners now plan to sell the Property and retire on O'ahu.

17. Any conclusion of law herein improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

#### CONCLUSIONS OF LAW

##### JURISDICTION

1. Jurisdiction of the Commission to consider the request of Petitioners is authorized under §§15-15-98 and 15-15-22(f), HAR.

##### REMEDY

1. Petitioners are requesting the Commission to issue a declaratory order clarifying and correcting the boundary interpretations dated October 29, 1998, in Boundary Interpretation No. 98-36 and dated January 12, 1999, in Boundary Interpretation No. 98-50.

##### APPLICABLE LEGAL AUTHORITIES

1. The "State of Hawaii Land Use Districts and Regulations Review" documented the Commission's process to establish the Conservation District boundaries during the 1969 Five-Year Boundary Review. The report recognized four major conditions and provided recommendations based on these conditions for the Conservation District boundaries. Of relevance here is Condition No. 3, which states:

In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used (p. 86).

2. The report further documented the Commission's actions with respect to the establishment of the Conservation District boundaries at the shoreline of the island of Hawai'i by stating:

The steep pali coast of east Kohala is presently within the Conservation District. This district should be extended to include the sandy beach at Waipio Valley and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line (p. 36).



3. Petitioners' topographical survey map of the Property prepared by a registered professional land surveyor delineates the top of the ridge or pali in metes and bounds.

4. Petitioners' request to place the approximately 22,888 square feet currently in the Agricultural District and containing stream beds and a waterfall into the Conservation District is not supported by the recommendations or actions documented in the report and is a matter more appropriately addressed through the district boundary amendment process, pursuant to Chapter 205, HRS.

A. DECLARATORY ORDER

FOR GOOD CAUSE APPEARING, the Commission hereby rules that the Boundary Interpretation No. 98-36 dated October 29, 1998, and Boundary Interpretation No. 98-50 dated January 12, 1999, are clarified and corrected to reflect that the Property mauka of the top of the ridge or pali, approximately shown on Exhibit "A" attached hereto and incorporated by reference herein, is designated within the State Land Use Agricultural District.

Accordingly, this Commission determines that State Land Use District Boundaries Map, H-59 (Papaaloa), be amended to reflect that the Property mauka of the top of the ridge or pali is designated within the State Land Use Agricultural District.

Done at Honolulu, Hawai'i, this 24th day of March 1999,  
per motions on February 25, 1999 and March 18, 1999.


LAND USE COMMISSION  
STATE OF HAWAI'I

By (absent)  
MERLE A. K. KELAI  
Chairperson and Commissioner


By   
LAWRENCE N.C. INA  
Vice Chairperson and Commissioner

By (absent)  
P. ROY CATALANI  
Commissioner

By   
RUPERT K. CHUN  
Commissioner

By   
PRAVIN DESAI  
Commissioner


By (absent)  
ISAAC FIESTA, JR.  
Commissioner


By   
M. CASEY JARMAN  
Commissioner

Filed and effective on  
March 24, 1999

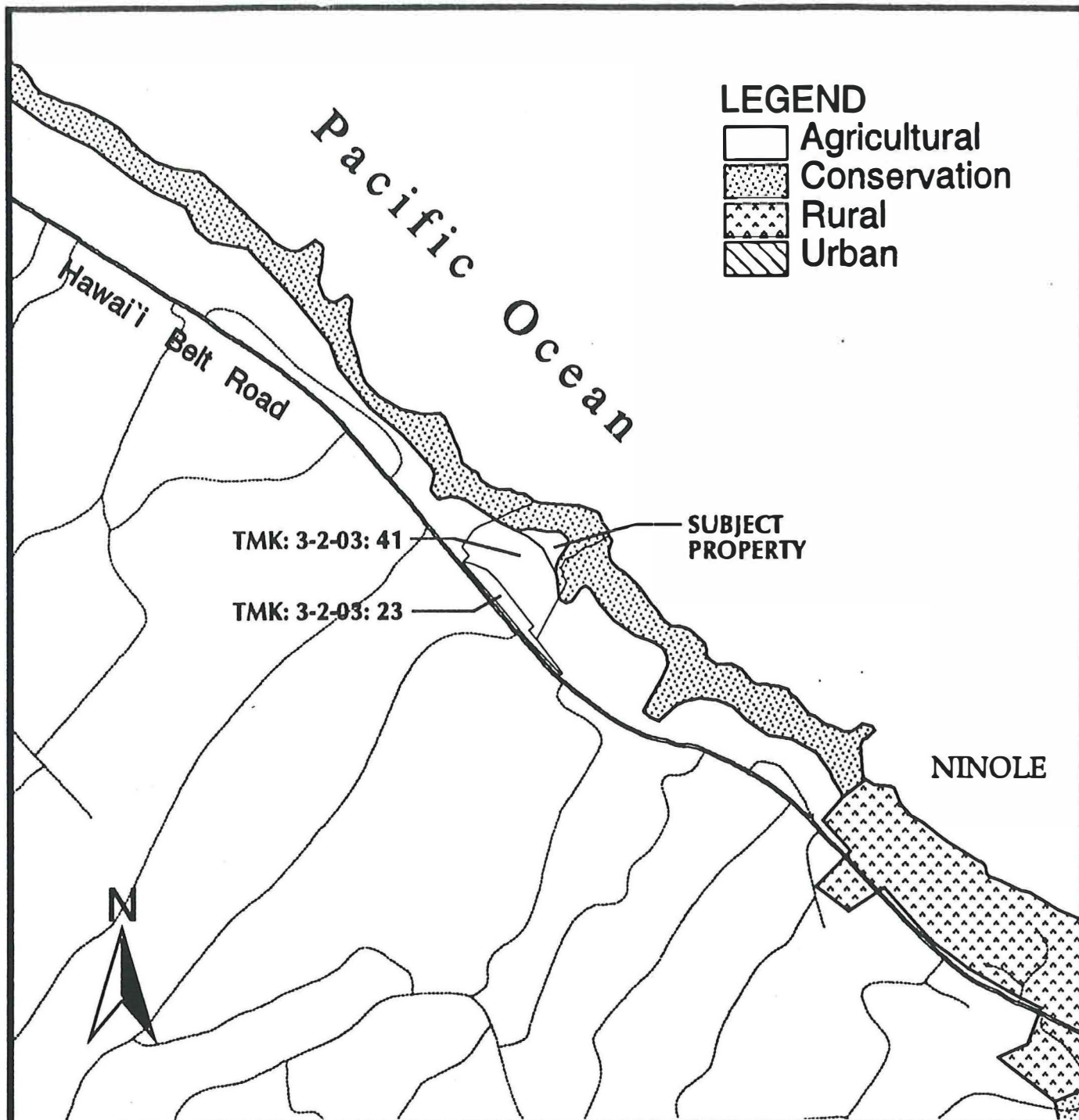
Certified by:

  
Executive Officer

By   
HERBERT S.K. KAOPUA, SR.  
Commissioner

By   
PETER YUKIMURA  
Commissioner





**LEGEND**

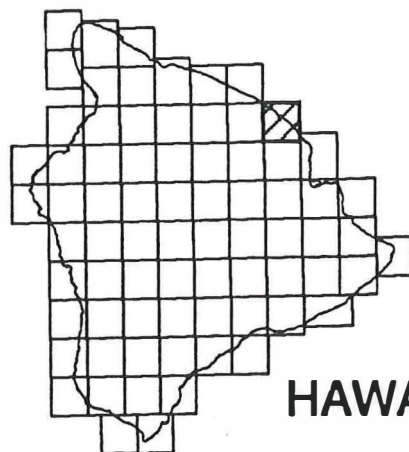
-  Agricultural
-  Conservation
-  Rural
-  Urban

**DR99-21 / ROBERT E. AND  
CHRISTINE M. STENGLE**

**LOCATION MAP**

**TMK: 3-2-03: 23 & 41  
NINOLE, NORTH HILO, HAWAI'I**

**EXHIBIT "A"**



**HAWAI'I**

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. DR99-21
	)	
ROBERT E. & CHRISTINE M. STENGLE	)	CERTIFICATE OF SERVICE
	)	
For a Declaratory Order Clarifying	)	
and Correcting the Boundary	)	
Interpretations of the Land Use	)	
Commission under Boundary	)	
Interpretation No. 98-36 Dated	)	
October 29, 1998, and Boundary	)	
Interpretation No. 98-50 Dated	)	
January 12, 1999	)	
<hr/>		

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Declaratory Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

DEL.	DAVID W. BLANE, Director Office of Planning P. O. Box 2359 Honolulu, Hawaii 96804-2359
CERT.	VIRGINIA GOLDSTEIN, Planning Director Planning Department, County of Hawaii 25 Aupuni Street Hilo, Hawaii 96720
CERT.	RICHARD D. WURDEMAN, ESQ. Corporation Counsel County of Hawaii The Hilo Lagoon Center 101 Aupuni Street, Suite 325 Hilo, Hawaii 96720
CERT.	TIMOTHY E. JOHNS, Chairperson ATTENTION: Dean Uchida, Land Division Board of Land and Natural Resources 1151 Punchbowl Street, Room 130 Honolulu, Hawaii 96813
CERT.	S. KAOLIN SACHET, Deputy Finance Director County of Hawaii Real Property Tax Division, Mapping Section 865 Pi'ilani Street Hilo, Hawaii 96720

CERT.        ROBERT E. STENGLE, Petitioner  
              5436 Kirkwood Place  
              Honolulu, Hawaii 96821

DATED:      Honolulu, Hawaii, this 24th day of March 1999.



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ESTHER UEDA  
Executive Officer

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A09-783
	)	
JAMES W. McCULLY and	)	OFFICE OF PLANNING FIRST
FRANCINE M. McCULLY	)	AMENDED LIST OF EXHIBITS;
	)	EXHIBITS 2, 3, 3A, 3B, 4, 7, 10, AND 16;
To Amend the Conservation Land Use	)	CERTIFICATE OF SERVICE
District Boundary to the Agricultural Land	)	
Use District for Approximately 3.54 Acres	)	
of Land at Wailea, South Hilo, Island of	)	
Hawaii; Consisting of, Tax Map Key Nos.	)	
(3) 2-9-003: 013 (por.), 029 (por.), and 060	)	
(por.)	)	

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OFFICE OF PLANNING

FIRST AMENDED LIST OF EXHIBITS, EXHIBITS 2, 3, 3A, 3B, 4, 7, 10, AND 16,

AND CERTIFICATE OF SERVICE

LAND USE COMMISSION  
STATE OF HAWAII  
2010 NOV -3 P 2:19

**LAND USE COMMISSION**

Page 1 of 3

**DOCKET NO./PETITIONER:** A09-783 JAMES W. McCULLY and FRANCINE M. McCULLY  
**PARTY:** OFFICE OF PLANNING (OP)

**FIRST AMENDED  
LIST OF EXHIBITS**

<b>EXHIBIT NUMBER</b>	<b>DESCRIPTION</b>	<b>PARTY: OBJECTIONS</b>	<b>ADMIT</b>
1	Office of Planning (OP) Written Testimony		
2	Map, <i>Petition Location and Regional Overview</i>		
3	Map, <i>Petition Area and Environs: Existing Conditions</i>		
<u>3A</u>	<u>Map, <i>Petition Area and Environs: Residential Conservation District Use Permits (CDUPs) &amp; Special Management Area in Petition Region</i></u>		
<u>3B</u>	<u>Map, <i>Petition Area and Environs: County Land Use Designations</i></u>		
4	Map, <i>Petition Area: Proposed Use/Resubdivision &amp; Constraints to Agriculture</i>		
5	State Department of Agriculture (DOA) Letter to Bobby Jean Leithead Todd, dated October 20, 2010		
6	State of Hawai'i Bureau of Conveyances Document No. 94-130295, Declaration of Restrictive Covenants, Mr. & Mrs. James McCully, Tax Map Key No. (3) 2-9-003: 013		
7	State Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (DLNR-OCCL) Written Testimony		
8	DLNR Land Division Letter to Bobby Jean Leithead Todd, dated October 18, 2010		

**LAND USE COMMISSION**

Page 2 of 3

**DOCKET NO./PETITIONER:** A09-783 JAMES W. McCULLY and FRANCINE M. McCULLY**PARTY:** OFFICE OF PLANNING (OP)**FIRST AMENDED  
LIST OF EXHIBITS**

<b>EXHIBIT NUMBER</b>	<b>DESCRIPTION</b>	<b>PARTY: OBJECTIONS</b>	<b>ADMIT</b>
9	Land Use District Boundaries: Plate 7 Island of Hawaii, Plate 19 Island of Maui, Plate 25 Islands of Molokai & Lanai, Plate 1 Island of Kauai, Plate 13 Island of Oahu, <i>State of Hawai‘i Land Use Districts and Regulations Review</i> , Eckbo, Dean, Austin & Williams, August 15, 1969		
10	1969 Land Use District Boundary Amendments for Petition Area, Proposed and Adopted, OP		
11	Potential Hazard Areas, Plate 10 Island of Hawaii, <i>State of Hawai‘i Land Use Districts and Regulations Review</i> , Eckbo, Dean, Austin & Williams, August 15, 1969		
12	Excerpts from <i>Hawaii Stream Assessment: A Preliminary Appraisal of Hawaii’s Stream Resources</i> , Table 19, Outstanding Aquatic Resources, Map 4, Outstanding Aquatic Resources, Hawaii, and Table 1, Candidate Streams for Protection, Hawaii Cooperative Park Service Unit, Western Region Natural Resources and Research Division, National Park Service, December 1990		
13	Title 13, Chapter 5, Subchapter 3, “Identified Land Uses and Required Permits,” DLNR-OCCL Administrative Rules, Hawai‘i Administrative Rules		



