CADES SCHUTTE
A Limited Liability Law Partnership

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Attorneys for Petitioner
HONOIPU HIDEAWAY, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of

HONOIPU HIDEAWAY, LLC

For Boundary Interpretation of certain land consisting of approximately 17.5470 acres situated at 56-102 Old Coast Guard Road, Tax Map Key No. (3) 5-6-001-074, Kapaa-Upolu, North Kohala, County of Hawai'i, State of Hawai'i.

DOCKET NO. DR21-73

PETITION FOR DECLARATORY ORDER FOR BOUNDARY INTERPRETATION

VERIFICATION OF PETITION

EXHIBITS 1 – 26

CERTIFICATE OF SERVICE

TABLE OF CONTENTS

Page

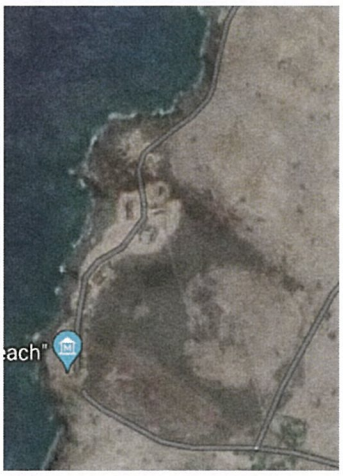
PETITION FOR DECLARATORY ORDER
FOR BOUNDARY INTERPRETATION

Honoipu Hideaway, LLC ("**Petitioner**"), a Hawai'i limited liability company, submits this Petition to the Land Use Commission of the State of Hawai'i (the "**Commission**") to determine the location of the State Land Use district boundary line pursuant to its authority under the Hawai'i Administrative Rules ("**HAR**") § 15-15-22. Specifically, Petitioner seeks an interpretation of the land use district boundary lines on certain lands consisting of approximately 17.5470 acres of Tax Map Key No. (3) 5-6-001-074, situated at Kapaa-Upolu, North Kohala, Island and County of Hawai'i ("**Petition Area**"), in the State Land Use Agricultural and Conservation District pursuant to HAR § 15-15-22(f).

I. INTRODUCTION

The Petition Area is a shoreline parcel with a road running through the property along the coastline. To the north, the road is identified as Upolu Point Road. The name changes to Old Coast Guard Road shortly before it crosses through the Petition Area (the "**Road**"). The area is shown below:

Google Maps Image of Relevant Area



Location of Petition Area

County of Hawai'i Real Property Tax Map

Exhibit 1 (Google Maps Image); Exhibit 2 (Excerpt of County of Hawai'i Real Property Tax Map). The current Conservation district boundary line bisects the Petition Area and places approximately 4.794 acres in the Conservation district. The remaining area is in the Agricultural district.

The Conservation district line has not been placed in the correct location. Following an apparent mapping error on the State Land Use District Boundaries Map H-3, dated 1974 ("**1974 LUC map**"), the boundary interpretation that Commission staff provided to Petitioner on October 19, 2020, was also incorrect.

The error is not due to any fault of the Commission staff. The source of the problem is an error in the map used by the Commission to draw the original State Land Use Conservation district lines. Because of this error, the usual application of HAR §§ 15-15-22(a)-(e) is ineffective to determine the location of the Conservation district boundary line. Accordingly, uncertainty regarding the correct location of the Conservation boundary line remains. For this reason, we ask the Commission to determine the location of the Conservation district line and, consistent with this Application and the intent of the drafters of the State Land Use Conservation district lines, to set the district line along the *mauka* edge of the Road.

II. PETITIONER AND PETITION AREA

A. Petitioner Information

Petitioner Honoipu Hideaway, LLC is a Hawai'i limited liability company whose mailing address is 1001 Bishop Street, Suite 2685A, Honolulu, Hawai'i 96813.

B. Correspondence and Communications

The law firm of Cades Schutte LLP has been appointed to represent Petitioner in accordance with HAR § 15-15-35(b).

Petitioner respectfully requests that all correspondence and communication regarding this Petition be addressed to and served upon, the undersigned counsel at:

CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN
MOLLY A. OLDS
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813
Telephone: (808) 521-9200

In connection with the filing of this Petition, Petitioner has authorized the undersigned counsel to act on its behalf with respect to this matter.

III. STATEMENT OF APPLICANT'S INTEREST

Petitioner owns the subject-property located in Kapaa-Upolu, North Kohala, Island and County of Hawai'i and consisting of approximately 17.5470 acres ("**Petition Area**"). The Petition Area is further identified by Tax Map Key No. (3) 5-6-001-074 and depicted below. Exhibit 3.

County of Hawai'i Real Property Tax Map

Parcel ID	560010740000	Situs/Physical Address	56-102 OLD COAST GUARD ROAD	Market Land Value	$514,200	Last 2 Sales Date	Price	Reason	Qual
Acreage	17.547	Mailing Address	HONOIPU HIDEAWAY LLC	Dedicated Use Value	$0	3/7/2018	$905000	ARMS LENGTH TRANSACTION	Q
Class	AGRICULTURAL; CONSERVATION		1001 BISHOP ST STE 2685A	Land Exemption	$0	3/5/2018	0	OTHER REASONS	U
			HONOLULU HI 96813 3404	Net Taxable Land Value	$514,200				
				Assessed Building Value	$0				
				Building Exemption	$0				
				Net Taxable Building Value	$0				
				Total Taxable Value	$510300				

IV. STATEMENT OF THE PETITIONER'S INTERPRETATION OF THE DISTRICT BOUNDARY LINE

As set out below, the proper location of the Conservation line is along the *mauka* edge of the Road, rather than through the *mauka* portion of the Petition Area.

V. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICANT'S POSITION

A. The Commission Has Jurisdiction.

Petitioner requests that the Commission exercise its authority to determine the location of the State Land Use Conservation district line that runs through the Petition Area. *See* HAR § 15-15-22(f). Under the Commission's Rules, "whenever subsections (a), (b), (c), (d), or (e) cannot resolve uncertainty concerning the location

of any district line, the commission, upon written application or upon its own motion, shall determine the location of those district lines." HAR § 15-15-22(f). Exhibit 4. The process set out in those subsections has failed to resolve the uncertainty concerning the location of the district boundary line. Accordingly, the Commission has jurisdiction to determine the district line.

B. Factual Background.

The Conservation district boundary line bisects the Petition Area. Approximately 4.794[1] acres of the parcel fall within the Conservation district, in the Resource subzone. The remaining 12.228 acres of the parcel are within the Agricultural district. *See* Exhibit 5 (Shoreline Survey Map, dated January 21, 2021); Exhibit 6 (Plan Showing Map of Lot 19-A).

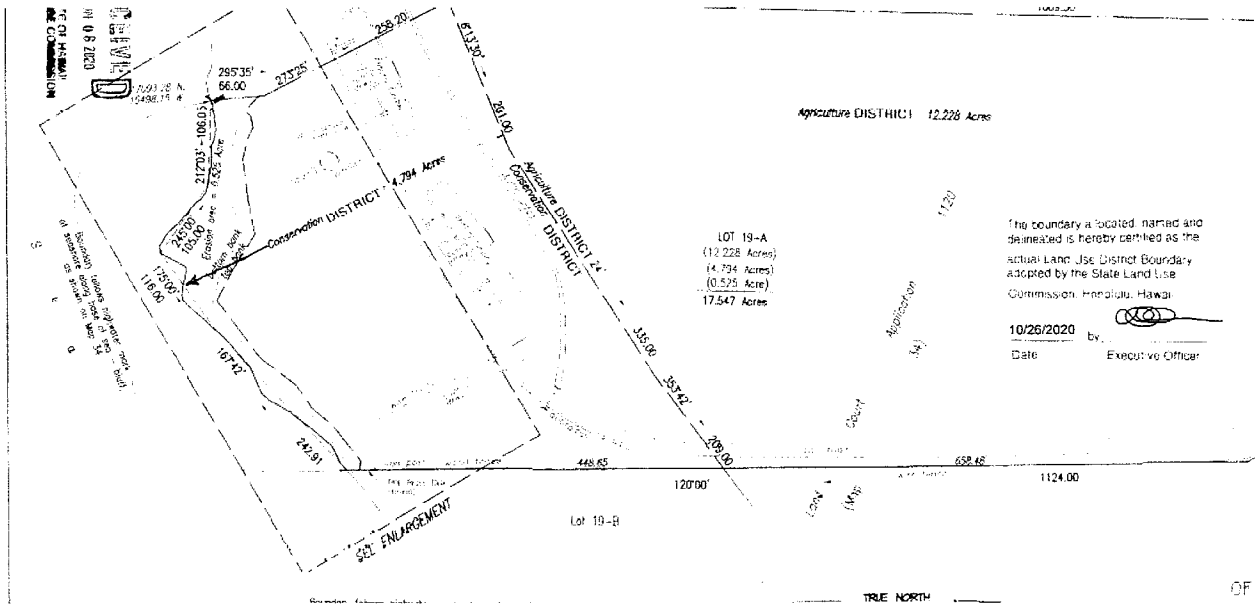
The Road runs through the property. *See* Exhibit 7 (GIS Map 2021).

Hawai'i SLUD Locator GIS Map 2021

[1] As shown on the Shoreline Survey, 0.525 acres of the Petition Area are in the erosion area and the Conservation District. Including this 0.525 acres, the total acreage of the Petition Area in the Conservation district is 5.319 acres. The total size of the Petition Area is 17.5470 acres. The Survey was completed by Andy R. Harada, a Licensed Professional Land Surveyor, and was certified on January 21, 2021.