**LAND USE COMMISSION**

Page 3 of 3

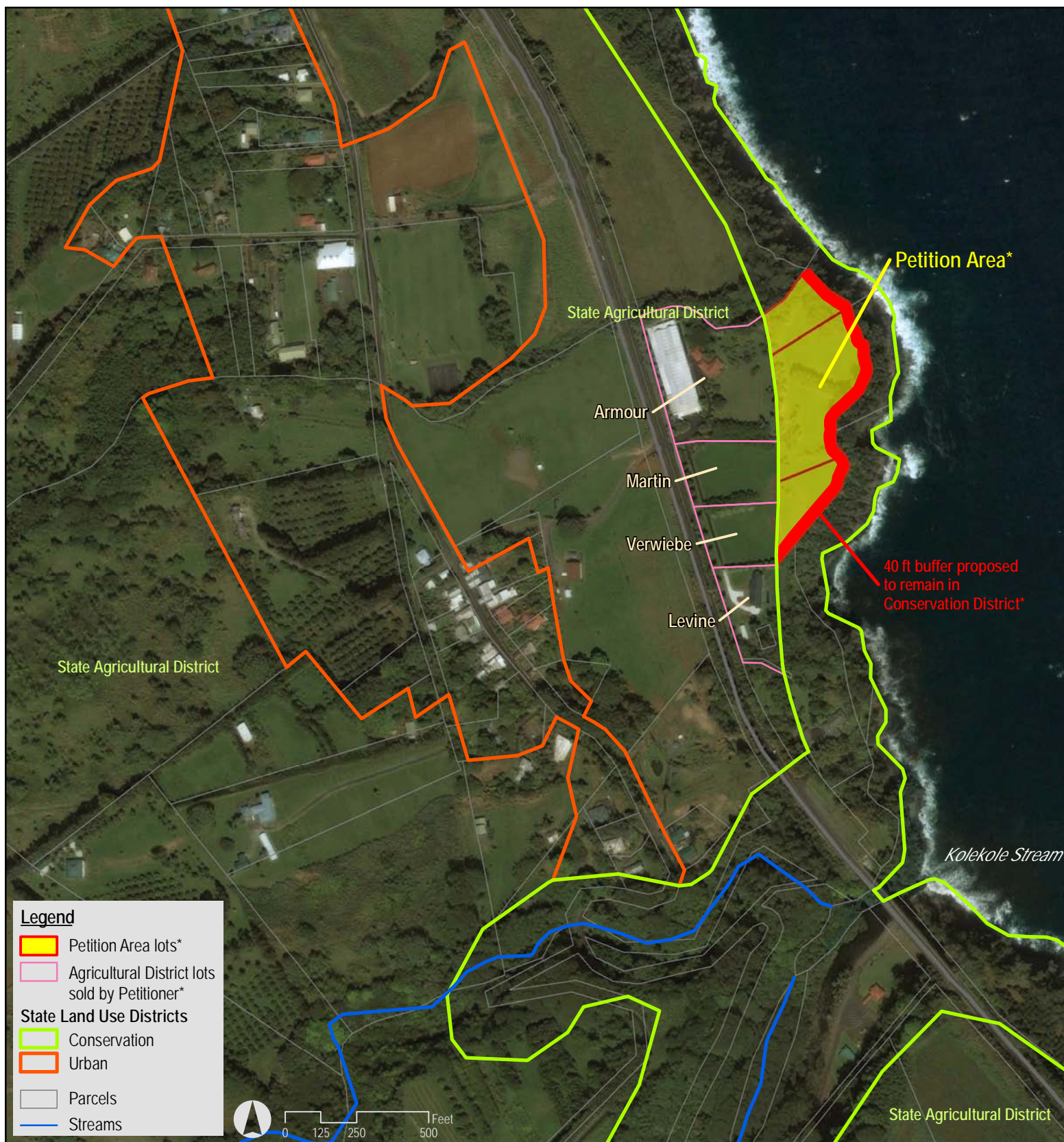
**DOCKET NO./PETITIONER:** A09-783 JAMES W. McCULLY and FRANCINE M. McCULLY  
**PARTY:** OFFICE OF PLANNING (OP)

**FIRST AMENDED  
LIST OF EXHIBITS**

<b>EXHIBIT NUMBER</b>	<b>DESCRIPTION</b>	<b>PARTY: OBJECTIONS</b>	<b>ADMIT</b>
14	State Land Use Commission Boundary Interpretation No. 92-48 for TMK No.: 2-9-03: 13, Wailea, South Hilo, Hawaii, Land Use Commission Letter to James Wm. McCully, with attachments, dated December 16, 1992		
15	Resume of DOA Representative, Sandra Lee Kunimoto		
16	Resume of DLNR-OCCL Representative, Samuel J. Lemmo		







This map was produced by the Office of Planning (OP) for planning purposes. It should not be used for analysis beyond the limitations of the source data. Information regarding the data used and presented may be obtained from OP.  
 Job: A09-783\_McCully[20101022-02-RE].pdf; Oct 27, 2010  
 SOURCES:  
 State Land Use Districts: Land Use Commission, May 2010  
 Petition Area Boundaries/Buffer: Digitized from Petition Exhibit Maps  
 Parcels: TMK Parcels, County of Hawai'i, May 2010  
 Image: Google Earth--DigitalGlobe, 2010; TerraMetrics, 2010

## OP Exhibit No. 3

### Petition Area and Environs: Existing Conditions

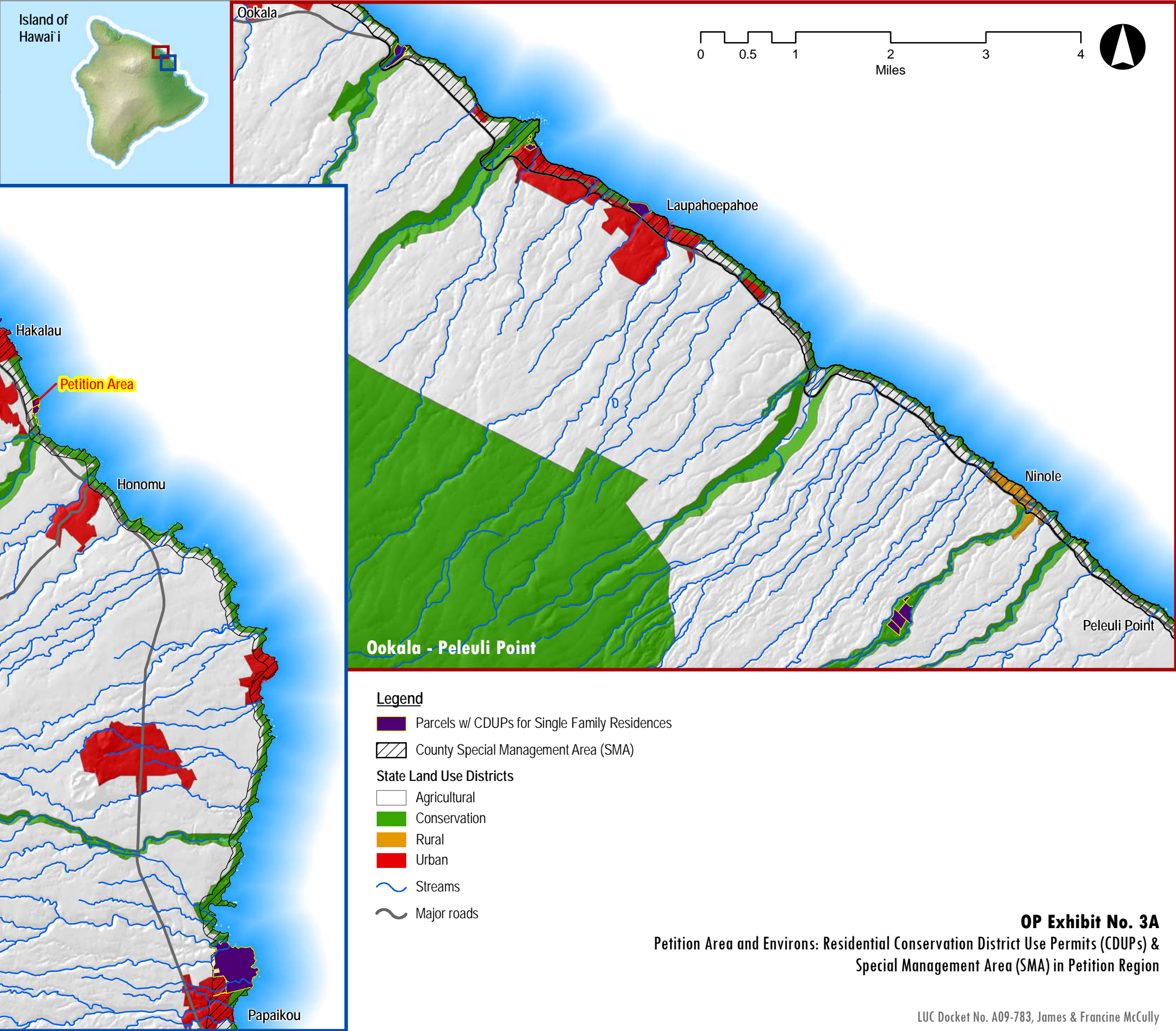
\*Note: Parcel boundaries for Petition Area parcels and parcels in the Agricultural District sold by Petitioner were digitized from Petition maps due to inaccuracies in the source parcel shapefile. See Petition exhibits for survey maps of existing and proposed parcel and buffer boundaries.

LUC Docket No. A09-783, James & Francine McCully

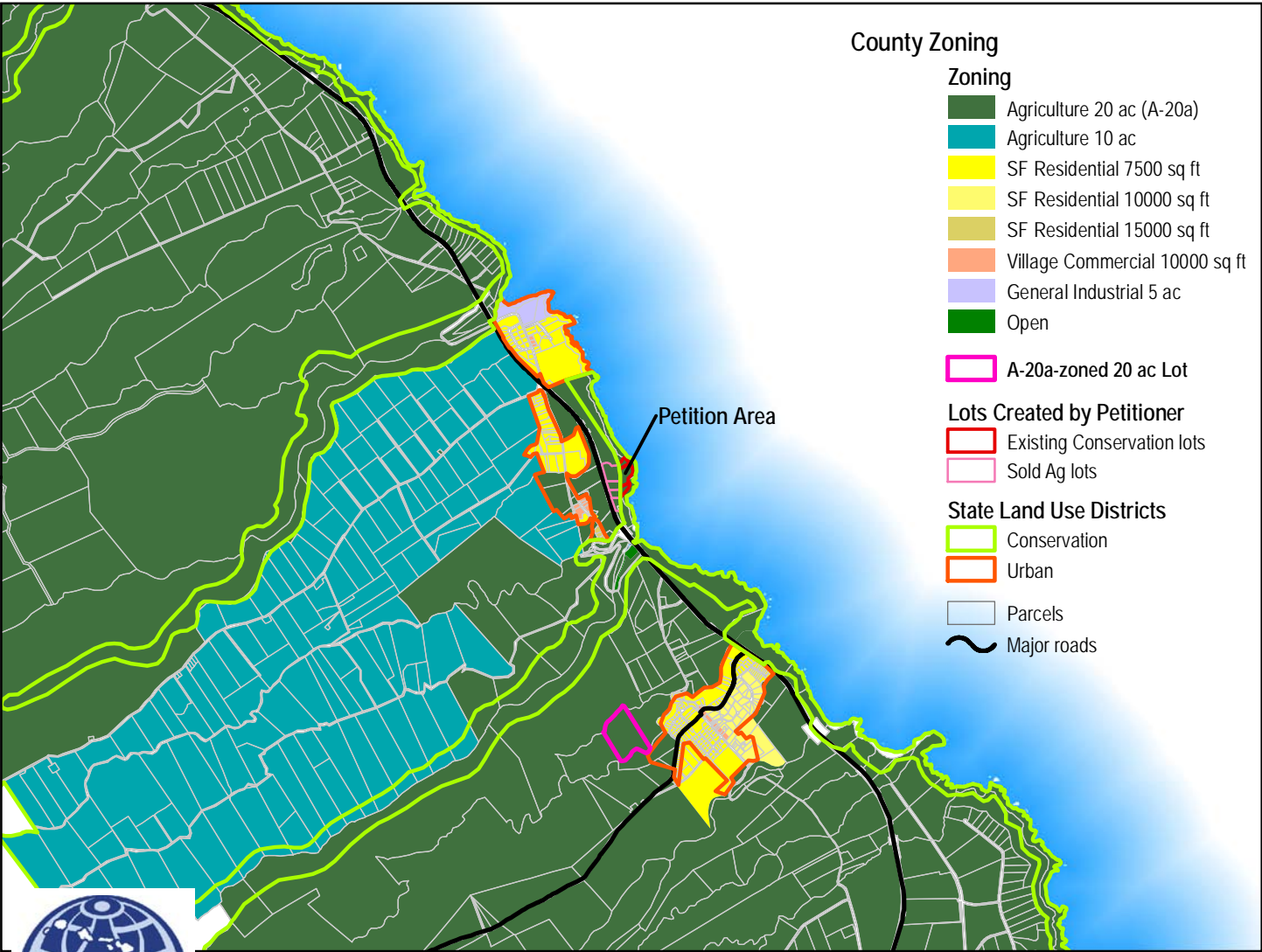
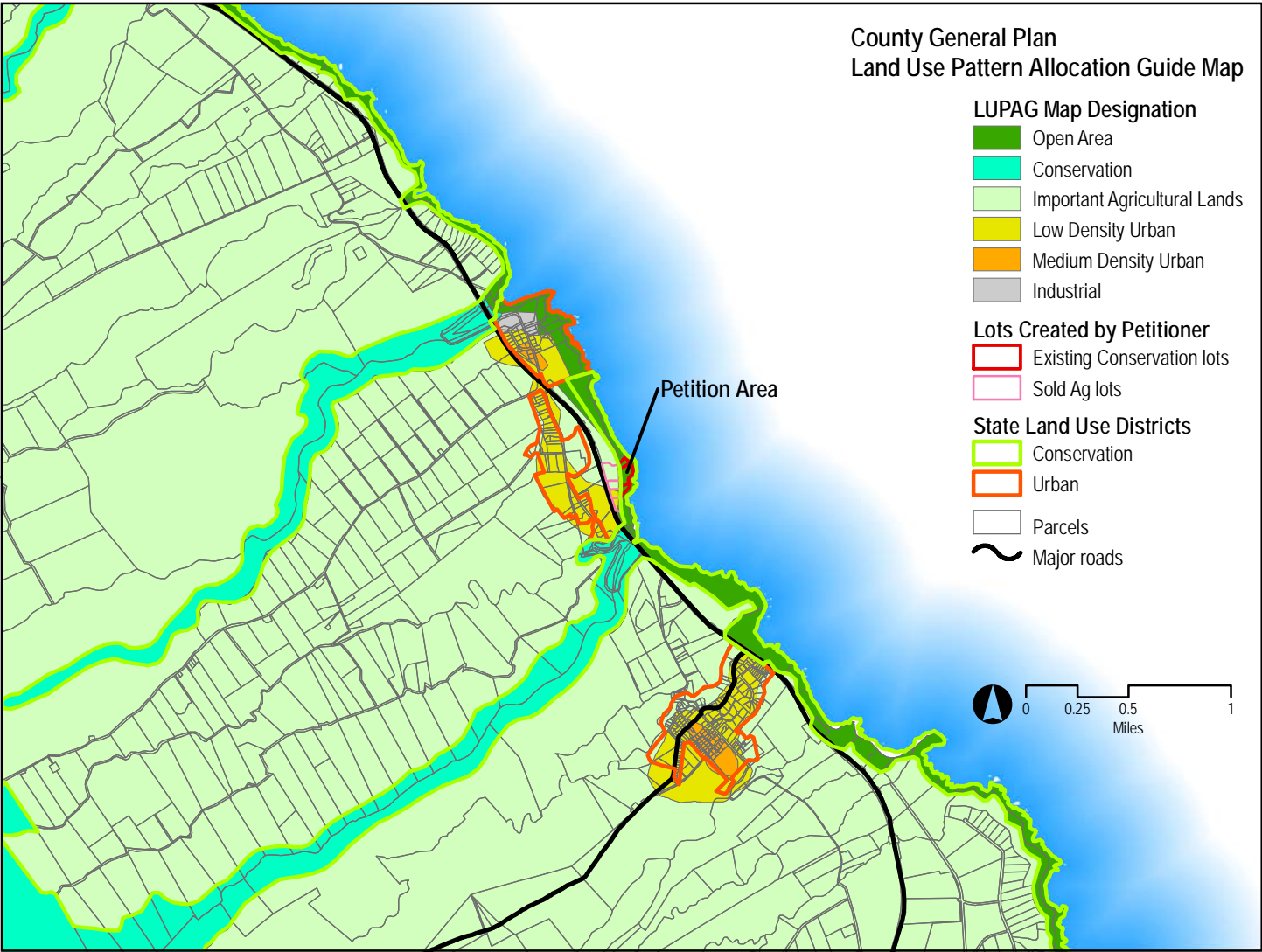