To the north, the Conservation district boundary line follows the *mauka* edge of the Road, excepting areas of historical, recreational or other significance. The land *mauka* of the Road is in the Agricultural District, and the land *makai* of the Road is in the Conservation District.

The conservation boundary line within the Petition Area is not consistent with this pattern. The Petitioner sought a district boundary interpretation on January 3, 2020 (the "**Request**"). Exhibit 8. Relying on a Shoreline Survey completed in October 2019 ("**Shoreline Survey**")[2] and the 1974 map, the Commission staff concluded that the entire 4.794 acres (plus the 0.525 acres comprising the erosion area) are within the Conservation district. Exhibit 9 at 3.[3] Staff's interpretation is depicted below:



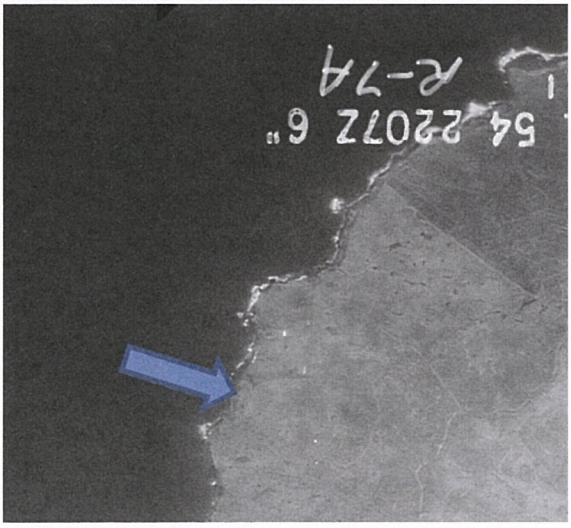
[2] This survey is substantively identical to the 2021 Survey. The 2019 Shoreline Survey is attached as Exhibit 26 for reference.

[3] The procedural history regarding the prior district boundary amendment request is discussed in greater detail in Section V.C.

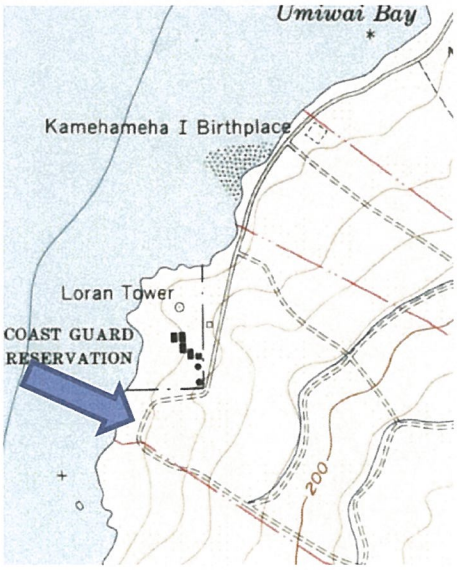
See id.

In conducting the survey of the Petition Area, the surveyor drew the Conservation district boundary line as it is shown on the 1974 LUC map. Commission staff followed the boundary line as it is shown on the 1974 LUC map and the survey. Because the surveyor and staff relied on the 1974 LUC map, the 1974 map essentially provided the sole source of information for the boundary interpretation. However, the Road, which has been in its current location since 1961, is incorrectly depicted on the 1974 LUC map.

Prior to 1961, there was a dirt road in the vicinity that did not hug the coastline or run through the Petition Area. *See* USGS Aerial Photo dated April 21, 1954, attached as Exhibit 10 (excerpt); Exhibit 11 (original). Rather, the dirt road rounded out toward the shoreline and turned in a southeastward direction, as shown below, at approximately a ninety degree angle shortly before the current boundary of the Petition Area. The location and curvature of the road as it existed prior to 1961 was correctly depicted on the 1957 USGS Map for Mahukona, attached as Exhibit 12.

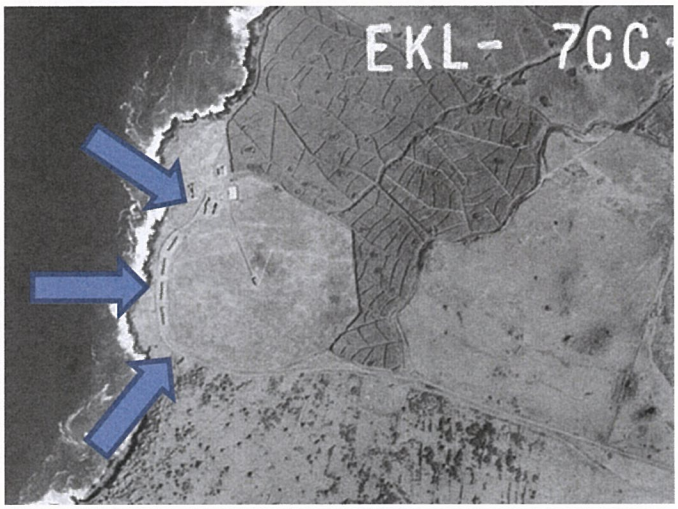


USGS Aerial Photo, April 21, 1954



1957 USGS Map Mahukona

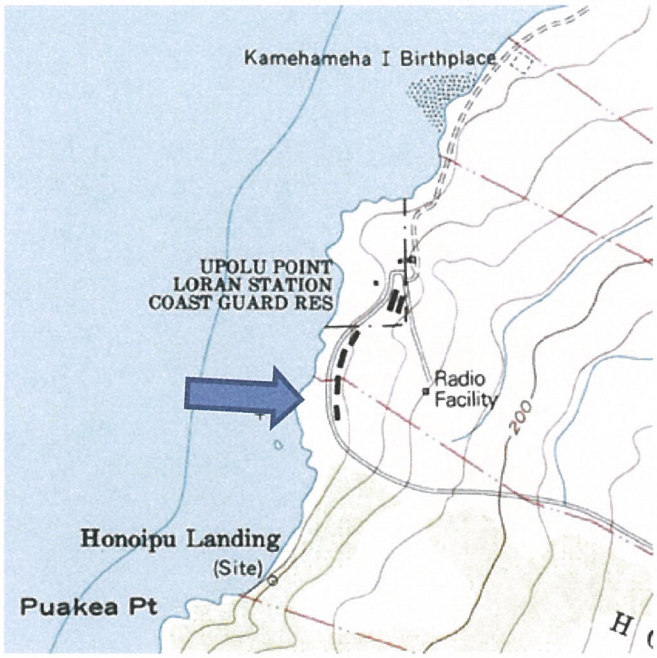
In 1961, the dirt road was reconstructed and paved to service the newly-built Loran Coast Guard Station. *See* U.S. Coast Guard, *Loran Station General Information Book*, at 1-1 to 1-2 (1969), Exhibit 13; *250 Kohalans Tour Coast Guard Facility At Upolu*, HAW. TRIB.-HERALD, Oct. 3, 1961, at 2, Exhibit 14. The change in direction and curvature of the Road as of 1961 are reflected on an USGS aerial photo dated January 18, 1965, attached as Exhibit 15 (excerpt); Exhibit 16 (original). The image is set out below:



USGS Aerial Photo, January 18, 1965

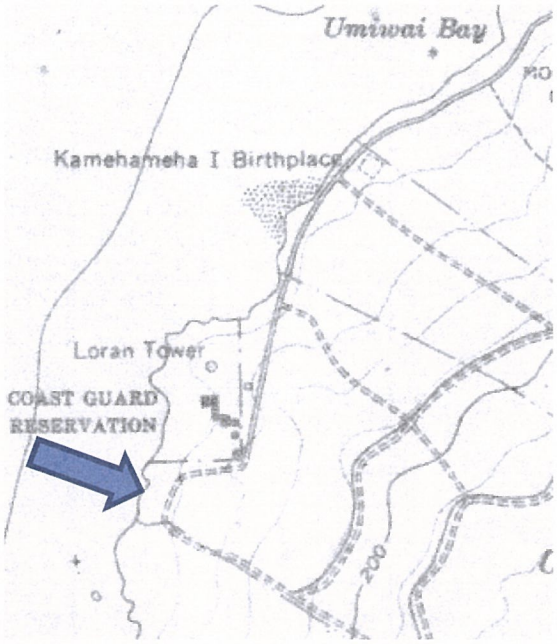
As the 1965 aerial shows, the reconstructed road hugged the shoreline and cut through the Petition Area.

The reconstructed road is the Road today. The 1982 USGS Map for Mahukona depicts the Road in the same location.



1982 USGS Map
Mahukona

Exhibit 17. Unfortunately, the correct location of the Road was **not** reflected on the LUC map dated 1964 ("**1964 LUC map**").[4]



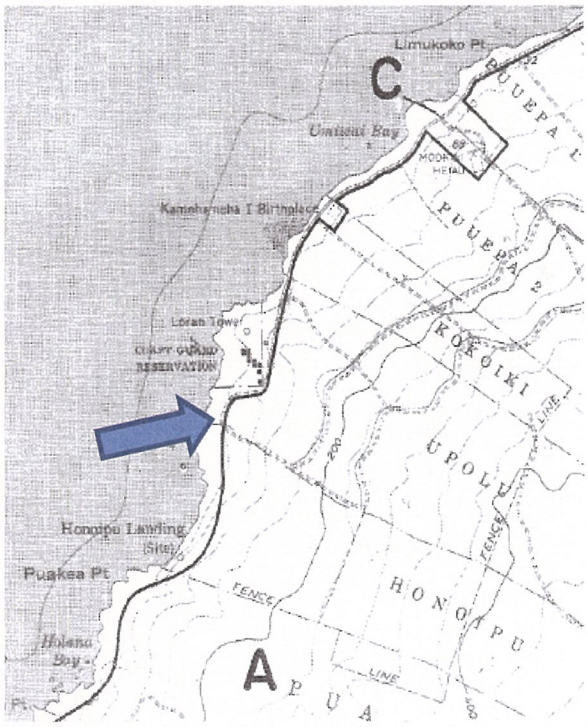
1964 LUC map

[4] The State Land Use Law was enacted in 1961. *See* 1961 Haw. Sess. Laws Act 187. Since 1964, the Board of Land and Natural Resources has adopted and administered land use regulations for the Conservation District pursuant to the State Land Use Law.

Exhibit 18 (1964 LUC map). Instead, the 1964 LUC map followed the 1957 USGS map. Accordingly, the 1964 LUC map shows the dirt road as it was mapped on the 1957 USGS Map for Mahukona.

While 1957 USGS map was accurate, the 1964 LUC map failed to correctly depict the Road as it existed at the time the map was drawn. An accurate rendering would have reflected the Road running along the coastline. *See* Exhibit 17 (1982 USGS Map of Mahukona).

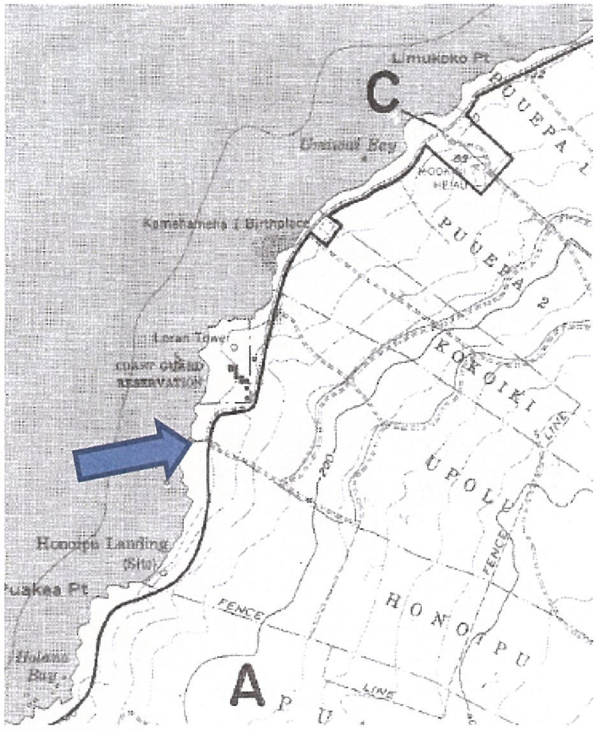
The 1964 LUC map does not include the Conservation district boundary. The Conservation boundary line first appears on the LUC map dated 1969 ("**1969 LUC map**"). The 1969 LUC map used the 1964 LUC map as the base.



1969 LUC map

See Exhibit 19 (1969 LUC map).

In turn, the 1974 LUC map used the 1969 LUC map as the base.



1974 LUC map

See Exhibit 20 (1974 LUC map).

In this way, the error on the 1964 LUC map was carried forward to the 1969 and 1974 LUC maps. All three LUC maps incorrectly depict the dirt road as it existed prior to 1961.

The error on the 1964 LUC map is significant because it impacts the location of the Conservation district boundary line on the 1969 LUC map, which in turn impacts the location of the Conservation district boundary on the 1974 LUC map. The 1974 LUC map, as amended, is the official map. *See* HAR § 15-15-17(b) ("The boundaries of land use districts are shown on the maps entitled 'Land Use District Boundaries, dated December 20, 1974,' as amended, maintained and under the custody of the commission.").

Drafters of the 1969 LUC map intended the Conservation boundary line to follow the *mauka* edge of any roadway in the area. Land *makai* of what they believed to be the location of the road was placed in the Conservation district. Land *mauka* of what they believed to be the location of the road was retained in the Agricultural district. If the Road had been drawn in the correct location on the 1964 LUC map, the district boundary line drawn on the 1969 and 1974 LUC maps would have followed the Road as well. The Conservation district boundary line would not have included the land *mauka* of the Road.

C. Procedural Background.

Petitioner submitted the Request on January 3, 2020. Exhibit 8. The Request explained that the location of the Conservation line—as it relates to the Petition Area—was drawn in error and should follow the Road.

On October 19, 2020, Commission staff concluded that all 5.319 acres of the Petition Area are within the Conservation district. In reaching this conclusion, staff relied on a copy of the Shoreline Survey, a survey of the Petition Area and the 1974 LUC map.[5] As explained in Section V.B above, because the Shoreline Survey and the survey of the Petition Area based the location of the Conservation district line

[5] The letter states, "[The] SLU Agricultural / Conservation District designation for the subject parcel was established during the original 1964 Boundary Review, effective dated August 23, 1964." *See* Exhibit D. Based on the 1964 LUC map, it does not appear that the Conservation district boundary had been set. Rather, the Conservation line first appears on the 1969 LUC map. In any event, it is immaterial whether the Conservation district boundary line was first mapped in 1964 or 1969, because all of the LUC maps—1964, 1969 and 1974 put the Road in the wrong location.

on the 1974 LUC map, the 1974 LUC map provided the sole information for the determination.

D. The Uncertainty Regarding the Location of the Conservation District Line Cannot Be Resolved Pursuant to HAR § 15-15-22 (a), (b), (c), (d) or (e).

Application of the provisions of HAR § 15-15-22 subsections (a), (b), (c), (d) and (e) to the Petition Area does not resolve the uncertainty regarding the location of the Conservation district boundary line. Each subsection is considered in turn.

First, subsection (a) does not resolve the uncertainty. Subsection (a) provides:

> (a) Except as otherwise provided in this chapter:
>
> (1) A district name or letter appearing on the land use district map applies throughout the whole area bounded by the district boundary lines;
>
> (2) Land having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps, shall be included in the conservation district;
>
> (3) All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps; and
>
> (4) All water areas within the State are considered to be within a district and controlled by the applicable district rules.

Mapping the boundary between the areas denoted as "C" and "A" on the 1969 and 1974 LUC maps does not resolve the uncertainty, because the 1969 and 1974 LUC maps did not depict the Road as it existed at those times. HAR § 15-15-22(a)(1). Moreover, the Petition Area is not below the elevation of the shoreline, is not a tide pool, does not consist of accreted land, is not an offshore island of the State and is not submerged in water. *See* HAR §§ 15-15-22(a)(2) to (4).

Second, Petitioner submitted a request of interpretation of the district boundary lines pursuant to subsections (b) and (c). *See* HAR §§ 15-15-22(b) to (c). Staff's review and determination of the boundary lines did not resolve the uncertainty, because staff (through no fault or failing) felt bound to rely on materials that do not accurately depict the location of the Road through the Petition Area.

Third, subsection (d) provides that the "executive officer may use all applicable commission records in determining district boundaries." HAR § 15-15-22(d). All of the Commission maps depict the Road in the incorrect location. *See* 1964 LUC map, Exhibit 18; 1969 LUC map, Exhibit 19; 1974 LUC map, Exhibit 20; *see also* Section V.B. Accordingly, consideration of these records, without more, does not resolve the uncertainty regarding the location of the Conservation district boundary line.

Finally, application of the provisions of subsection (e), without more, cannot resolve the uncertainty regarding the location of the Conservation district boundary line. Subsection (e) provides:

> (e) The following shall apply whenever uncertainty exists with respect to the boundaries of the various districts:
>
> (1) Whenever a district line falls within or abuts a street, alley, canal, navigable or non-navigable stream or river, it may be deemed to be in the midpoint of the foregoing. **If the actual location of the street, alley, canal, navigable or non-navigable stream or river varies slightly from the location as shown on the district map, then the actual location shall be controlling;**
>
> (2) Whenever a district line is shown as being located within a specific distance from a street line or other fixed physical feature, or from an ownership line, this distance shall be controlling; and

(3) Unless otherwise indicated, the district lines shall be determined by the use of the scale contained on the map.

HAR § 15-15-22(e) (emphasis added.) Because the location of the Road was not correctly depicted on 1964 LUC map, subsection (e) does not resolve the uncertainty regarding the location of the Conservation district boundary.

For these reasons, subsections of HAR § 15-15-22(a) through (e) do not resolve the uncertainty surrounding the actual location of the Conservation district line within the Petition Area. Accordingly, the Commission "shall determine the location of those district lines." HAR § 15-15-22(f).

E. The Conservation District Boundary Within the Petition Area Should Be Located Along the Road.

In accordance with the intent of the drafters of the 1969 LUC map and principles to guide the demarcation of Conservation district boundaries, the Conservation district boundary within the Petition Area should be located along the *mauka* edge of the Road. The location of the Road, documented intent of the drafters, historical uses in the area and compliance with the intent of the Conservation district lead to this conclusion.

First, the Road existed in its current location before the Conservation district was created in 1964 and first mapped in 1969. *See* 1964 LUC map, Exhibit 18; 1969 LUC map, Exhibit 19; 1974 LUC map, Exhibit 20. Thus, the Road was an existing physical boundary.