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Job: A09-783\_McCully[20101022-03-RE].pdf; Oct 27, 2010  
SOURCES:  
State Land Use Districts: Land Use Commission, May 2010  
SMA: Digitized from County blueline maps, County of Hawai'i, 1998  
Petition Area Boundaries: Digitized from Petition Exhibit Maps  
Streams: Perennial Streams, USGS DLGs, 1983, CWRM, 1994  
Roads: Major, USGS DLGs, 1983







This map was produced by the Office of Planning (OP) for planning purposes. It should not be used for analysis beyond the limitations of the source data. Information regarding the data used and presented may be obtained from OP.  
Job: A09-783\_McCully[20101022-04-RE].pdf, Oct 27, 2010  
SOURCES:  
LUPAG: County of Hawai i Planning Department, July 24, 2008  
Zoning: County of Hawai i Planning Department, Sept 2010  
Parcel Boundaries: TMK Parcels, County of Hawai i, May 2010





This map was produced by the Office of Planning (OP) for planning purposes. It should not be used for analysis beyond the limitations of the source data. Information regarding the data used and presented may be obtained from OP.  
Job: A09-783\_McCully[20101022-05-RE].pdf; Oct 27, 2010  
SOURCES:  
Petition Parcel Boundaries: Scanned from Pet Exhibit No. 8  
Use Constraints: Scanned from Pet Exhibit No. 12, Figure 3C  
Proposed Conservation District Buffer & Structural Setback:  
Generated by GIS from Proposed Parcel Boundaries  
Site & Floor Plans: Scanned from Pet Exhibit No. 12, Figure 4 & "Floor Plan"  
State Land Use Districts: Land Use Commission, May 2010  
Aerial Image: Google Earth--DigitalGlobe, 2010; TerraMetrics, 2010

**Legend**

- Proposed Conservation District boundary
- Proposed lots\*
- Proposed 40-ft Conservation District buffer\*
- Conservation District boundary

**Use Constraints\***

- 70-ft Structural setback
- View corridor, 10-ft height limit
- View corridor, 6-ft height limit
- Gulch
- Agricultural District lots sold\*
- Parcels

**OP Exhibit No. 4**  
**Petition Area: Proposed Use/Resubdivision**  
**and Constraints to Agriculture**  
**(For Illustrative Purposes Only)**

\*Note: Parcel boundaries for Petition Area parcel and parcels in the Agricultural District sold by Petitioner were digitized from Petition maps due to inaccuracies in the source parcel shapefile. See Petition exhibits for survey maps of existing and proposed parcel and buffer boundaries.



**Land Use Commission Docket No. A09-783 James and Francine McCully**  
**North Hilo, Island of Hawai'i**  
**Testimony of Samuel J. Lemmo, Office of Conservation and Coastal Lands**  
**Department of Land and Natural Resources**

I am the administrator of the Office of Conservation and Coastal Lands (OCCL) of the State Department of Land and Natural Resources (DLNR). The Office of Conservation and Coastal Lands' primary function is to manage the use and development of lands within the Conservation District in accordance with Chapter 183C, Hawai'i Revised Statutes (HRS), and Chapter 13-5, Hawai'i Administrative Rules (HAR), Conservation District rules. OCCL also administers DLNR's Coastal Lands Program, which was established in 2000 following the adoption of the Hawai'i Coastal Erosion Management Plan (COEMAP) in 1999. COEMAP is a strategic plan for dealing with erosion issues in the State. Its purpose is to balance development with conservation of our beaches and coastal areas.

OCCL believes that lands that have conservation values should not be removed from the Conservation District unless there is long-term public benefit to doing so. These conservation values are articulated in Section 205-2(e), HRS, and Section 15-15-20, HAR, of the Land Use Commission (LUC) rules, including but not limited to lands necessary to protect watersheds and water sources; scenic and historic areas; natural ecosystems of indigenous or endemic species; lands susceptible to floods, soil erosion, tsunami inundation, volcanic activity, and landslides; and open space areas whose existing state would enhance the value of abutting or surrounding communities or maintain or enhance the conservation of natural or scenic resources.

OCCL objects to the petition. I want to focus primarily on coastal and bluff erosion hazards, although I believe that scenic resource values and stormwater runoff and drainage impacts on coastal waters and native aquatic species habitat are also of some concern here.

Need for oversight of development in coastal hazard areas. Coastal areas are dynamic zones that are undergoing constant change in response to a multitude of factors including sea level rise, wave and current patterns, storms, tsunamis, and human influences. Coastal land management activities fall primarily under the jurisdiction of the counties through the administration of the Special Management Area (SMA) and shoreline setback provisions of Chapter 205A, HRS, and through DLNR's administration of Conservation District regulations.

Under County of Hawai'i regulations, the applicable setback would be 40 feet from the shoreline and single family residences are exempt from the County's Special Management Area (SMA) permit.

Through our Conservation District Use Application process, OCCL uses a set of protocols set out in the *Hawaii Coastal Hazard Mitigation Handbook* for evaluating development proposals for coastal lands. OCCL requires that an erosion analysis be conducted for proposed projects, so that there is some kind of scientific basis for determining the hazard risk to proposed uses and structures, and what the appropriate setback might be for a particular site. Typically, the extent of the setback should be based on the rate of erosion, the life of a proposed structure, and an adequate buffer zone.

You'll note in OP Exhibit 11 that in the first Land Use District Boundary Review, the coastal lands all along the Hāmākua Coast were identified as having erosion and slope hazards. These lands, including the Petition Area, were subsequently reclassified into the Conservation District by the Land Use Commission in 1969.

Bluff erosion has not been well studied in Hawai'i; the nature of bluff failure—whether it is chronic, catastrophic, or both—is not well understood. Nevertheless, bluff erosion is a hazard that should be addressed early in the planning stages for any development or use. Erosion of the bluff may occur when wave action or runoff removes unconsolidated sediment or rocks at the base, which in turn undercuts the overlying portion of soils and vegetation. Bluff erosion is very difficult to control and may undermine structures built near the bluff edge.

OCCL received calls from people north of Hilo, which is a bluff area, where there's been serious cliff erosion. A major apartment or condominium unit was threatened by this problem. The material that sloughs off the slopes of the Hāmākua Coast is the sediment that helps create the little pocket beaches along the coast. One of the Commission members in 2006 mentioned an incident north of Laupahoehoe Point sometime in the late 1990s, where there was sloughing off of the bluff into the ocean in the order of feet not inches. Attachment A provides a couple of photos showing evidence of bluff failure and erosion from locations on the Hāmākua Coast.

I visited the site with Commission members on January 19, 2006. I observed there was erosion occurring on the north side of the property. There was a depression within the hala trees in that the area that looked pretty unstable to me. It was difficult to assess the mid to south side of the property because it was difficult to access. In a bluff situation, vegetative plantings such as those planted by the petitioner are not going to make a lot of difference when you have the undercutting going on: as the bluff becomes undercut, gravity is going to cause the upper part of the bluff to fail. The vegetation might help stabilize the top of the bluff or reduce erosion of the bluff due to runoff from upslope, but it may not be able to prevent slumping or bluff failure if the top of the bluff is saturated by stormwater and runoff.

Generally, the CDUA process requires the completion of an erosion analysis that includes an analysis of historical aerial photographs by a coastal geologist or engineer that tracks any changes in the shoreline over time. Based on that information, an annual erosion rate is calculated that is used to arrive at the appropriate setback, keeping in mind that bluff erosion is not as consistent or predictable as that of beach areas.

There is flexibility, however, in our process to accept a large setback that would reasonably site development out of harm's way and to forego the detailed erosion analysis based on the opinion or statement of a professional coastal geologist or engineer. I have a coastal geologist on staff with training in coastal processes, sedimentology, shoreline change, and so forth. We work closely with University of Hawai'i School of Ocean and Earth Science and Technology (SOEST) faculty and staff who study erosion hazards all over the State and have expertise in coastal erosion hazards. If we agree that there are no potentially catastrophic conditions, we will accept a suitable setback, like 70 to 80 feet, in lieu of a detailed erosion analysis.

We don't have a fixed standard for shoreline setbacks. The size of the appropriate setback varies with site conditions and parcel size. Setbacks for dwellings with approved CDUPs in this region range from 60 to 100 feet from the cliff edge.

Retaining these lands in the Conservation District ensures that development is reviewed by coastal professionals and is appropriately sited based on a case-by-case analysis of existing conditions, the proposed use, and the potential hazard.

Allowable Uses in the Conservation District and Petitioner's CDUP. Under Chapter 13-5, HAR, single family residences and agriculture are identified uses in all Conservation District subzones, except the Protective subzone. Consolidation and resubdivision is an identified use or activity in all of the Conservation District subzones. All single family residences require the approval of the Board of Land and Natural Resources (BLNR), and are limited in total floor area to 5,000 square feet. Within the Resource subzone, agriculture within an area of one acre or less requires an administrative or departmental permit; agriculture within an area of more than one acre requires approval from the Board. Consolidation and resubdivision into an equal number of lots, such as is proposed by the Petitioner, requires a departmental permit. (See OP Exhibit 13, Subchapter 3, "Identified Land Uses and Required Permits.") We also have a site plan approval, which is a permit OCCL can issue for minor landscaping actions. If we were to consider a greenhouse structure, it would likely be processed under a lesser permit structure.

The Petitioner submitted a Conservation District Use Application for a single family residence and landscaping on or after September 17, 2007. The CDUA was accepted for processing by OCCL on October 17, 2007. An environmental assessment was prepared as part of the CDUA. A shoreline certification was not required, but we did ask for some kind of erosion analysis and verification from a coastal engineer. The Board approved the Petitioner's application at its March 28, 2008 meeting.

Sixteen (16) CDUPs, including the Petitioner's, have been granted for single family residences in the North and South Hilo Districts since 1976.

A broad range of uses, including those proposed by the Petitioner, are allowable within the Resource subzone as well as other Conservation District subzones, subject to DLNR or BLNR review and approval. OCCL believes the CDUA process provides a suitable mechanism for sustainable use and development of coastal lands **without the necessity of removing these lands from the Conservation District.**

Other Conservation Values. DLNR doesn't have established criteria for determining scenic value, but a property's scenic resource value is not solely determined by whether the property and proposed development can be seen from a coastal highway or nearby beach park. By its sheer location on the coastline, this property may be visible from a number of perspectives: possibly from scenic overlooks up or down the coasts, from the ocean, from aircraft flying down the Hāmākua Coast. **Redistricting of Conservation District lands along the coast could foster development that would fragment this relatively open coastal landscape and erode this region's scenic resource value.** Attachment A includes pictures demonstrating the natural beauty and open space character of this coastal region. **Similarly, the presence of native aquatic species, such as 'o'opu and hihiwai in the nearby Kolekole Stream system and in other stream systems along the Hāmākua Coast, warrant that precautions be taken to protect coastal and surface water quality to sustain the aquatic resource values of this region. Keeping coastal lands in the Conservation District helps ensure that these and other conservation resource values are protected.**

Effect of Removing Coastal Lands from the Conservation District. In the 1969 Land Use District Boundary Review, the Land Use Commission amended the State land use district boundaries statewide to classify all undeveloped coastal lands in the Conservation District. This can be seen in OP Exhibit 9. In coastal areas where development pre-dated the drawing of the first State land use district boundaries, we are now faced with very serious coastal hazard problems, whether it's beach and shoreline erosion, flooding, storm surge, or the threat of tsunami inundation. In retrospect, the Commissioners showed tremendous foresight in recognizing the value and need to protect and conserve Hawai'i's shoreline and coastal lands, and in accepting a new definition of the shoreline inland from the line of wave action.

OCCL is concerned that approval of this petition would set a precedent for other similar requests to remove coastal lands from the Conservation District in this region and elsewhere, and that the cumulative effect of such petitions would seriously erode our ability to conserve the conservation resource values of the State's coastal landscapes. Keeping these lands in the Conservation District ensures that coastal erosion hazards are adequately assessed and that structures are sited away from sensitive coastal areas and provides a process for doing that.