Second, the Conservation district boundary depicted on the 1969 and 1974 LUC maps line follows *mauka* edge of the depicted roadway. *See* 1969 LUC map, Exhibit 19; 1974 LUC map, Exhibit 20. The drafters intended to follow the existing

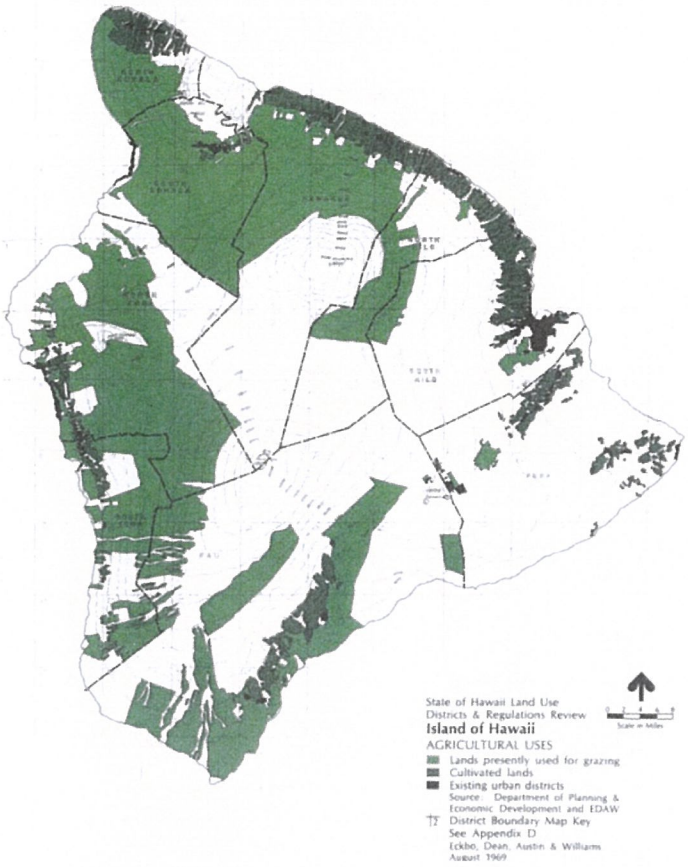
physical boundary. In other words, the drafters intended for the Road to constitute the boundary line separating the Agricultural and Conservation districts. The problem is that the roadway was not depicted in the correct location on those maps.

Third, locating the Conservation district boundary along the *mauka* edge of the Road is consistent with the State of Hawai'i Land Use Districts and Regulations Review prepared for the Commission in 1969. *See* Eckbo, Dean, Austin & Williams, State of Hawaii Land Use Regulations Review 86 (1969) ("**1969 Review**"), relevant excerpts of which are attached as Exhibit 21. The "most extensive phase of th[is] study" was the "review of district boundaries." *Id.* at 11. In explaining how district boundaries were initially drawn and making further recommendations, the authors noted the following:

> Four major **conditions have been recognized** and recommendations based upon these conditions have been made for the new Conservation District boundaries.
>
> 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.**

Id. at 86 (emphases added).

Here, a map of Hawai'i Island in the 1969 Review clearly shows that the area encompassing the Petition Area was "presently used for grazing." *Id.* at 43.



Map of Agricultural Uses on Hawai'i Island

Consistent with the principles expressed in the 1969 Review, the Road existed at the edge of land used for grazing, which is a recognized agricultural use. Moreover, the Road was, and remains, within a reasonable proximity to the shoreline. There is no doubt that if Road had been properly mapped at the time the district boundary was drawn in 1964 or reviewed in 1969, the Conservation district boundary line would have followed the *mauka* edge of the Road.

Finally, locating the Conservation district boundary line along the Road—except in areas where the land is of historical, recreational or other significance—

comports with the purpose and standards of the Conservation district. *See* HRS § 205-2(e). Further, HAR § 15-15-22(e) provides that where "**the actual location of the street, . . . varies slightly from the location as shown on the district map, then the actual location shall be controlling.**" (Emphasis added.); *cf. Coppola v. Zoning Bd. of Appeals of City of Derby*, 23 Conn. App. 636, 642, 583 A.2d 650, 653 (1990) (reversing trial court's dismissal of appeal from zoning board where statute provided property is not intended to be divided by zoning boundaries and the zoning map erroneously showed district boundary line dividing property), Exhibit 22. The actual location of the Road should control.

For these reasons, the Conservation district boundary through the petition should be located at the *mauka* edge of the Road. The Commission has the power to reach this conclusion under HAR § 15-15-22(f) or through the correction of the plain error that led to the scrivener's mistake on the 1964 LUC map that was carried forward to the 1968 and 1974 LUC maps. *See Jenkins v. Town of Pepperell*, 18 Mass. App. Ct. 265, 269, 465 N.E.2d 268, 271 (1984) ("A land owner is thus bound by [the zoning map] map unless, carrying the burden of proof, he can demonstrate that a different boundary was intended.") (explaining landowner did not demonstrate at trial that a different boundary line was intended, all that was proven was that the line was subject to more than one interpretation), Exhibit 23. Generally, the reasoning is that the map adopted by the local legislative or quasi-legislative body is the "official map" regardless of whether errors exist. *See S & R Dev. Estates, LLC v. Feiner*, 112 A.D.3d 945, 947, 977 N.Y.S.2d 377, 379 (N.Y. App.

Div. 2013) (holding zoning board's determination that property was in R–20 was arbitrary and capricious where official map showed property in CA–1 district and town failed to produce any map or other evidence related to alleged scrivener's error), Exhibit 24. Where the scrivener's error appears on documents that have not been officially adopted, such errors may be disregarded. *See Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC*, 192 N.C. App. 391, 397, 665 S.E.2d 561, 565 (2008) (concluding scrivener's error in board minutes did not contradict the manifest weight of the evidence that the district had been rezoned by the board of commissioners), Exhibit 25.

VI. NAMES OF OTHER POTENTIAL PARTIES

The following are identified as potential parties. These entities will be served by Petitioner at the time of filing this Petition:

- County of Hawai'i and the County of Hawai'i Planning Department
- The State of Hawai'i and the State of Hawai'i Office of Planning

VII. WHETHER THE PETITION FOR DECLARATORY RULING RELATES TO ANY DOCKET FOR DISTRICT BOUNDARY AMENDMENT OR SPECIAL PERMIT

The Petition does not relate to any known Commission docket.

VIII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Commission grant the Petition and determine the location of the Conservation district line as running along the *mauka* side of the Road, as described and requested herein.

DATED: Honolulu, Hawai'i, June 25, 2021.

CADES SCHUTTE
A Limited Liability Law Partnership

CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN
MOLLY A. OLDS
Attorneys for Petitioner
HONOIPU HIDEAWAY, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of HONOIPU HIDEAWAY, LLC For Boundary Interpretation of certain land consisting of approximately 17.5470 acres situated at 56-102 Old Coast Guard Road, Tax Map Key No. (3) 5-6-001-074, Kapaa-Upolu, North Kohala, County of Hawai'i, State of Hawai'i.	DOCKET NO. DR21-73 **VERIFICATION OF PETITION**

VERIFICATION OF PETITION

Calvert G. Chipchase, being first duly sworn on oath, deposes and says that I am an attorney for Petitioner Honoipu Hideaway, LLC, and as such am authorized to make this verification on behalf of Petitioner. I have rate the foregoing Petition and accompanying Memorandum and have full knowledge of the contents thereof, and the same are true to the best of my knowledge and belief.

DATED: Honolulu, Hawai'i, June 25, 2021.

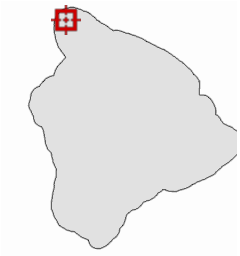
CALVERT G. CHIPCHASE

EXHIBIT 1

EXHIBIT 2

COUNTY OF HAWAI'I
Real Property Tax Office

Overview



Legend

☐ Parcels

Parcel ID	560010740000	**Situs/Physical Address**	56-102 OLD COAST GUARD ROAD	**Market Land Value**	$514,200	**Last 2 Sales**			
Acreage	17.547	**Mailing Address**	HONOIPU HIDEAWAY LLC 1001 BISHOP ST STE 2685A HONOLULU HI 96813 3404	**Dedicated Use Value**	$0	**Date**	**Price**	**Reason**	**Qual**
Class	AGRICULTURAL; CONSERVATION			**Land Exemption**	$0	3/7/2018	$905000	ARMS LENGTH TRANSACTION	Q
				Net Taxable Land Value	$514,200	3/5/2018	0	OTHER REASONS	U
				Assessed Building Value	$0				
				Building Exemption	$0				
				Net Taxable Building Value	$0				
				Total Taxable Value	$510300				

Brief Tax Description LOT 19-A 17.547 AC MAP 34 LCAPP 1120 TOG/NON-EXCL ESMT FOR ACCESS & UTILITY PURP
(Note: Not to be used on legal documents)

*Hawaii County makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. The assessment information is from the last certified taxroll. All data is subject to change before the next certified taxroll. The 'parcels' layer is intended to be used for visual purposes only and should not be used for boundary interpretations or other spatial analysis beyond the limitations of the data. The 'parcels' data layer does not contain metes and bounds described accuracy therefore, please use caution when viewing this data. Overlaying this layer with other data layers that may not have used this layer as a base may not produce precise results. GPS and imagery data will not overlay exactly.

EXHIBIT 3

Date created: 6/14/2021
Last Data Uploaded: 6/14/2021 7:16:33 AM

Developed by Schneider GEOSPATIAL

EXHIBIT 3

West's Hawaii Administrative Code
Title 15. Department of Business, Economic Development, and Tourism
Subtitle 3. State Land Use Commission
Chapter 15. Land Use Commission Rules (Refs & Annos)
Subchapter 2. Establishment of State Land Use Districts

Haw. Admin. Rules (HAR) § 15-15-22

§ 15-15-22. Interpretation of district boundaries.