The Land Use Commission plays an important role in identifying and managing use of hazard areas early in the planning process. Under LUC rules, a petition for a district boundary amendment must consider the consistency of the petition with the objectives and policies of Chapter 205A, HRS, Coastal Zone Management Act, which includes the objective of reducing hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution, through a policy of controlling development in areas subject to storm waves, tsunami, flood, erosion, subsidence, and point and nonpoint source pollution hazards. OCCL sees no reason why—in an era of growing concern over climate change, sea level rise, and increasing threats to coastal areas—the Commission should now reverse the far-sighted action of the 1969 Commission in placing the State's valuable shorelines and coastal lands in the State Conservation District.

The Conservation District designation does not bar the petitioner's planned use of his property. Rather, the CDUA process provides a flexible way of ensuring that use or development of the State's coastal lands avoids potential hazards and protects other conservation values of these lands. OCCL believes the public's interest in protecting coastal lands is best served by retaining these lands in the Conservation District.



## Attachment A. Conservation Values of Coastal Lands on the Hāmākua Coast

### ► Coastal Erosion Hazard



Figure 1  
A bluff property with evidence of bluff failure following the October 15, 2006 earthquake. Source: County of Hawai'i Civil Defense, USGS Hawaiian Volcano Observatory, <http://hvo.wr.usgs.gov/earthquakes/destruct/2006oct15/FAQ.html>.



Figure 2  
A bluff with evidence of sloughing. Source: Lava Ocean Adventures, <http://www.lavaocean.com/HiloNaturalWondersTour.htm>.

### ► Scenic Resource and Open Space





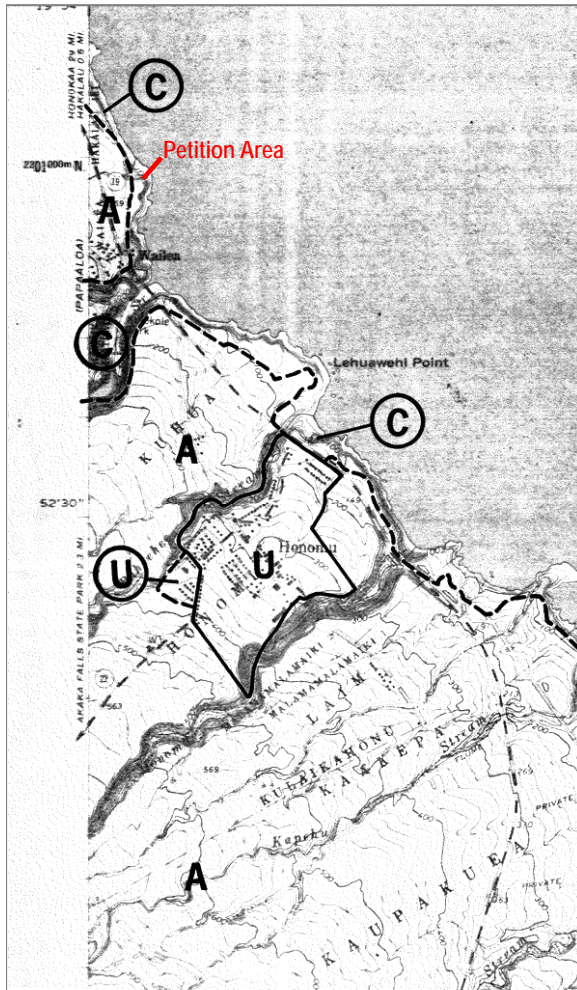


Homes situated on coastal cliff property along the Hāmākua Coast

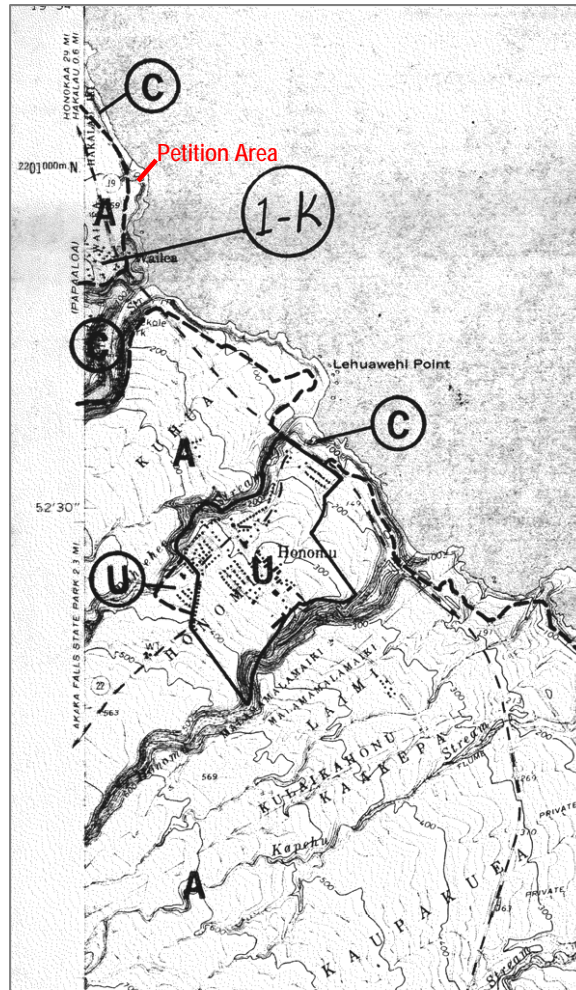


◀ Note the silt in the nearshore waters from runoff

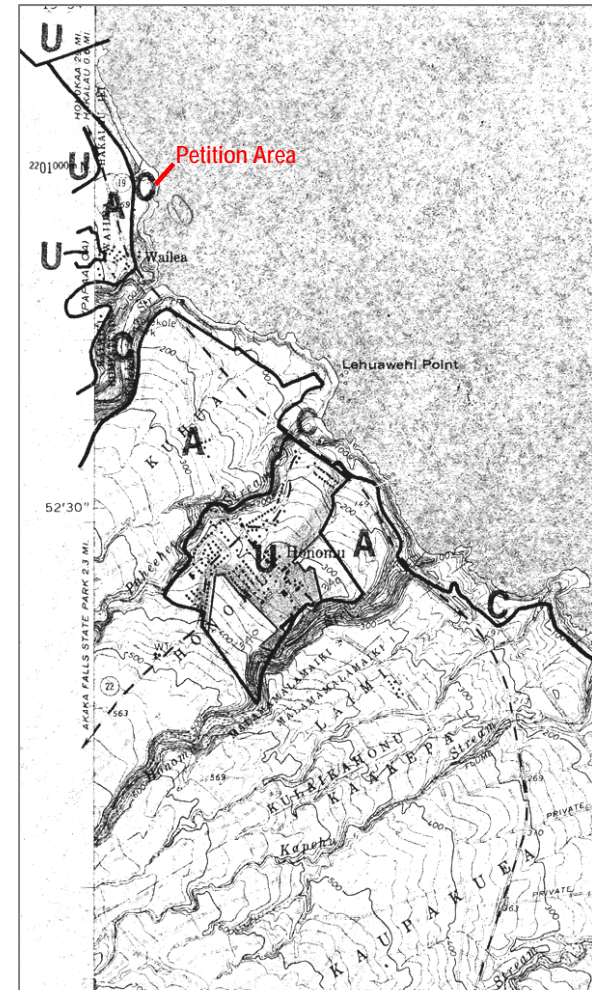




Panel A. Proposed district boundaries, April 1969



Panel B. Proposed boundaries with requested amendments, April 1969



Panel C. Final district boundaries as adopted at July 18, 1969 hearing

## OP Exhibit No. 10

### 1969 Land Use District Boundary Amendments for Petition Area, Proposed and Adopted

# SAMUEL J. LEMMO

2457A PARKER PLACE, HONOLULU, HAWAII 96822  
(808) 781-4468

## WORK EXPERIENCE

**Administrator**, Office of Conservation and Coastal Lands (OCCL), Department of Land and Natural Resources (DLNR)

### 2004-Present

- Responsible for the regulation of land uses within the State Land Use Conservation District including all submerged land out to the seaward extent of the State's Territorial jurisdiction. Duties include administration of conservation district use applications, contested cases, enforcement actions, administrative rule amendments, development of new state policies to facilitate wise land use practices, initiating and analyzing legislation, and educating the public about conservation district issues.
- Established and currently administers the State Coastal Lands Program (CLP). Developed statewide policies and tools to conserve beaches and manage coastal erosion problems. Responsible for the development of Hawaii Coastal Erosion Management Plan (COEMAP), and Hawaii Coastal Hazard Mitigation Guidebook. Currently working with Counties to develop a Statewide Integrated Shoreline Policy. In 1999, established and currently administers the Hawaii Special Beach Restoration Fund. Generated \$2 million in revenues to date.
- Currently manage seven (7) employees. Create, fund, and fill positions, monitor/manage employee performance; write, implement, and monitor contracts and agreements for planning and engineering services designed to implement program directives and objectives. Responsible for preparing Capitol Improvement Project (CIP) budget for proposed beach restoration projects at Waikiki. Completed Waikiki sand nourishment project in January 2007.
- Administered 100s of conservation district use application and violation cases with a 98 percent success rate. Presently administer one of the most publicly responsive and efficient public offices in the State of Hawaii.

### Senior Planner, OCCL, DLNR 1996-2003

- Similar duties as described above

### Planner, DLNR 1991-1996

### Peace Corps Volunteer, Republic of the Philippines 1986-1988

- Developed forestry and agricultural projects for the Municipality of Mulanay, Quezon Province

## **EDUCATION**

- University of Hawaii at Manoa, Honolulu, HI,  
Masters in Urban and Regional Planning 1992
- University of California, Santa Barbara, Santa Barbara, CA  
Bachelors of Arts in Environmental Studies 1986

## **AWARDS AND PUBLICATIONS**

- 2008 World Town Planning Day “Planner Who Has Made a Difference Award”
- 2006 Finalist National Public Service Award
- 2005 DLNR Manager of the Year
- 2000 State of Hawaii Employee of the Year
- 2000 DLNR Employee of the Year
- 2000 DLNR Sustained Superior Performance Award
- 1998 DLNR Sustained Superior Performance Award
- 1995 DLNR Certificate of Recognition for Achievement and Service to the State of Hawaii
- **Publications** - Fletcher, C.H., and Lemmo, S.J. (1999) Hawaii's Emergent Coastal Erosion Management Program. Shore and Beach, v. 67, no. 4, pp. 15-20

## **SPECIAL SKILLS**

- Able to excel in all aspects of land use planning within Hawaii's highly complex land entitlement process with special emphasis on coastal areas
- Developed science based decision-making capacity in DLNR for coastal resources management
- Developed excellent relationships with many of Hawaii's State, County and Federal personnel, elected officials, and leaders of community and environmental organizations
- Served as a Hearing Officer in over 25 public hearings statewide
- Understand and speak Filipino
- Highly dedicated and hardworking

## **REFERENCES**

Timothy Johns, President and CEO  
Bishop Museum  
(808) 847-8247

Karl Kim, Ph.d  
University of Hawaii at Manoa,  
Professor of Urban and Regional Planning (808) 956-4570

Charles Fletcher Ph.d  
University of Hawaii at Manoa, Professor of Geology  
and Geophysics (808) 956-2582

## **SPECIAL INTERESTS**

Canoe Paddling, Kayaking, Hiking, Running, Golfing.

CERTIFICATE OF SERVICE

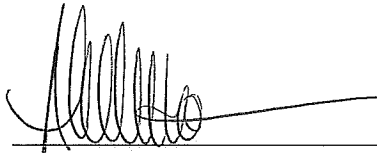
I hereby certify that copies of the foregoing *Office of Planning First Amended List of Exhibits, Exhibits 2, 3, 3A, 3B, 4, 7, 10, and 16* were served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular mail.

ALAN M. OKAMOTO, Esq.  
Nakamoto, Okamoto & Yamamoto, Attorneys at Law  
187 Kapiolani Street  
Hilo, Hawai'i 96720-2687

BOBBY JEAN LEITHEAD TODD, Director  
Planning Department  
County of Hawai'i  
101 Pauahi Street, Suite 3  
Hilo, Hawai'i 96720

LINCOLN ASHIDA, Esq.  
Office of the Corporation Counsel  
County of Hawai'i  
101 Aupuni Street, Suite 325  
Hilo, Hawai'i 96720

DATED: Honolulu, Hawai'i, this 3<sup>rd</sup> day of November, 2010.

  
\_\_\_\_\_  
ABBEY SETH MAYER  
Director  
Office of Planning

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A09-783
	)	
JAMES W. McCULLY and	)	OFFICE OF PLANNING LIST OF
FRANCINE M. McCULLY	)	WITNESSES; LIST OF EXHIBITS;
	)	EXHIBITS 1, 5, 6, 8, 9, 11, AND 12-15;
To Amend the Conservation Land Use	)	CERTIFICATE OF SERVICE
District Boundary to the Agricultural Land	)	
Use District for Approximately 3.54 Acres	)	
of Land at Wailea, South Hilo, Island of	)	
Hawaii; Consisting of, Tax Map Key Nos.	)	
(3) 2-9-003: 013 (por.), 029 (por.), and 060	)	
(por.)	)	

OFFICE OF PLANNING

LIST OF WITNESSES, LIST OF EXHIBITS,

EXHIBITS 1, 5, 6, 8, 9, 11, AND 12-15, AND CERTIFICATE OF SERVICE

LAND USE COMMISSION  
STATE OF HAWAII  
2010 OCT 20 PM 4:30

# LAND USE COMMISSION

Page 1 of 1

**DOCKET NO./PETITIONER:** A09-783 JAMES W. McCULLY and FRANCINE M. McCULLY  
**PARTY:** OFFICE OF PLANNING (OP)

## LIST OF WITNESSES

NAME/ORGANIZATION/POSITION (List in Order of Appearance)	TO BE QUALIFIED AS AN EXPERT IN:	SUBJECT MATTER	WRITTEN TESTIMONY (Yes or No)	EXHIBIT NUMBER(S)	LENGTH OF DIRECT
SANDRA LEE KUNIMOTO or REPRESENTATIVE Chairperson, Board of Agriculture State Department of Agriculture		Agriculture, agricultural development, agricultural land and resource policy	Yes	4, 5, 6, 15	15 min.
SAMUEL J. LEMMO or REPRESENTATIVE Office of Conservation and Coastal Lands State Department of Land and Natural Resources	Coastal and Conservation District land use, coastal processes	Coastal and conservation land resources, coastal and conservation district land use policy and impact mitigation	Yes	7, 8, 13, 16	15 min.
ABBEY SETH MAYER or REPRESENTATIVE Director Office of Planning		State concerns; OP testimony	Yes	1-16	20 min.



# LAND USE COMMISSION

Page 1 of 2

**DOCKET NO./PETITIONER:** A09-783 JAMES W. McCULLY and FRANCINE M. McCULLY  
**PARTY:** OFFICE OF PLANNING (OP)

## LIST OF EXHIBITS

EXHIBIT NUMBER	DESCRIPTION	PARTY: OBJECTIONS	ADMIT
1	Office of Planning (OP) Written Testimony		
2	Map, <i>Petition Location and Regional Overview</i>		
3	Map, <i>Petition Area and Environs: Existing Conditions</i>		
4	Map, <i>Petition Area: Proposed Use/Resubdivision &amp; Constraints to Agriculture</i>		
5	State Department of Agriculture (DOA) Letter to Bobby Jean Leithead Todd, dated October 20, 2010		
6	State of Hawai'i Bureau of Conveyances Document No. 94-130295, Declaration of Restrictive Covenants, Mr. & Mrs. James McCully, Tax Map Key No. (3) 2-9-003: 013		
7	State Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (DLNR-OCCL) Written Testimony		
8	DLNR Land Division Letter to Bobby Jean Leithead Todd, dated October 18, 2010		
9	Land Use District Boundaries: Plate 7 Island of Hawaii, Plate 19 Island of Maui, Plate 25 Islands of Molokai & Lanai, Plate 1 Island of Kauai, Plate 13 Island of Oahu, <i>State of Hawai'i Land Use Districts and Regulations Review</i> , Eckbo, Dean, Austin & Williams, August 15, 1969		

# LAND USE COMMISSION

Page 2 of 2

**DOCKET NO./PETITIONER:** A09-783 JAMES W. McCULLY and FRANCINE M. McCULLY  
**PARTY:** OFFICE OF PLANNING (OP)

## LIST OF EXHIBITS

EXHIBIT NUMBER	DESCRIPTION	PARTY: OBJECTIONS	ADMIT
10	1969 Land Use District Boundary Amendments for Petition Area, Proposed and Adopted, OP		
11	Potential Hazard Areas, Plate 10 Island of Hawaii, <i>State of Hawai'i Land Use Districts and Regulations Review</i> , Eckbo, Dean, Austin & Williams, August 15, 1969		
12	Excerpts from <i>Hawaii Stream Assessment: A Preliminary Appraisal of Hawaii's Stream Resources</i> , Table 19, Outstanding Aquatic Resources, Map 4, Outstanding Aquatic Resources, Hawaii, and Table 1, Candidate Streams for Protection, Hawaii Cooperative Park Service Unit, Western Region Natural Resources and Research Division, National Park Service, December 1990		
13	Title 13, Chapter 5, Subchapter 3, "Identified Land Uses and Required Permits," DLNR-OCCL Administrative Rules, Hawai'i Administrative Rules		
14	State Land Use Commission Boundary Interpretation No. 92-48 for TMK No.: 2-9-03: 13, Wailea, South Hilo, Hawaii, Land Use Commission Letter to James Wm. McCully, with attachments, dated December 16, 1992		
15	Resume of DOA Representative, Sandra Lee Kunitomo		
16	Resume of DLNR-OCCL Representative, Samuel J. Lemmo		



BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A09-783
	)	
JAMES W. McCULLY and	)	OFFICE OF PLANNING TESTIMONY
FRANCINE M. McCULLY	)	IN OPPOSITION TO THE PETITION
	)	
To Amend the Conservation Land Use	)	
District Boundary to the Agricultural Land	)	
Use District for Approximately 3.54 Acres	)	
of Land at Wailea, South Hilo, Island of	)	
Hawaii; Consisting of, Tax Map Key Nos.	)	
(3) 2-9-003: 013 (por.), 029 (por.), and 060	)	
(por.)	)	
	)	

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**OFFICE OF PLANNING**  
**TESTIMONY IN OPPOSITION TO THE PETITION**

The Office of Planning ("OP") recommends denial of the Petition of James and Francine McCully ("Petitioner"), to reclassify approximately 3.54 acres of land from the State Conservation District to the State Agricultural District at Wailea, South Hilo, Hawaii. OP's opposition is based on its review of the subject Petition and issues raised in Land Use Commission ("LUC") hearings on Docket A05-757 held in 2005 and 2006 on substantially the same matter.

**PETITION OVERVIEW**

**General Information**

The Petitioner, James W. McCully and Francine M. McCully, whose mailing address is 40 Kamehameha Avenue, Hilo, Hawaii, 96720, is the fee owner of the subject parcels, Tax Map Key ("TMK") Nos. (3) 2-9-003: 013, 029, and 060, of which 3.54 acres of the total 4.6 acres are proposed for reclassification under this Petition.

OP  
EXHIBIT NO. 1

### **Petitioner's Proposed Use of the Property**

The Petitioner proposes to consolidate and resubdivide three existing parcels that are overlaid by a former railroad right-of-way into three lots with a more optimum lot configuration for residential and agricultural use. The size of the proposed lots will range from 1.214 to 2.146 acres. The Petitioner, an orchid breeder and propagator, proposes to build a single family residence and a greenhouse for orchid cultivation on one of the three new lots. Petitioner does not have clear plans for agricultural use of the remaining two lots.

In 2007, the Petitioner applied for a Conservation District Use Permit ("CDUP") for a single family residence. On March 28, 2008, the Board of Land and Natural Resources approved the CDUP for the McCully's residence, which is intended to be built on the middle of the three subject parcels, TMK 2-9-003:029. See Petitioner Exhibit Nos. 12 and 13 for details on the planned residence and permit conditions.

During the 2005-2006 hearings, the Petitioner testified that the intent was to build a 2,000 square foot greenhouse at the site to relocate his warm weather orchid operations, and if the A05-757 Petition was approved, work on the greenhouse would be undertaken first, with the house to follow. However, the 2007 Conservation District Use application was limited to a single family residence and landscaping; the site and floor plans did not include plans for a greenhouse on the property.

### **KEY CONCERNS FOR THE STATE**

The following summarizes the key points of OP's analysis and findings that led to its objection to the Petition.

### **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. (See OP Exhibit No. 9 to see the sweeping scope of this decision.) 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).

As stated in the 1969 Eckbo, Dean, Austin and Williams' *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." (Eckbo et al, 1969, pg.86)

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

- "1. 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.
2. Where a vegetation line such as a windbreak or row of trees more clearly marks the edge of the agricultural practice, this was used.
3. In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used.
4. 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. 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.

### **Conservation Values of the Petition Area and Environs**

**Coastal Erosion Hazard.** Coastal erosion and cliff slumping and collapse have not been adequately studied along the Hilo-Hāmākua Coast, and in the State in general. Cliff erosion and slumping have been known to occur along the Hāmākua Coast. The Petitioner noted in the January 2006 hearing that there was at least one incidence of cliff erosion at the Petition site. Furthermore, DLNR-CCL staff testified that he had observed some slope erosion on the northernmost parcel of the Petition Area on the LUC's January 2006 site visit. The 1969 Land Use District Boundary Review identified this coastline as a potential hazard area in part because it is characterized by slopes exceeding twenty degrees. This was one of the factors underlying proposed amendments to the State Conservation District. (See OP Exhibit 11 for the 1969 Boundary Review map of potential hazard areas for the Island of Hawai'i.) Thus, the Conservation District designation serves to ensure that an erosion analysis and coastal hazard assessment is done in evaluating development proposals along the coast in this region.

**Scenic Landscape Value.** The Petition states the Petition Area has no scenic resource value because coastal views from the State highway at the Petition Area are blocked by a berm, and the proposed development can't be viewed from natural beauty sites identified in the County's General Plan. This analysis fails to recognize that the Petition Area is an integral part of a larger coastal landscape whose remarkable features of sheer coastal cliffs, plateaus, and gulches from Wailuku River to Waipi'o were noted and named by early Hawaiians as *Hilo-pali-Kū*, or 'Hilo of the upright cliffs' (Petitioner Exh. 1, Appendix C, *Archaeological Inventory Survey and Limited Cultural Assessment of TMK: 3-2-9-03:13, 29, and 60*, pp. 6-7). The natural beauty of this coastline is visible from the air, the ocean, and at other points along the coast. The County General Plan states that Hawaii's natural beauty is an irreplaceable asset and a part of the public trust, and includes Goal 7.2(a) to "protect, preserve, and enhance the quality of areas endowed with natural beauty, including the quality of coastal scenic resources." The Plan states that safeguards for this asset are a major consideration for any construction or development that may alter, alleviate, or intrude upon it.

*Proximity to Coastal and Surface Waters with Significant Aquatic and Recreational Resource Value.* The Petition Area drains toward the coastal outlet of Kolekole Stream. Kolekole Stream was identified in the *Hawaii Stream Assessment* completed in 1990 as having outstanding resource values due to the presence of 'o'opu and other native aquatic species and the recreational experiences available along the stream and its receiving coastal waters. See OP Exhibit 12 for a summary of these resource values. As 'o'opu spend their larval stage in ocean waters, non-point source pollution from land-based activities along the coast would be of concern in this area, and would require mitigation to ensure that stormwater runoff and drainage and wastewater disposal from developed sites does not impair coastal water quality.

**Consistency with Applicable Conservation District Standards and Rules and Cumulative Impact of Removing Coastal Lands from the Conservation District**

Clearly, the Conservation District designation is appropriate for the types of resource values and hazards noted above. In the 2005-2006 hearings, DLNR-OCCL raised legitimate concerns about the precedential nature of removing coastal lands from the Conservation District. If this Petition is granted, the conversion would create a precedent for similar requests along the entire Hamakua Coast as well as other coastal areas and subject these lands to increased development pressure, which would threaten the integrity and sustainability of Hawai'i's coasts and shorelines—the State's signature natural asset—and the natural systems dependent on coastal processes. Single family residences are exempt from County Special Management Area rules and regulations under Planning Commission Rule No. 9-4(10)(B)(i). In a coastal region like the Hamakua Coast where the risk of coastal erosion, slumping, and cliff collapse has not been adequately studied or quantified, permitting of activities in proximity to the pali and shoreline through the Conservation District Use application process provides for the technical assessment necessary to determine appropriate setbacks and other conditions for a particular site on a case-by-case basis.

The cumulative effect of approvals of this type of Petition would impair the achievement of Chapter 205A, Hawaii Revised Statutes, Coastal Zone Management Objectives and Policies related to coastal hazards, coastal resources and ecosystems, coastal water quality related to stormwater runoff and nonpoint source pollution, scenic resources, and the location of non-coastal dependent uses away from the coast.

The Petition Area is currently designated in the Conservation District Resource Subzone. Agricultural activity and single family dwellings are allowable uses under State Department of Land and Natural Resources' ("DLNR") rules for the Resource subzone. (See OP Exhibit 13 for identified uses allowable and permit requirements in the respective subzones.) Agricultural activity on an area less than one acre requires a departmental or ministerial permit; agricultural activity on areas greater than one acre requires a Board of Land and Natural Resources ("BLNR") permit. Single family dwellings are subject to Board approval. OCCL records show that seventeen single family residences have been approved in the Conservation District in the North and South Hilo Districts.

The Petitioner has already received a CDUP from DLNR to build a 5,000–6,000 square foot home for one of the Petition Area parcels, thus reducing the need for reclassification.

#### **Conformance with Applicable Agricultural District Standards**

The Petition Area parcels are a portion of an 11.51 acre parcel situated between the Hawaii Belt Road and the ocean purchased by the Petitioner from C. Brewer Properties in 1992. The property was part of land holdings once cultivated for sugar by a succession of plantation companies and cooperatives.

The original parcel was classified in the State Agricultural District mauka of the former railroad right-of-way that traverses north-south through the property; the right-of-way and makai lands were classified State Conservation District, as confirmed by LUC Boundary Interpretation No. 92-48 in 1992 (OP Exhibit 14). The Petitioner stated his intent to reclassify the property in his request for a boundary interpretation, and was informed that the LUC, not the County, is the decision-making authority for such a boundary amendment from the Conservation District.

The Petition Area, as was the original parcel, is designated as 'Open' on the County of Hawai'i's ("County") Land Use Pattern Allocation Guide ("LUPAG") map of the County's General Plan, and zoned A-20a, Agricultural District with a minimum building site area of 20 acres.

When the Petitioner purchased the original parcel in 1992, the lot was a legal, non-conforming parcel. Petitioner was subsequently able to create seven non-conforming lots from the original parcel: four in the Agricultural District and three in the Conservation District. In

1994, Petitioner recorded a Declaration of Restrictive Covenants on the entire property of seven lots that restricted the keeping of poultry and swine, limited the size, design, and materials that could be used for structures to be built on the property, and so forth – restrictions that could, in effect, constrain agricultural use of the property (See OP Exhibit 6). Petitioner Exhibit 6 is a copy of restrictive covenants filed with the deeds for the parcels, which contain a provision for easements in favor of the mauka parcels for view corridors that prohibit structures or plantings that exceed 6 or 10 feet from the ground on portions of the three Petition Area parcels.

Since the recordation of the seven lots in 1994, Petitioner has sold the parcels that were in the State Agricultural District. The Petitioner had built a greenhouse and single family dwelling on one of the four Agricultural District parcels, which was sold with the greenhouse stock to his current neighbors, the Armours. The remaining three Agricultural District lots were also sold. One lot was developed with a single family dwelling; the other two lots are vacant. No agricultural activity appears to be taking place on three of the four Agricultural District lots. According to the Petition, the Petition Area has been fallow since July 1992.

The Petitioner has not presented the Commission with evidence in either the A05-757 Petition or this Petition that the remaining Petition Area parcels will be used for agriculture. Indeed, at least one Commissioner noted at the LUC's June 2, 2005 hearing on Docket A05-757 that the current Department of Water Supply water lines limited supply to 600 gallons per day, which raised questions as to the availability of water for agricultural use.