Currentness

(a) Except as otherwise provided in this chapter:

(1) A district name or letter appearing on the land use district map applies throughout the whole area bounded by the district boundary lines;

(2) Land having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps, shall be included in the conservation district;

(3) All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps; and

(4) All water areas within the State are considered to be within a district and controlled by the applicable district rules.

(b) All requests for boundary interpretations shall be in writing and include the tax map key identification of the property and a print of a map of the property. All requests for boundary interpretations involving shoreline properties shall be accompanied by a survey map showing the locations of the shoreline as provided for in section 205A-42, HRS. Any erosion or accretion through natural processes shall be reflected on the map. Further, any shoreline structure, piers, and areas of man-made fill which were constructed or completed since the date of adoption of the state land use district boundaries existing as of the date of the request for boundary interpretation shall be reflected on the map.

(c) The executive officer may request the following information:

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

(2) Additional information such as, but not limited to, tax map key maps, topographic maps, aerial photographs, certified shoreline surveys, and subdivision maps relating to the boundary interpretation.

EXHIBIT 4

The executive officer may employ, or require that the party requesting the boundary interpretation employ, at its sole expense, a registered professional land surveyor to prepare a map for interpretation.

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

(e) The following shall apply whenever uncertainty exists with respect to the boundaries of the various districts:

(1) Whenever a district line falls within or abuts a street, alley, canal, navigable or non-navigable stream or river, it may be deemed to be in the midpoint of the foregoing. If the actual location of the street, alley, canal, navigable or non-navigable stream or river varies slightly from the location as shown on the district map, then the actual location shall be controlling;

(2) Whenever a district line is shown as being located within a specific distance from a street line or other fixed physical feature, or from an ownership line, this distance shall be controlling; and

(3) Unless otherwise indicated, the district lines shall be determined by the use of the scale contained on the map.

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

Credits

Adopted Oct. 27, 1986; Amended and Compiled Aug. 16, 1997; Compiled May 8, 2000. Amended and Compiled Nov. 2, 2013. Compiled Oct. 18, 2019.

(Auth: HRS §§ 205-1, 205-7) (Imp: HRS § 205-1)

Current through register dated December 2020. Some sections may be more current. See credits for details.

Haw. Admin. Rules (HAR) § 15-15-22, HI ADC § 15-15-22

End of Document

Grant 5089 to Trustees under the will and of the Estate of Bernice Pauahi Bishop, deceased

SEE ENLARGEMENT

1/2" pipe (found)

301°53'

1089.50

303°48'

94.60

1/2" pipe (found)

1/2" pipe (found)

143.50

101°50'

388.70

R. P. 4922, L. C. Aw. 10,154 to Makahalalu

19°50'

TRUE NORTH

Scale: 1 in. = 100 ft.

258.20

295°35'

66.00

273°25'

1/2" pipe (found)

existing building

conc. drwy

conc. s/w

bbq

pavilion

212°03'

106.05

Erosion area = 0.525 acre

245°00'

105.00

bottom bank

top bank

conc. ditch

existing building

conc. drwy

Conservation line

LOT 19-A

17.547 Acres
(17.022 Acres)

175°00'

116.00

167°42'

242.91

wire fence

conc. drwy

guard rail

POL Brass Disk (found)

sign post

wood fence

a.c. road

wire fence

120°00'

1124.00

1/2" pipe (found)

295°29'

95.22

1/2" pipe (found)

250.79

90°00'

Lot A

Lot 19-B

(Map 34)

S e a

Boundary follows highwater mark at seashore along base of sea – bluff, as shown on Map 34

The shoreline as delineated in red is hereby certified as the shoreline as of

JAN 21 2021

Chairperson, Board of Land and Natural Resources

PHOTO INDEX MAP
SHORELINE SURVEY MAP
OF LOT 19-A AS SHOWN ON MAP 34
OF LAND COURT APPLICATION 1120
Situated at Honoipu, North Kohala,
Island of Hawaii, Hawaii
T.M.K. : (3) 5-6-01: 074

Boundary follows highwater mark at seashore along base of sea – bluff, as shown on Map 34

TRUE NORTH

242.91

175°00'

116.00

245°00'

105.00

167°42'

bottom bank

top bank

Shoreline follows top of bank as surveyed on November 2, 2020

Erosion area = 0.525 acre

S e a

212°03'

106.05

173°30' → 91.20

237°25'
43.80

157°40' → 55.10

176°00'
33.60

161°00'
35.60

172°10' → 56.50

(9.92)

16.87

215°00'
11.43

242°40' → 52.20

199°00' → 48.00

203°10' → 49.00

224°48' 29.20

240°00' 12.50

199°40' 14.80

158°20' 10.20

253°26' 25.56

6.14

295°35'

59.86

66.00

1)X2" pipe (found)

273°25'

258.20

Shoreline follows top of bank as certified October 3, 2019

LOT 19-A

POL Brass Disk (found)

120°00'

1124.00

1107.13

wood fence

sign

wire fence

conc. s/w

bbq

ENLARGEMENT

Scale: 1 in. = 50 ft.

The shoreline as delineated in red is hereby certified as the shoreline as of

JAN 21 2021

Chairperson, Board of Land and Natural Resources

Owner: Honoipu Hideaway LLC
Address: 1001 S. Bishop Street, Suite 2685A
Honolulu, Hawaii 96813

Site Address: 56-102 OLD COAST GUARD ROAD
Kapaa-Upolu, Hawaii

1. *Shoreline survey is for setback purposes*
2. *① → denotes photo number and direction*

ANDY R. HARADA
LICENSED PROFESSIONAL LAND SURVEYOR
No. 5963
HAWAII, U.S.A.

This work was prepared by me or under my direct supervision.

Andy R. Harada Exiprre 4/30/22
Licensed Professional Land Surveyor
Certificate Number 5963

Honolulu, Hawaii
16-40

ENGINEERS SURVEYORS HAWAII, INC.
CIVIL ENGINEERS ~ LAND SURVEYORS ~ PLANNERS

EXHIBIT 5

15 X 21

1320 North School St.
November 6, 2020

Grant 5089 to Trustees under the will and of the Estate of Bernice Pauahi Bishop, deceased

301°53' 1089.50

303°48' 94.60

16421.31 N. 14177.16 W.

TRUE NORTH

Scale: 1 in. = 100 ft.

101°50' 143.50

R. P. 4922, L. C. Aw. 10,154 to Makahalalu

19°50' 388.70

295°29' 95.22

Lot A

250.79

90°00'

Agriculture Zone Area = 12.228 Acres

Conservation Zone Area = 4.794 Acres

Erosion area = 0.525 Acre

LOT 19-A
(12.228 Acres)
(4.794 Acres)
(0.525 Acre)
17.547 Acres

1120

Application

34)

Court

Land (Map

17093.28 N. 15498.15 W.

295°35' 66.00

273°25' 258.20

8°13'30" 201.00

358°24' 335.00

353°42' 209.00

212°03' 106.05

245°00' 105.00

175°00' 116.00

167°42' 242.91

448.65

658.48

1124.00

120°00'

a.c. road

wire fence

sign post

wood fence

guard rail

conc. drwy

existing building

conc. s/w

bbq

pavilion

conc. ditch

bottom bank

top bank

POL Brass Disk (found)

Boundary follows highwater mark at seashore along base of sea – bluff, as shown on Map 34

S e a

SEE ENLARGEMENT

Lot 19-B

Boundary follows highwater mark at seashore along base of sea – bluff, as shown on Map 34

TRUE NORTH

242.91 167°42'

175°00' 116.00

245°00' 105.00

212°03' 106.05

bottom bank

top bank

Erosion area = 0.525 acre

Shoreline follows top of bank as surveyed on November 17, 2016

173°30' 91.20

237°25' 43.80

242°40' 52.20

199°00' 48.00

203°10' 49.00

224°48' 29.20

240°00' 12.50

199°40' 14.80

158°20' 10.20

253°26' 25.56

295°35' 59.86

66.00

6.14

1/2" pipe (found)

273°25' 258.20

(9.92)

16.87

172°10' 56.50

161°00' 35.60

176°00' 33.60

157°40' 55.10

215°00' 11.43

1124.00

448.65

120°00'

POL Brass Disk (found)

wood fence

sign

wire fence

LOT 19-A

bbq

conc. s/w

S e a

ENLARGEMENT

Scale: 1 in. = 50 ft.

PLAN SHOWING MAP
OF LOT 19-A, AS SHOWN ON MAP 34, OF LAND COURT APPLICATION 1120

Situated at Honoipu, North Kohala, Island of Hawaii, Hawaii

T.M.K. : (3) 5-6-01: 074

Owner: Honoipu Hideaway LLC
Address: 1001 S. Bishop Street, Suite 2685A
Honolulu, Hawaii 96813

NOTES:

1. Azimuths and coordinates referred to Government Survey Triangulation Station "PUU O NALE"
2. Shoreline survey is for setback purposes

MILES S. HORIE
LICENSED PROFESSIONAL LAND SURVEYOR
No. 10007
HAWAII, U.S.A.

This work was prepared by me or under my direct supervision.