The State Department of Agriculture ("DOA") and OP are concerned about the continuing use of Agricultural District lands for residential development. The Petitioner sold off four Agricultural District lots, which to this day, with the exception of their former home and greenhouse, have not been put to agricultural use. The proposed lots, which range from one to two acres in size, will have a farmable area that is significantly constrained by the view easements, a proposed Conservation District buffer, a structural setback, a gulch, as well as land area that will be required for septic fields and retention basins to contain stormwater runoff. The Petitioner has not demonstrated that further subdivision is required to enable agricultural use of the entire Petition Area.

Section 205-4.6, Hawai'i Revised Statutes ("HRS") prohibits restrictions on agricultural uses contained in any deed, agreement of sale, or other conveyance of land recorded after July 8, 2003. Thus, it is not clear whether sale of the two Petition Area parcels with the existing restrictive covenants would be in compliance with the law.

OP believes that the granting of this Petition is unlikely to contribute to diversified agriculture beyond the Petitioner's own business. Furthermore, the Petitioner has not demonstrated that his actions-to-date and proposed plans have or will result in making smaller parcels available for agricultural use.

OP cannot support reclassification to the State Agricultural District where there is so little evidence of future agricultural use beyond those of the Petitioner, and when there is already evidence that three of the four parcels sold by the Petitioner, though in the Agricultural District, either have not been developed and/or are not being put to agricultural use. OP sees no enforceable mechanism available to the Commission to ensure that all the proposed parcels will be used for agricultural purposes.

#### **Consistency with County Plans and Zoning**

Reclassification of the Petition Area to the State Agricultural District would not promote consistency with the County's General Plan and the LUPAG "Open" designation. The State Conservation District is more consistent with the Open designation. The County's A-20a zoning is entirely consistent with the Open designation, as one dwelling per 20 acres results in a fairly open, low-density rural landscape. On the other hand, the one- to two-acre parcels created by the Petitioner, including those sold by the Petitioner, are not consistent with either the County's A-20a zoning or the LUPAG Open designation, as proposed residences or farm dwellings would be built at a density over ten times that anticipated under the existing zoning.

#### **LUC Docket A05-757**

The Petitioner filed a petition, LUC Docket A05-757, with the LUC in March 2005, for essentially the same proposal. OP initially supported the request for reclassification. In the course of hearings on that docket, several Commissioners raised questions as to the necessity of reclassification given that the proposed uses are allowed in the Conservation District under DLNR rules. In fact, Petitioner received approval from BLNR to build a single family residence,



and as noted earlier, the Petitioner did not include construction of a greenhouse in the CDUA that was subsequently approved. Further, several Commissioners expressed concern that the Petitioner had no clear plans for agricultural use for the entire Petition Area, other than their own plans to build a home and a greenhouse. Late in the hearings, DLNR Office of Conservation and Coastal Lands ("OCCL") staff was asked by the LUC to testify on Conservation District Use applications in the region, and provided testimony expressing concern about the precedent of removing lands from the Conservation District in this region, due to coastal erosion and cliff collapse risks, loss of scenic resources, and other conservation resource values.

The 2005 petition was denied by the LUC in 2006 due to the lack of sufficient affirmative votes. A motion to reconsider filed by the Petitioner was also denied. The Petitioner's proposal to retain 40 feet of the makai edge of the Petition Area in the Conservation District does not materially change the nature of the Petition, and there has been no change in facts or circumstances to justify a change in the Commission's prior decision on the Petitioner's request for reclassification. Given the lack of significant change in the Petition and the Commission's prior denial, OP does not now support this renewed request for reclassification.

### **RECOMMENDATION**

Based on the above discussion, the Office of Planning believes the subject Petition to reclassify approximately 3.54 acres from the State Conservation District to the State Agricultural District has not demonstrated that there is either a need to change the district boundaries or that the proposed reclassification would further the objectives of Section 205-2, Hawai'i Revised Statutes. Therefore, OP recommends denial of the Petition.

DATED: Honolulu, Hawai'i this 20<sup>th</sup> day of October, 2010.

OFFICE OF PLANNING  
STATE OF HAWAI'I

A handwritten signature in black ink, appearing to read "Abbey Seth Mayer" with a stylized flourish at the end.

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ABBEY SETH MAYER  
Director

LINDA LINGLE  
Governor

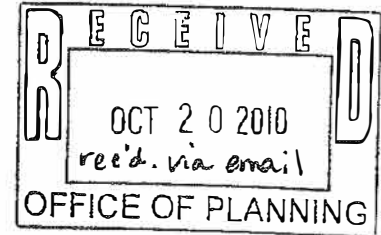


State of Hawaii  
DEPARTMENT OF AGRICULTURE  
1428 South King Street  
Honolulu, Hawaii 96814-2512

SANDRA LEE KUNIMOTO  
Chairperson, Board of Agriculture

DUANE K. OKAMOTO  
Deputy to the Chairperson

October 20, 2010



72569

Ms. BJ Leithead Todd  
Director  
Planning Department  
County of Hawaii  
Aupuni Center  
101 Pauahi Street, Suite 3  
Hilo, Hawaii 96720

Dear Ms. Todd:

Subject: State Land Use District Boundary Amendment A09-783  
PD No. 09-000011  
Conservation to Agricultural  
James and Francine McCully  
TMK: 2-9-03: portions of 13, 29, 60  
Acreage: 3.54 acres  
Proposed lots: 3 (1.214, 1.241, 2.146 acres)

The Department of Agriculture has reviewed the subject petition and offers the following comments.

### Background

The subject petition involves a consolidation of three existing parcels totaling 3.54 acres and resubdivision into three lots. The largest proposed lot is 2.146 and the smallest is 1.214 acres. The petitioner, who is a successful orchid breeder and propagator, proposes to build a dwelling and a separate greenhouse of about 2,000 square feet on one of the three proposed lots. The entire petitioned area is said to be "...suitable for the cultivation of other types of stock plants that thrive in full sun, including day lilies, lotuses and other water plants, tropical rhododendrons and other exotic tropical plants"

OP  
EXHIBIT NO. 6

(Petition, page 13) however there are no firm plans or commitments to encourage and cause agricultural use of the two remaining proposed lots.

Any agricultural use to be established on these small proposed lots will be constrained by view easements on two lots that, by restrictive covenant (Petition, Exhibit 5) prohibit structures and new plantings exceeding six to ten feet in height. This could affect the establishment of windbreaks and shadehouse/greenhouse which will likely exceed the six-foot restriction and may exceed the ten-foot restriction. We point out that the "Second Amendment to Declaration of Restrictive Covenants" (Petition, Exhibit 5) that reinforces the view easement restrictions of the Petition may be in violation of Section 205-4.6, Hawaii Revised Statutes that does not allow for restrictions on agricultural uses and activities as defined in Sections 205-2(d) and -4.5(a). Another feature limiting the land area available for use on the northernmost proposed lot is Puahanui Stream gulch.

Properties adjacent to the petitioned area are said to be in agricultural use, including a certified orchid nursery, foliage plants, edible ginger, and Chinese taro (Petition, page 9). There is no description of the magnitude of these agricultural uses. This information appears inconsistent with the Final Environmental Assessment (Petition, Exhibit 1) that states "Of the five adjoining parcels, three are currently vacant and two have been developed with single family dwellings. An orchid nursery business has also been established on Parcel 48 along with a single family dwelling" (Petition, Exhibit 1, page 17).

### **Findings and Recommendation**

Proposed reclassification of land into the Agricultural District should show that there is existing and substantial agricultural use, including crop or livestock production, on the petitioned land, or that there is clear evidence of imminent action to establish substantial agricultural use.

The Department of Agriculture finds that there is likelihood that one of the three proposed lots may have an agricultural activity (greenhouse) established on it by the Petitioner who is a successful agricultural entrepreneur. The remaining two lots do not show the same commitment for agricultural use. Further, the restrictions on use of the land due to the view easements and other encumbrances reduce the area available for agricultural use and limit the kinds of agricultural activity that can be established.

The Petitioner wishes to relocate his warm-weather orchid breeding operation to a 2,000 square foot greenhouse to be built on one of the three proposed lots. We understand that requests to establish agricultural uses on lands within the Restrictive Subzone of the Conservation District can be sought through the Conservation District Use Application Permit, thus obviating the need for a reclassification from the Conservation to Agricultural District.

The Department of Agriculture has long been concerned about the subdivision of agricultural lands into "fake farms". We do not support petitions for reclassifications to the Agricultural District where doing so would likely contribute to the proliferation of "fake farms" already occurring on agricultural lands where the primary use and market price of the agricultural lots reflects a rural residential lifestyle and there is little evidence that substantial agricultural use or activities will be established.

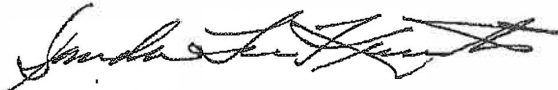
Should the subject petition be approved without substantial evidence of forthcoming agricultural production for all proposed lots, this would reinforce the widely held and damaging perception that the Agricultural District is a catch-all zone for lands that do not fit into the other districts and that token agriculture activity is sufficient to qualify for Agricultural District classification.

Finally, a possible consequence of accepting minimal requirements for reclassification of Conservation District lands into the Agricultural District would be an increase in requests to do the same elsewhere.

Ms. BJ Leithead Todd  
October 20, 2010  
Page 4

Based upon our findings, the Department of Agriculture is opposed to the Petitioner's request to reclassify the subject lands from the Conservation to Agricultural District.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Lee Kunimoto", with a stylized flourish at the end.

Sandra Lee Kunimoto  
Chairperson, Board of Agriculture

c: Office of Planning

Mccully(A09-783)2.e10



R-142

STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED

AUG 05, 1994 08:01 AM

Doc No(s) 94-130295

/s/ S. FURUKAWA  
REGISTRAR OF CONVEYANCES

LAND COURT SYSTEM	REGULAR SYSTEM
Return by Mail ( <input checked="" type="checkbox"/> )	Pickup (    ) To:
MR & MRS JAMES MCCULLY	154217 M R/S (2)
P O BOX 355	943020496
HAKALAU, HI 96710	TOE

TITLE OF DOCUMENT:

DECLARATION OF RESTRICTIVE COVENANTS

DECLARATION OF RESTRICTIVE COVENANTS

JAMES WILLIAM MCCULLY AND FRANCINE MORALES MCCULLY, whose residence address is Hakalau, County of Hawaii, State of Hawaii, and whose mailing address is P. O. Box 355, Hakalau, Hawaii 96710 (hereinafter "Declarant"), hereby establishes the following restrictive covenants relative to the use of the lands within the Wailea Springs Subdivision, South Hilo, Hawaii, as more particularly described in Exhibit "A" attached hereto and incorporated by reference herein.

Declarant wishes to establish covenants, conditions and restrictions on the use of said property in order to develop a complete, planned community.

Declarant hereby declares that each of the lots within the Wailea Springs Subdivision shall be subject to these covenants, conditions and restrictions except for those lands in use or reserved for roadway, utility or access purposes or dedicated to the County of Hawaii or State of Hawaii or common use areas. For

OP  
EXHIBIT NO. 6

purposes of these covenants, the land contained within the former Hawaii Consolidated Railway, Ltd. right of way which is within the area described in Exhibit A shall be considered a part of the lot which abuts and is makai of said railway lands. It is the intent of declarant that there be 7 lots subject to these covenants, exclusive of lands in use or reserved for roadway, utility or access purposes or dedicated to the County of Hawaii or State of Hawaii or common use areas.

1. Permitted Uses. All lots within the subdivision and any part thereof shall be used for agricultural uses defined below or for single family residential use and for purposes ancillary to residential uses and for no other use.

2. Agricultural Uses. The following agricultural uses are expressly permitted: propagation and cultivation of horticultural products, including floral and foliage products whether or not conducted in greenhouse or shadehouse structures. The following agricultural uses are not permitted: breeding or maintenance of any livestock or fowl for commercial purposes. Unless prohibited under any other provisions of these covenants, any other agricultural uses may be conducted, provided that said uses are otherwise in conformance with the provisions of these covenants.

3. Prohibited Uses. The following are prohibited, whether or not they are conducted for commercial purposes: poultry or fowl (including but not limited to chickens, ducks, swans, guinea fowl, peafowl), swine, commercial dog kennels (including those for breeding or for boarding of animals).

4. Compliance with Law. The use of lots subject to these covenants, the construction, erection or maintenance of any improvements on said lots shall be in full compliance with the laws, rules and regulations of the United States, County of Hawaii and State of Hawaii, including those related to hazardous materials, the rules and regulations of the State Department of Health, County zoning and subdivision laws, grading ordinance, laws applicable to building codes, fire codes, electrical and plumbing codes. No work shall be commenced on the construction of any improvements until any applicable special management area permit or building permit has been obtained as required by law.

5. Nuisance. No noxious or offensive activity shall be carried on, or upon any of the lots subject to these covenants, nor shall any activity or use be conducted thereon which may become an annoyance or nuisance to other lot owners within this subdivision or to use or enjoyment of said lots.

6. Maintenance and Appearance. All lots and improvements thereon are to be maintained in good order and in presentable

condition. No lot shall be allowed to become overgrown with noxious weeds or bushes. No burning of vegetation or rubbish shall be conducted on any lot. No lumber, scrap metal, bulk materials, disabled motor vehicles, equipment, refuse or trash shall be kept stored or allowed to accumulate on a lot which is visible from another lot or the roadway easement; provided, however, that lumber and building materials may be maintained on a lot during the course of construction of a permitted structure, but any excess materials following such construction shall be removed or stored. All equipment or vehicles, including those for agricultural purposes, shall be kept in enclosed structures.

7. Permitted Structures. All structures to be constructed on lots shall conform to the requirements set forth below and no construction shall begin until design review has been completed as provided below. No ohana dwellings are permitted on said lots.

8. Minimum area of dwellings. Each dwelling unit shall have a minimum living area of not less than 1,600 square feet of living area, not including garages, carports, lanais, porches, verandas or other similar areas.

9. Height limitations of structures. The total height of any structure shall not exceed twenty five feet from the highest elevation of a lot in its "natural grade" to the top of the highest point of the structure. "Natural grade" means the topography of the lot at the time of the establishment of these covenants and the determination of the highest elevation for purposes of these covenants shall not be affected by regrading of any lot after these covenants are established.