Miles S. Horie Exiprre 4/30/22
Licensed Professional Land Surveyor
Certificate Number 10007

Honolulu, Hawaii
18-60

ENGINEERS SURVEYORS HAWAII, INC.
CIVIL ENGINEERS ~ LAND SURVEYORS ~ PLANNERS

EXHIBIT 6

1320 North School St.
June 3, 2020


Kohala
Historical Sites
St Monument
Kohala
Histsites S M
Kamehameha I
Upolu Point
Coast Guard
Reserve
Honoipu
Landing
Coast Guard Rd

EXHIBIT 7

Jan 3, 2020

RE: Boundary Interpretation Request for *TMK: 3-5-6-001-074*-0000

Dear Land Use Commissioners,

This letter is to request a boundary interpretation for my shoreline parcel located on the Island of Hawaii in the district of North Kohala at Honoipu / Upolu Point. The TMK for the parcel in question is 3-5-6-001-074-0000. Specifically, I am requesting a boundary interpretation of the conservation to agriculture boundary on this parcel.

The 1964 and 1974 LUC map appears to show the conservation boundary of this parcel as following along the roadway depicted in the maps for both decades. In reviewing the conservation boundaries of other nearby parcels to the north beyond the coast guard base such as TMKs 3-5-5-005-004, 3-5-5-005-017, 3-5-5-005-009, and 3-5-5-006-004 the conservation boundary also appears to follow the same shoreline roadway in those parcels as well.

However, in reviewing the LUC maps, USGS maps, and historical aerial photographs, it appears there are a number of discrepancies between the original Dec 20, 1964 LUC boundary map and its road aligned conservation boundary and the actual road alignment that was present in 1964. The 1974 LUC map did not appear to update/resolve this discrepancy.

I have uploaded attachments as follows:

1) **2019 certified shoreline survey and site survey** map from Engineers Surveyors Hawaii, Inc depicting the entire TMK
2) **USGS Aerial photo dated Jan 18, 1965** showing the current USCG station buildings and current roadway alignment in front of those buildings that are still visible in the current 2019 shoreline survey noted above
    a) Retrieved from the University of Hawaii archives at http://magis.manoa.hawaii.edu/remotesensing/GeoserverFiles/ShpFiles/Hawaii/058/jpegs/5671.jpg
    b) Note that this photo was taken approximately 28 days after the original LUC map was certified on Dec 20, 1964.
3) **USGS Aerial Photo Survey dated April 21, 1954** showing the previous / original USCG base that was 20 acres and matches the location and road based conservation zone boundaries depicted on the 1964 LUC boundary map.
    a) Retrieved from the University of Hawaii archives at http://magis.manoa.hawaii.edu/remotesensing/GeoserverFiles/ShpFiles/Hawaii/017/jpegs/1936
4) **Zoom excerpt of LUC map for H3-Mahukona from Dec 20, 1974**
    a) The only one available online right now

EXHIBIT 8

5) **1957 USGS quad for Mahukona**, HI showing the same boundaries of the old coast guard base as depicted on the 1964 and 1974 LUC maps - both appear to use the 1957 USGS quad as their foundational map.
6) **1982 USGS quad** for Mahukona excerpt showing the base that was constructed in 1961
7) **USCG Upolu Point Station Information NARA documentation** supporting that the USCG Upolu Point base boundaries were enlarged from 20 acres to 100 acres and all buildings and roads were demolished in 1960. Subsequently a new coast guard base was constructed with new buildings and roads with all construction completed in June 1961 which is approximately 4.5 years before the LUC boundary map was certified.
    a) Originally retrieved from the US National Archives
8) **GIS image of conservation boundaries** along shoreline road for all nearby northern ocean parcels

I am requesting the boundary interpretation to clarify that the existing boundary is along the actual roadway that had existed since 1961 and is as depicted in the shoreline survey. It seems likely that the person performing the LUC mapping at that time did not visit and perform a site survey of this very remote location that was also a secret military base at the time to identify that the USGS 1957 base map was inaccurate in December 1964.

Mahalo for your consideration,
Nathan Eggen

Managing Member, Honoipu Hideaway LLC the registered owner of TMK 3-5-6-001-074

DAVID Y. IGE
Governor

MIKE MCCARTNEY
Director

DANIEL E. ORODENKER
Executive Officer

LAND USE COMMISSION
Department of Business, Economic Development & Tourism
State of Hawai`i

October 27, 2019

Mr. Nathan Eggen
206-390-9313
Email: Nathan Eggen <neggen@gmail.com>

Subject: State of Hawai`i Land Use District Boundary Interpretation No. 01-20, Per Tax Map Key: 5-6-001: 074, 56-102 Old Coast Guard Road, Kapaa - Upolu, North Kohala, Hawai`i

Dear Mr. Eggen,

Mahalo for your patience in awaiting a response from our office.

Pursuant to your request email dated January 03, 2020, and the submittal of your survey map dated June 08, 2020, requesting a boundary interpretation for the subject parcel we have determined the subject parcel is within the State Land Use (SLU) Agricultural and Conservation District.

Our determination is based on the commission's records currently on file at our office, the survey map and Shoreline Survey Map, dated October 03, 2019, you provided and especially the SLU District Boundaries Map H - 3, Mahukona Quadrangle. It is our understanding the SLU Agricultural / Conservation District designation for the subject parcel was established during the original 1964 Boundary Review, effective dated August 23, 1964.

Your survey map and the written description of the subject parcel contains a total of approximately 17.547 acres. A portion of the subject parcel as depicted on the survey map containing approximately 12.228 acres is within the SLU Agricultural District. The remainder portions of the subject parcel as depicted on the survey map which contains approximately 4.794 acres and approximately 0.525 acres totals approximately 5.319 acres is within the SLU Conservation District.

EXHIBIT 9

We enclosed a copy of your survey map entitled, "Shoreline Survey Map of Lot 19-A as Shown on Map 34 of Land Court Application 1120", with the certification of the SLU District Boundaries for your reference.

Should you require clarification or further assistance, please feel free to call Fred Talon of my staff at (808) 587-3822.

Sincerely,

Daniel Orodenker
Executive Officer

C: Samuel J. Lemmo, Administrator, Office of Conservation and Coastal Lands, DLNR (w/enclosure)
Micheal Yee, Planning Director, County of Hawaii Planning Department (w/enclosure)
Bethany Morrison, County of Hawaii Planning Department
Mary Aken, Tax Maps & Records Supervisor, County of Hawaii Planning Department (w/enclosure)
Gilbert Bailado, GIS Analyst, County of Hawaii Planning Department (w/enclosure)

RECEIVED
JUN 06 2020
STATE OF HAWAII
LAND USE COMMISSION

Grant 5089 to Trustees under the will and of the Estate of Bernice Pauahi Bishop, deceased

301°53' 1089.50

303°48' 94.60

16421.31 N.
14177.16 W.

TRUE NORTH
Scale: 1 in. = 100 ft.

101°50' 143.50

R. P. 4922, L. C. Aw. 10,154 to Makanalulu

19°50'

388.70

295°29' 95.22

250.79

Lot A

90°00'

Agriculture DISTRICT : 12.228 Acres

17093.28 N.
15498.15 W.

295°35' 66.00

273°25' 258.20

81°13'30" 201.00

212°03' 106.05

Erosion area = 0.525 Acre

245°00' 105.00

bottom bank
top bank

Conservation DISTRICT : 4.794 Acres

Agriculture DISTRICT 24'
Conservation DISTRICT
conservation

LOT 19–A
(12.228 Acres)
(4.794 Acres)
(0.525 Acre)
17.547 Acres

1120

Application
34)

The boundary a located, named and delineated is hereby certified as the actual Land Use District Boundary adopted by the State Land Use Commission, Honolulu, Hawaii.

10/26/2020 by _____
Date Executive Officer

existing building
conc. drwy
conc. s/w
bbq
pavilion
existing building
conc. drwy

Boundary follows highwater mark at seashore along base of sea – bluff, as shown on Map 34

S e a

175°00' 116.00

167°42'

242.91

wire fence
conc. drwy
guard rail

353°42' 335.00

209.00

a.c. road

Court

448.65

sign post
wood fence
POL Brass Disk (found)

120°00'

658.48

wire fence

1124.00

Land (Map

SEE ENLARGEMENT

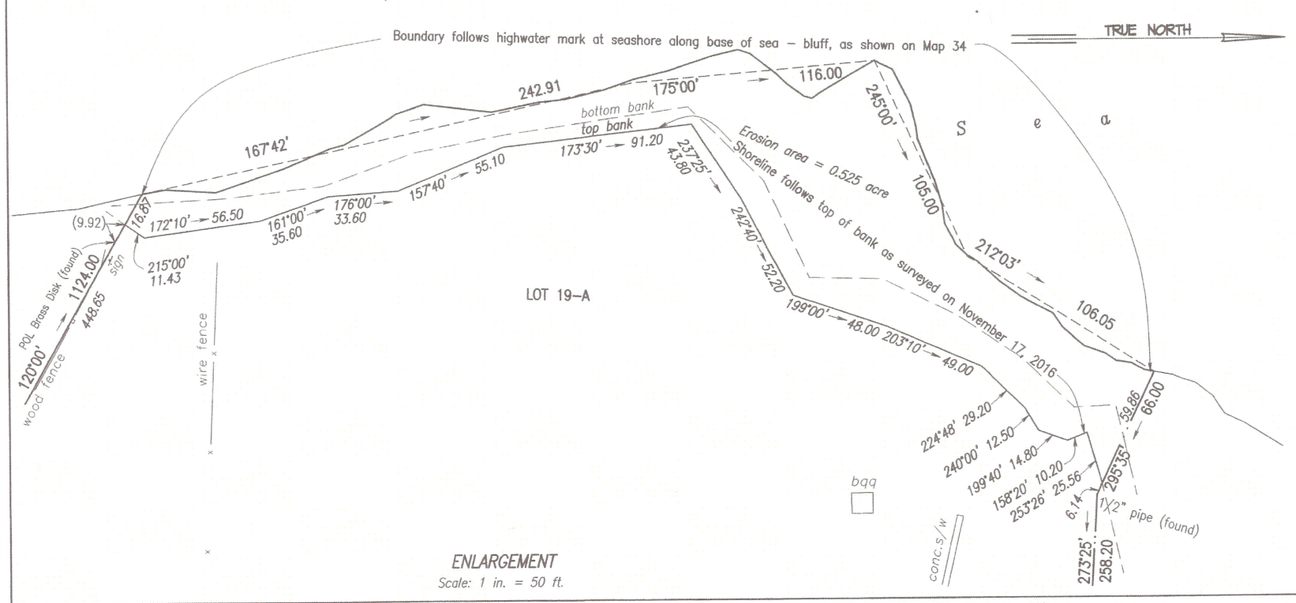
Lot 19–B

BOUNDARY INTERPRETATION NO. 01–20

PLAN SHOWING MAP
OF LOT 19–A, AS SHOWN ON MAP 34,
OF LAND COURT APPLICATION 1120
Situated at Honoipu, North Kohala,
Island of Hawaii, Hawaii