10. Garages, Clotheslines, Storage, Antennae. Garages and other outdoor storage structures shall be designed and located so as to minimize visual impacts on other lots and from the roadway easement. Clotheslines, outdoor storage structures, antennae or satellite dishes shall not be visible from view from other lots or from roadway easements. Fences or appropriate screen plantings may be used to screen such items from view.

11. Cisterns, catchment tanks, ponds and water wells. Any cistern or catchment tank shall be underground or bermed in such fashion as to present the appearance of being underground. Pool type tanks are not allowed. Tank design and installation plans are subject to review by the Design Review Authority. Ponds for decorative or agricultural purposes are permitted, subject to review by the DRA. Such ponds are not to be used for domestic water supply and must be maintained in such manner as to preclude the breeding of mosquitoes or other insects. Water wells are permitted and are encouraged.

12. Fencing. Fences are permitted, but shall be located not closer than six inches from the property line or at such distance to allow maintenance of same without encroaching upon the adjoining lot. Construction of fences is subject to review by the DRA. Unless fences are decorative in nature and have been approved by the DRA as such, fences shall be screened by appropriate screen plantings to obscure them from view from another lot or the roadway easement.

13. Lighting. Outdoor lighting is permitted, but installation of same is subject to review by the DRA. Outdoor lighting to illuminate walkways, driveways, stairs and entry areas is permitted. Lighting fixtures shall be designed and located so as not to radiate light into the sky or to shine directly into a residence on another lot. Screen plantings or structures to minimize such undesirable illumination may be proposed for review and approved by the DRA. Use of flood lights or security lights is not encouraged, although installation and use of same may be proposed for review and approval by the DRA.

14. Construction Materials. No second hand lumber, roofing or materials of any kind shall be permitted for construction of any improvements on the property. Provided, however, that recycled bricks, quarry stone, or other suitable masonry materials used for appropriate decorative purposes may be submitted for review and approval by the DRA. The type of roofing material and the design of the roof for any structure shall be subject to review and approval by the DRA. Metal roofing is allowed, but use of metal roofing formed into corrugated panels for use on warehouses or similar industrial structures is not allowed.

15. Temporary structures and trailers. Except as provided herein, no trailers or other temporary structures shall be permitted on any lot. Temporary sheds for secure storage of construction materials or tools may be maintained on a lot, but must be removed on completion of the improvements and in any event may not be maintained on a lot for a period of longer than nine months. Containers for the shipment of horticultural or agricultural products or the receipt of agricultural supplies may be kept on a lot, but for only the period necessary to load or unload said containers. In no event shall any temporary structure or trailer be used for residential purposes at any time.

16. Underground utilities. All electrical, telephone and cable lines shall be installed underground. All methods and materials shall comply to applicable laws, including County building and electrical codes. Any cost of installation of such underground systems from the terminal box to each structure shall be the sole responsibility of the affected owner.



17. Pets. Domestic pets, such as dogs, cats and fish may be maintained. Poultry or fowl and swine are not permitted. Dogs who are kept outdoors shall be housed in enclosed or fenced kennels or runs which shall have concrete or paved floors. Animal waste from such kennels or runs shall be disposed of into cesspools or approved sanitary sewage disposal systems.

18. Roadway Easement. Vehicles and equipment shall not be parked within the roadway easements except for the purpose of construction or maintenance of roadways or utilities within the roadway easement or for loading or unloading. In the case of unloading and unloading activities, such vehicles and equipment shall not be left unattended.

19. Ka Ehu Kai Community Association. The Ka Ehu Kai Community Association shall operate and maintain common areas and related improvements, such as gates, private subdivision roads, drywells and other drainage structures that serve the lots subject to these covenants. "Common areas" do not include any areas owned by the County of Hawaii, State of Hawaii or other governmental agencies, nor do they include any areas within a non-roadway area in this subdivision, except to the extent of any easement rights on such areas which are held for the common benefit for the owners of the lots subject to these covenants.

20. Each owner of lots subject to these covenants shall be a member of the Association by reason of such ownership. Each such owner shall be entitled to all the benefits or rights as such member. The rights of such membership and to the beneficial use of common areas shall be appurtenant to each lot within said subdivision, and membership shall automatically be transferred upon transfer of ownership of each lot. "Owner" shall mean, either the holder of the legal fee simple title to the real property who has the right of possession thereto, or the holder's lease or a buyer under a recorded Agreement of Sale for the lot, or such buyer's lessee. In order for lessees to act as "owners" hereunder, the rights of such lessees to do so must be established in lease documents recorded in the Bureau of Conveyances of the State of Hawaii.

21. The Community Association shall have the authority to impose dues for assessment against any owner as provided in the Articles of Incorporation or By Laws of the Association. Such dues or assessment shall constitute a lien upon the lots subject thereto in favor of the Association and may be enforced in a court of law on suit for money judgment or may be foreclosed by the Association in the same manner and with the same effect as the judicial foreclosure of a real estate mortgage; provided, however, that no suit shall be brought to foreclose such lien unless a notice of assessment has first been duly sent to the owner of such a lot and the dues or assessment remains unpaid for

a period of at least 90 days after it becomes due. Provided, further, that the liability of Declarants as owners shall be limited to their interest in the lots and shall not extend to any other property of Declarants and Declarants shall not be subject to liability for any deficiency judgment. Declarants, or their successors in interest, shall be responsible for the payments of assessments on lots which have not been sold, or which are not under contract of sale by them to third parties.

22. Preservation of View. Lots in this subdivision presently enjoy scenic views, including those of the Pacific Ocean. In order to preserve the enjoyment of the existing views to the extent possible, Declarant has established a View Corridor Map, a copy of which is attached hereto as Exhibit B and incorporated by reference herein. For the areas designated "restricted", no improvements, trees or plantings shall have a height in excess of 10 feet from the ground on which they are located (irrespective of the highest elevation on the lot). The effect on views and view corridors of all improvements and plantings, whether or not within the "restricted" areas shall be considered by the DRA.

23. Design Review. These covenants include provisions for review by a Design Review Authority with respect to improvements to be made upon lots subject to these covenants. The Design Review Authority shall initially be composed of both Declarants and one representative from the Community Association. Following the sale of four or more lots subject to these covenants by Declarants, the Design Review Authority shall be composed of three members selected by the Community Association. Design review shall be governed by these covenants and by the design review guidelines

a. Review by DRA. Building plans approved by the County Building department, specifications for buildings and special management area site plans, together with landscaping and other plans showing all proposed improvements shall be submitted to the DRA for review and approval not less than four weeks prior to start of construction thereon. The DRA will review and approve or disapprove such plans and specifications within two weeks of the submission to the DRA. Submission of incomplete plans or specification or submission of plans which have not received all necessary approval from the County of Hawaii, State of Hawaii or other governmental authority shall be grounds for disapproval. Review by the DRA shall not be arbitrarily withheld. Each member of the DRA shall have one vote with respect to approval or disapproval. All plans and specifications shall be available for inspection by the owner of any lot subject to these covenants.

b. An owner may submit preliminary plans for review by the DRA in order to facilitate design review and in such case, the

DRA shall provide guidance as to any revisions that may be needed in order to obtain DRA approval. Such guidance shall not be considered approval under paragraph 23a and shall in no event be a substitute for the written approval required in paragraph 23a prior to start of construction of improvements.

c. Approval by the DRA indicates that the design of the proposed improvements meets with the minimum requirements of the covenants and the design guidelines. Said approval is not an approval as to the structural, architectural or engineering integrity of the proposed improvements.

d. Appeals. A decision of the DRA may be appealed by serving on the DRA a written notice which shall describe briefly the decision being appealed and the reasons for the appeal. The written notice shall be served on the DRA by personal delivery or by mail within 30 days of the decision being appealed. Within 10 days of the service of the written notice, the DRA and the appellant shall discuss selection of a single arbitrator. If the DRA and appellant are unable to select a mutually acceptable arbitrator, either DRA or appellant may petition the Circuit Court of the State of Hawaii for appointment of a suitable arbitrator. The decision of the arbitrator shall be final and binding and shall be enforceable under the Hawaii Arbitration Statute. The cost of the arbitration shall be borne equally by the DRA and owner, but the arbitrator shall have the power to allocate cost of arbitration between the parties to the arbitration. Compensation of the arbitrator shall be on terms acceptable to the arbitrator. The arbitrator shall interpret and apply the provisions of these covenants relating to design review. The arbitrator is not authorized to modify, repeal or add to these covenants.

24. Design Review Guidelines. The lots subject to these parcels are in close proximity to the coastline and offer superior views of the coastline and the ocean. Any improvements to the lots are accordingly to be made so as to preserve such views and to minimize adverse impacts on the views of other lots.

a. Structural Materials. Materials that are compatible in composition and color to that of the surrounding area is encouraged. Use of highly reflective surfaces for exterior surfaces of structures, such as uncoated galvanized iron roofs, mirrored glass and the like is not compatible and the use of same is discouraged. Where improvements require use of materials such as metal chain link fences or metal water storage tanks, such materials shall be screened from sight by use of earth berms, landscaping plantings and the like, and to the extent practicable, the visual effects shall be minimized by painting or coating metal surfaces with nonreflective coatings of appropriate colors.

b. Colors. The colors of materials used for exterior surfaces should be compatible with the surrounding area. Use of earth tone colors is encouraged. Use of bright pastel colors is discouraged.

c. Lighting. Outdoor lighting which results in the creation of glare visible from other lots is discouraged. Accordingly, the use of floodlights or other lights for general illumination which will result in such glare is discouraged. Appropriate security lighting which uses infrared or other detection systems to turn on lighting to detect intruders may be allowed, but in such cases such security lighting shall be limited to use for such purposes and not for general illumination, nor shall such systems be designed so as to remain on continuously.

d. View Corridors. The designated "restricted" view corridors are designed to restrict improvements on certain areas of the lots which are especially critical for view preservation. However, the DRA shall give due consideration to preserving existing views in reviewing all proposed improvements. In reviewing the site for a proposed improvement, the affected owner and the DRA shall consider the location of residences on other lots and the effect of the proposed improvement on the view from said other residences.

25. Resubdivision. Provisions for these covenants and the planned common roadway have been made with the view that the land subject to these covenants will have a limited number of residences and structures. In order to preserve the character of this subdivision, there shall be no further subdivision of the lots subject to these covenants, nor shall any of said lots be submitted to a condominium property regime to increase the number of residences on any lot.

26. Modification or Amendment of Covenants. For a period of 3 years from the recordation of these covenants, these covenants may only be amended by unanimous consent of all seven lots subject to these covenants. Thereafter, the owners of not less than 5/7 of the lots subject to these covenants may amend or modify the covenants.

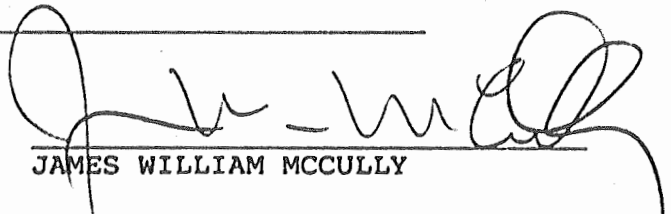
27. Covenants run with Land. These restrictive covenants shall operate as covenants running with the land. Each and any of said restrictive covenants shall be binding upon and enforceable and effective against Declarants, their successors or assigns, the Association or any owner of lots subject to these covenants, their heirs, successors or assigns. All deeds, mortgages, agreements of sale, leases, or conveyances made shall be subject to these restrictive covenants, whether expressly made in such conveyance, mortgage, or lease.

28. The violation of these restrictive covenants creates irreparable injury to the owners of lots subject to these restrictive covenants and to the Association such that the remedies at law are inadequate. Accordingly, declarants, any owner of lots subject to these covenants and the Association shall be entitled to obtain injunctive relief, including mandatory injunctive relief, from an appropriate court for any violations of the restrictive covenants, without prejudice to the right of said declarants, owner, or the Association to obtain any other remedy concurrently or thereafter for said breach, including an action for damages. The failure of declarants, any owner, or the Association to enforce any of the restrictive covenants shall not be deemed a waiver of the rights of said persons to thereafter enforce such covenants. If suit is initiated for breach of these restrictive covenants, and injunctive relief or damages is awarded, the party obtaining such relief shall be entitled to reasonable attorneys fees and costs against the owner in violation.

29. These restrictive covenants shall apply from the date hereof for a period of thirty (30) years. Thereafter, these restrictive covenants shall continue in effect during successive 30 year periods, except to the extent that the same is terminated prior to commencement of any such period by the agreement in writing of the owners of not less than 5/7 of the lots subject to these restrictive covenants; said agreement to be effective on recordation in the Bureau of Conveyances of the State of Hawaii.

30. Severability. If any provision in these restrictive covenants shall be found invalid or otherwise ineffective by a court of competent jurisdiction or otherwise, all other provisions of these restrictive covenants shall, to the extent possible, be construed as to remain in full force and effect.

Dated: Hilo, Hawaii, \_\_\_\_\_



\_\_\_\_\_

JAMES WILLIAM MCCULLY



\_\_\_\_\_


FRANCINE MORALES MCCULLY



STATE OF HAWAII  
COUNTY OF HAWAII

)  
) SS:  
)

On this 24th day of July, 1994, before me personally appeared JAMES WILLIAM MCCULLY, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.


  
Notary Public, State of Hawaii.

My commission expires: 2-10-98

STATE OF HAWAII  
COUNTY OF HAWAII

)  
) SS:  
)

On this 24th day of July, 1994, before me personally appeared FRANCINE MORALES MCCULLY, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

  
Notary Public, State of Hawaii.

My commission expires: 2-10-98

EXHIBIT A

All of that certain parcel of land (being portion(s) of Royal Patent Grant Number 1874 to Naai, Royal Patent Grant Number 803 to Naai and Land Patent Grant Number 7396, Part 1 to Wailea Milling Company) situate, lying and being at Wailea, District of South Hilo, Island and County of Hawaii, State of Hawaii, bearing Tax Key designation 2-9-003-013 (3), and containing an area of 11.9501 acres, more or less, as shown outlined in red on the map attached hereto as Exhibit "1".

Excepting and reserving therefrom:

- (1) Wailea spring and pipe line right of way, said right of way having a width of four (4) feet, the center line of which is described as follows:

Beginning at Wailea spring at the west end of the right of way, the coordinates of said point of beginning referred to Government Survey Trig. Station "WAILEA CHURCH" being 14.7 feet south and 1176.8 feet east, as shown on Government Survey Registered Map No. 2656, and running by true azimuths:

- |    |          |       |                        |
|----|----------|-------|------------------------|
| 1. | 272° 56' | 105.0 | feet;                  |
| 2. | 301° 41' | 95.0  | feet to railroad tank; |

Area 02/100 acre.

- (2) Graveyard, described as follows:

Beginning at a point at the west corner of this lot, the coordinates of said point of beginning referred to Government Survey Trig. Station "WAILEA CHURCH" being 127.9 feet north and 1257.5 feet east, as shown on Government Survey Registered Map No. 2656, and running by true azimuths:

- |    |          |      |                                       |
|----|----------|------|---------------------------------------|
| 1. | 250° 12' | 50.0 | feet along government land to a post; |
| 2. | 340° 12' | 75.0 | feet along same;                      |

3. 70° 12' 50.0 feet along same;
4. 160° 12' 75.0 feet along same to the point of beginning.

Area 09/100 acre.

(3) All existing roads and trails within this tract, and such other roads, trails and rights of way that be required for public purposes.

Excepting and reserving, therefrom, that portion of sea bluff, along makai portion of said Land Patent, Grant Number 7396, Part 1 to Wailea Milling Company, as colored in blue on said Exhibit "1".

SUBJECT HOWEVER, to the following:

1. Reservation in favor of the State of Hawaii of all mineral and metallic mines.
2. Location of the seaward boundary in accordance with the laws of the State of Hawaii and shoreline setback line in accordance with County regulation and/or ordinance and the effect, if any, upon the area of the land described herein.
3. Limited access rights along Hawaii Belt Road, Seismic Wave Damage Rehabilitation Project No. SDR 3 (2), as conveyed to the State of Hawaii by DEED dated November 25, 1955, recorded in Liber 3060 at Page 423.

4. Lease in favor of HAWAII ELECTRIC LIGHT COMPANY, INC., dated October 15, 1976, recorded in Liber 11955 at Page 568; leasing and demising rights of way in the nature of nonexclusive easements to build, maintain, operate and repair poles and wire lines, and to use such poles, wires, guys, anchors, conduits and other appliances and equipment as may be necessary for the transmission of electricity to be used for light and power, etc., through, over, along and across the premises described in Schedule C, besides other land, said easements for said poles and wire lines to be ten (10) feet wide, extending five (5) feet on either side of the center lines the approximate locations of which are attached thereto; for a term of thirty (30) years from October 1, 1976, to and including September 30, 2006, and thereafter from year to year until terminated by either the Lessor or the Lessee giving to the other at least three (3) months' previous notice in writing of intention to terminate this lease.

5. Discrepancies, conflicts in boundary lines, shortage in area, encroachments or any other facts which a correct boundary and improvement survey would disclose; and which are not shown by public records.

6. Reservation(s) set forth in DEED dated March 20, 1992, recorded as Document No. 92-044633.

## Plot of 02

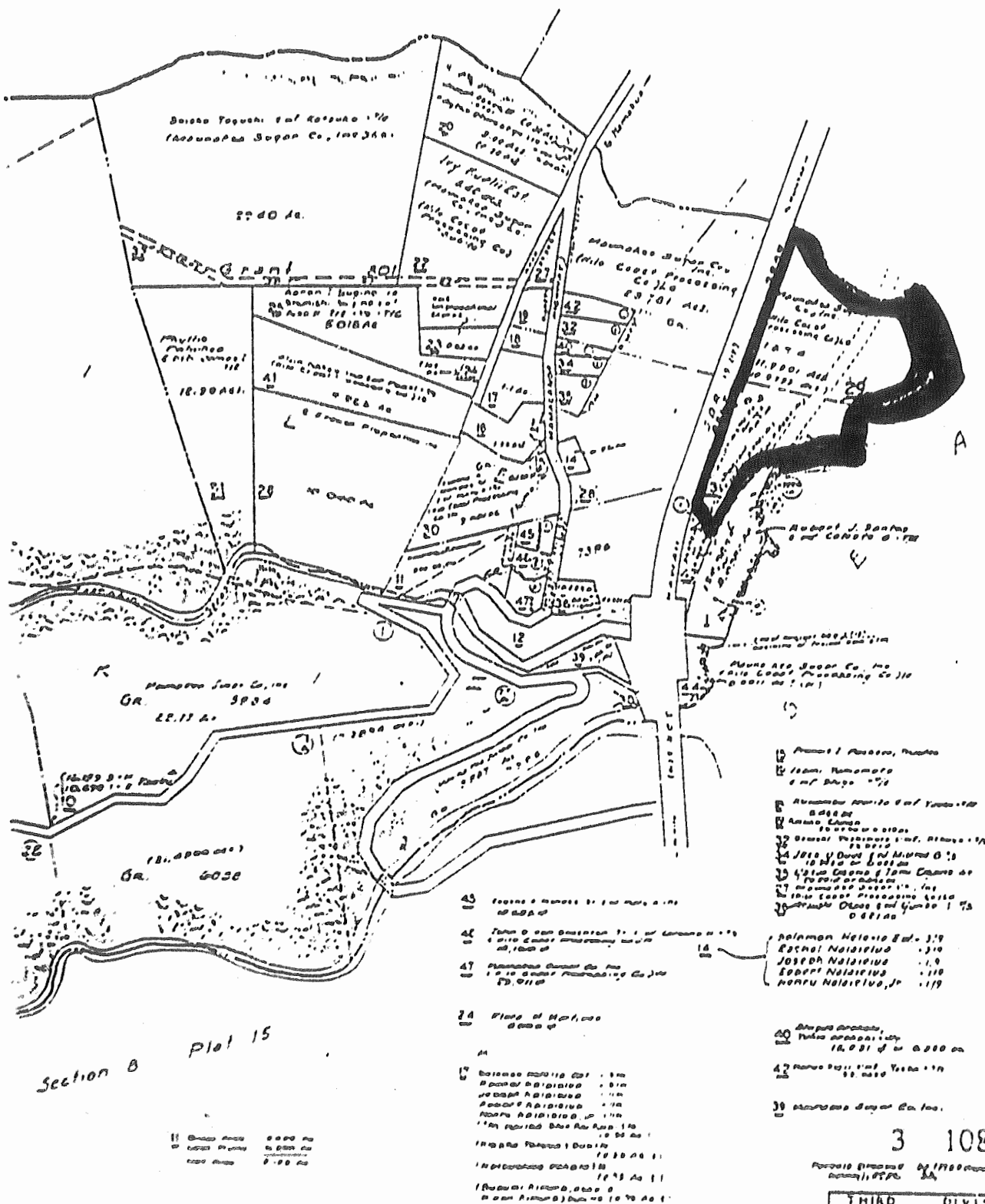


EXHIBIT 1

3 1089

THIRD		DIVISION	
ZONE	SEC.	PLAT	
2	9	03	
CONTAINING		PARCELS	
SCALE: 1" = 300 FT.			

PRINTED



Subject, also to perpetual non-exclusive easements with others entitled thereto for road and utility easement described as follows:

10,950 SQUARE FEET

Road and Utility Easement  
(30.0-Foot Wide)

Within Parcel 1, Portion of R.P. Grant 803 to Naai  
Wailea, South Hilo, Hawaii, Hawaii

Beginning at a point at the southwest corner of this parcel of land being also the northwest corner of Parcel 2 and on the easterly side of Hawaii Belt Road the coordinates of said point of beginning referred to Government Survey Triangulation Station "ALALA" being 18,793.33 feet North and 3,662.81 feet East and running by azimuths measured clockwise from true South:

1. 164° 42' 30.52 feet along the easterly side of the Hawaii Belt Road;
2. 265° 20' 102.99 feet;
3. 274° 17' 266.59 feet to a point at the westerly side of the Former Hilo Railroad Company's Railroad Right-of-Way;
4. 2° 06' 30.02 feet along the westerly side of the Former Hilo Railroad Company's Railroad Right-of-Way;
5. 94° 17' 265.40 feet along Parcel 2;
6. 85° 20' 95.00 feet along Parcel 2 to the point of beginning and containing an area of 10,950 Square Feet.

5,952 SQUARE FEET

Road and Utility Easement  
(30.0-Foot Wide)

Within Parcel 3, Portions of Grant 803 to Naai  
Wailea, South Hilo, Hawaii, Hawaii

Beginning at a point at the southwest corner of this parcel of land being also the northwesterly corner of Parcel 4 and on the easterly side of Hawaii Belt Road the coordinates of said point of beginning referred to Government Survey Triangulation Station "ALALA" being 18,354.86 feet North and 3,782.76 feet East and running by azimuths measured clockwise from true South:

1. 164° 42' 198.89 feet along the easterly side of Hawaii Belt Road;
2. 267° 20' 30.72 feet along Parcel 2;
3. 344° 42' 197.89 feet;
4. 85° 20' 30.52 feet along Parcel 4 to the point of beginning and containing an area of 5,952 Square Feet.

7,686 SQUARE FEET

Road and Utility Easement  
(30.0-Foot Wide)  
Within Parcel 2, Portion of R.P. Grant 803 to Naai  
Wialea, South Hilo, Hawaii, Hawaii

Beginning at a point at the northwest corner of this parcel of land being also the southwest corner of Parcel 1 and on the easterly side of Hawaii Belt Road the coordinates of said point of beginning referred to Government Survey Triangulation Station "ALALA" being 18,791.33 feet North and 3,662.81 feet East and running by azimuths measured clockwise from true South:

1. 265° 20' 30.52 feet along Parcel 1;
2. 344° 42' 256.69 feet;
3. 87° 10' 30.72 feet along Parcel 3 to a point at the easterly side of the Hawaii Belt Road;
4. 164° 42' 255.69 feet along the easterly side of the Hawaii Belt Road to the point of beginning and containing an area of 7,686 Square Feet.

BEING THE PREMISES DESCRIBED IN DEED

GRANTOR : C. BREWER PROPERTIES, INC., a Hawaii corporation

GRANTEE : JAMES WILLIAM McCULLY and FRANCINE MORALES McCULLY, husband and wife, as Tenants by the Entirety

DATED : March 23, 1992

RECORDED : Document No. 92-044634

Scale: 1:100

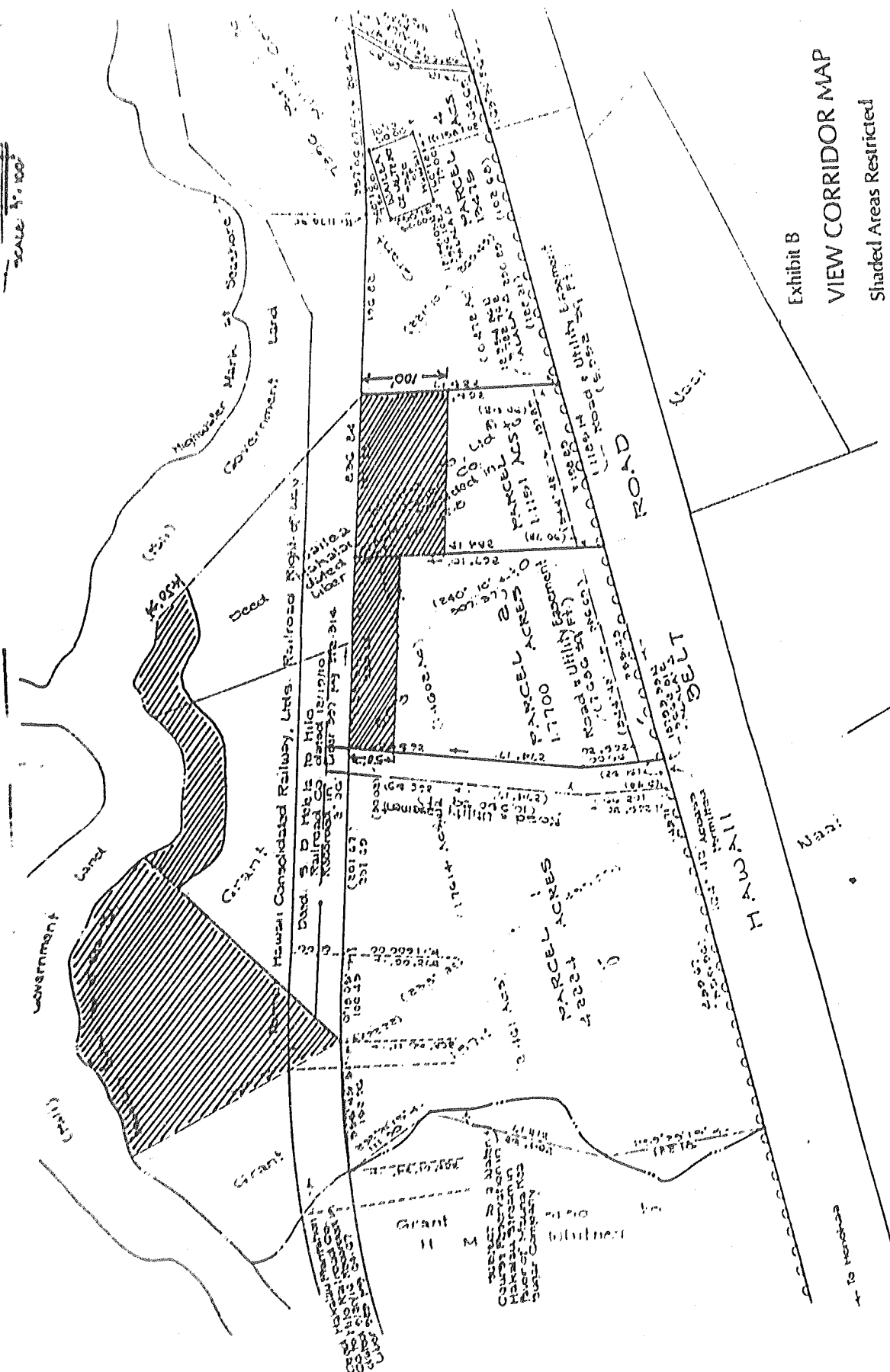


Exhibit B

## VIEW CORRIDOR MAP

Shaded Areas Restricted

OWNERS  
Mr. & Mrs. James W. McCully  
P.O. Box 311  
Mt. View, Hawaii 96771

EXHIBIT B