T.M.K. : (3) 5–6–01: 074

Owner: Honoipu Hideaway LLC
Address: 1001 S. Bishop Street, Suite 2685A
Honolulu, Hawaii 96813



ENLARGEMENT
Scale: 1 in. = 50 ft.

NOTES:

1. Azimuths and coordinates referred to Government Survey Triangulation Station "PUU O NALE"
2. Shoreline survey is for setback purposes

MILES S. HORIE
LICENSED PROFESSIONAL LAND SURVEYOR
No. 10007
HAWAII, U.S.A.

This work was prepared by me or under my direct supervision.

Miles S. Horie Exprre 4/30/22
Licensed Professional Land Surveyor
Certificate Number 10007

Honolulu, Hawaii
18–60

ENGINEERS SURVEYORS HAWAII, INC.
CIVIL ENGINEERS ~ LAND SURVEYORS ~ PLANNERS

1320 North School St.
June 3, 2020

EXHIBIT 10

USGS science for a changing world

EXHIBIT 11

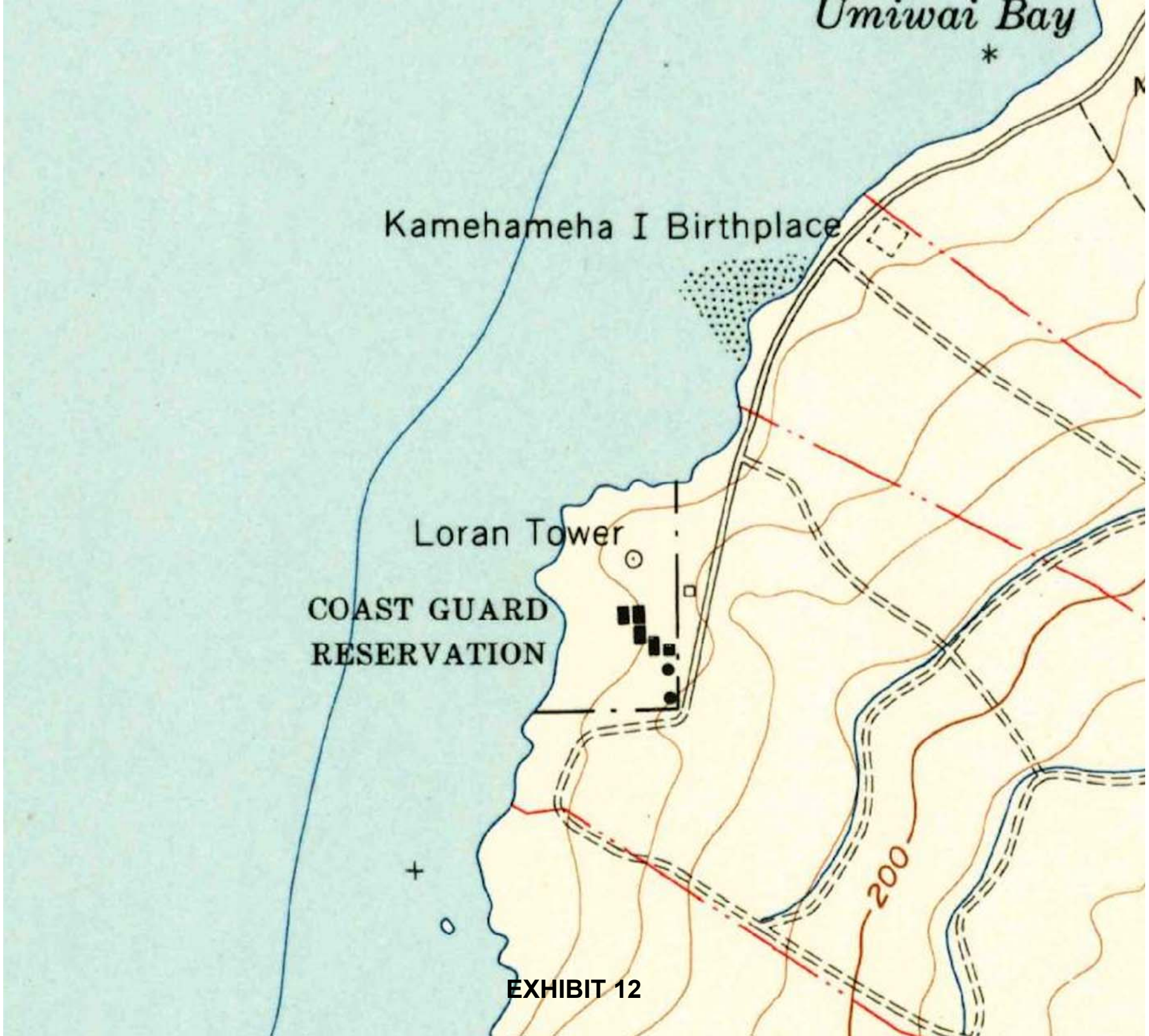

Umiwai Bay
Kamehameha I Birthplace
Loran Tower
COAST GUARD
RESERVATION
200

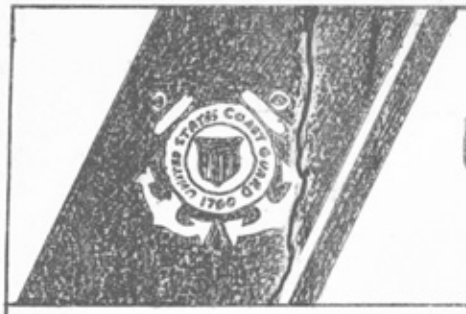
EXHIBIT 12

LORAN STATION HAWAII

1969 Station Information Book

Retrieved from NARA during Sept 2017
and
Posted to www.loran-history.info Dec 2017
by the LHI Team

EXHIBIT 13



U.S. COAST GUARD

LORAN STATION

HAWAII

General Information Book

1969

TABLE OF CONTENTS

STATION HISTORY

1. Loran Transmitting Station Hawaii was originally built in June of 1944 by a Navy Construction Battalion and consisted of seven quonset huts on about twenty acres of land at 20°15' North latitude, 155° 54' West longitude. It is located at Upolu Point, District of North Kohala, Island of Hawaii, and is near the small town of Hawi.

2. It was designed to transmit Loran A pulses as a slave station, and was paired with LORSTA MOLOKAI on rate 2L4. The station was built when Loran was still in the developmental stage and has seen Loran A progress from its early and unreliable beginnings to the fully automatic, 99.9% reliable aid to navigation that it is today. With the addition of Loran C in 1961 this station has acquired one of the most advanced methods of electronic position fixing known. Yet the station and its equipment continues to change, to progress; for this is the measure of our technological advancement, and a vital link in the chain of our national security.

3. Installation of the original Loran A transmitters was completed in August of 1944, and the station became operational in January 1945 as a unit of the 14th Naval District.

4. In August 1947 new and better equipment, UE-1 Timers and TDP-1 transmitters, replaced the original gear. Two years later work commenced on permanent buildings to house the men and equipment. Most of the quonsets were abandoned and removed when the permanent buildings were completed in March 1951. Between June and November of the same year, new water and telephone lines were run in from nearby Kokoiki. Water comes from the Hawaii County Board of Water Supply in pipes that run well back into the rainy Kohala Mountains. The Hawaiian Telephone Company installed and maintains the telephone lines and equipment lining the station to the International Bell System.

5. A water purification system and storage tanks, drainage ditches, paved roadways between buildings, a new antenna ground system, and a new water distribution system were completed in the fall of 1951.

6. Once again, newer and more modern equipment, the TEH transmitters, were installed and became operational in November 1951. Loran A continued to progress towards greater accuracy and reliability. In November 1953, almost before the bugs were worked out of the TEH, the new T-325/FPN transmitters replaced them, and CU-277/URT antenna couplers were installed. In May 1954, T-138 amplifiers boosted the output of the Loran A pulse to a powerful 1,000,000 watts; and in the laboratories electronic engineers in research began to talk about a new concept ... Loran C.

But it would be another seven years before this system would become operational in the Central Pacific, and meanwhile Loran A continued to grow and advance.

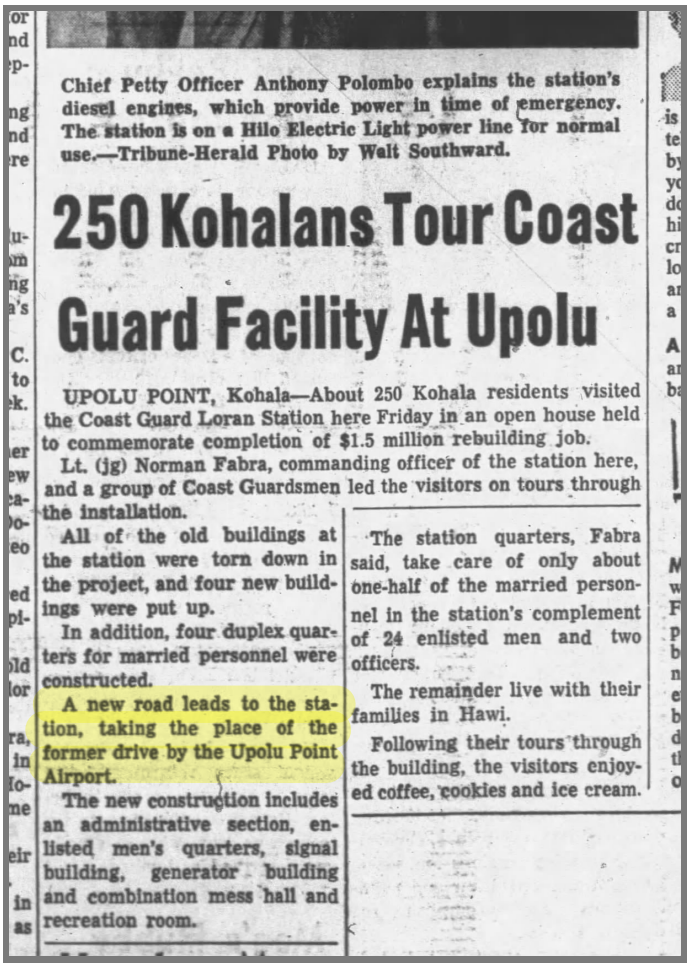
7. On June 2, 1955 the station shifted to commercial power from Hilo Electric Company, and the diesel generators were relegated to a standby status. That was a welcome change for station personnel. No more generator watches, and far less maintenance. In August the 280' steel transmitting tower was erected for Loran A, and the coverage area increased as a result. AN/FPN-30 timers, the latest development, replaced the obsolete UE-1 in November of 1955, and once more Loran A became more reliable to the user. The AN/FPA-2 replaced the old UM Switchgear providing more continuous service and less off air time.

8. Then, in August of 1960, construction began on the combined Loran A and C station that exists today. About 80 acres of land were acquired, bringing the total to nearly 100 acres, to accommodate the skyscraping 625' steel tower and the massive ground system necessary for Loran C transmissions. The contract for the construction went to Fisher and Walsh Company of Honolulu at an approximate cost of $1,300,000.00. All existing buildings and equipment, with the exception of the Loran A signal Building were removed and a totally new station constructed on the site. The buildings are of sturdy concrete block with prestressed concrete beams and ceilings, and concrete slab floors. They are designed to be typhoon and earthquake proof and to last for many years with a minimum of maintenance.

9. Loran C timers and transmitters built by the Sperry Company were airlifted to Hawaii and installed in January 1961. This station transmitted the first Loran C signals in the Central Pacific. On 2 February the AN/FPA-3A Switchgear for Loran A was installed, and rate 2L4 became a semi-automatic, Type III operation. In March 1961, LORSTA MOLOKAI was decommissioned, and rate 2L5 was made operational, with LORSTA HAWAII the master, LORSTA KAUAI a double slave.

10. The new station was completed on 2 June 1961, and officially became an "A-C" station at 0000Z, 6 June 1961. The station personnel allowance was raised to 1 officer and 24 men and the task of making a home out of new buildings and raw-cut earth began. Landscaping is an endless job, and 100 acres are a lot to cover with grass and shrubs and trees. Drainage, dust, and mud problems had to be met and licked with varying degrees of success. The six buildings and four duplex family units include most modern facilities for comfortable living and good operational capabilities.

11. In the spring of 1964 Group Hilo was disestablished and this station's aids to navigation responsibilities were expanded to include the entire Island of Hawaii. Two men were added to the personnel allowance. The functions that the old Group Hilo office performed as COTP Representative were also transferred to LORSTA HAWAII.



Chief Petty Officer Anthony Polombo explains the station's diesel engines, which provide power in time of emergency. The station is on a Hilo Electric Light power line for normal use.—Tribune-Herald Photo by Walt Southward.

250 Kohalans Tour Coast Guard Facility At Upolu

UPOLU POINT, Kohala—About 250 Kohala residents visited the Coast Guard Loran Station here Friday in an open house held to commemorate completion of $1.5 million rebuilding job.

Lt. (jg) Norman Fabra, commanding officer of the station here, and a group of Coast Guardsmen led the visitors on tours through the installation.

All of the old buildings at the station were torn down in the project, and four new buildings were put up.

In addition, four duplex quarters for married personnel were constructed.

A new road leads to the station, taking the place of the former drive by the Upolu Point Airport.

The new construction includes an administrative section, enlisted men's quarters, signal building, generator building and combination mess hall and recreation room.

The station quarters, Fabra said, take care of only about one-half of the married personnel in the station's complement of 24 enlisted men and two officers.

The remainder live with their families in Hawi.

Following their tours through the building, the visitors enjoyed coffee, cookies and ice cream.

Upolu Point annoucement

Clipped By:

neggen
Wed, Oct 28, 2020

EXHIBIT 14

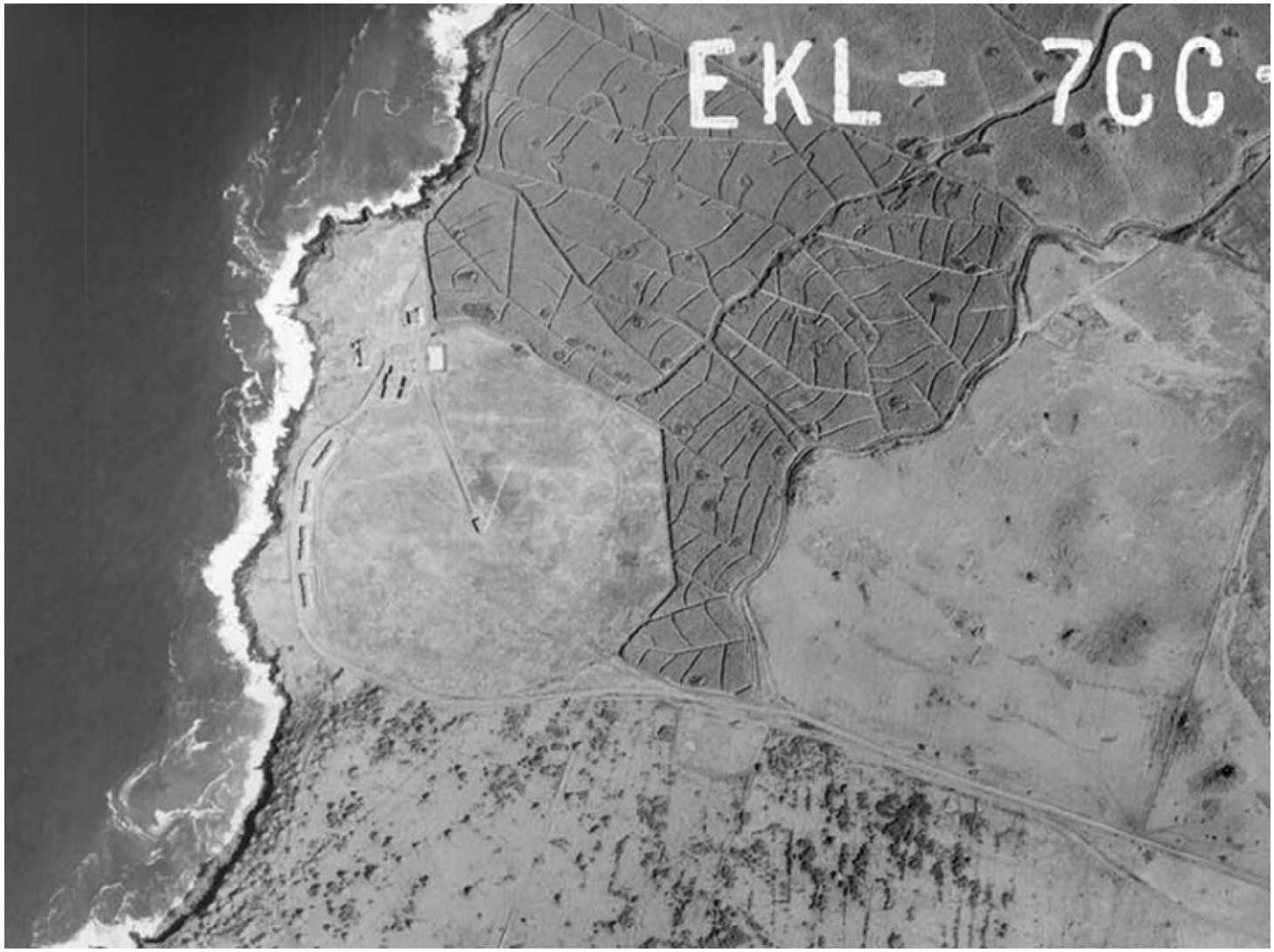


EXHIBIT 15

EXHIBIT 16

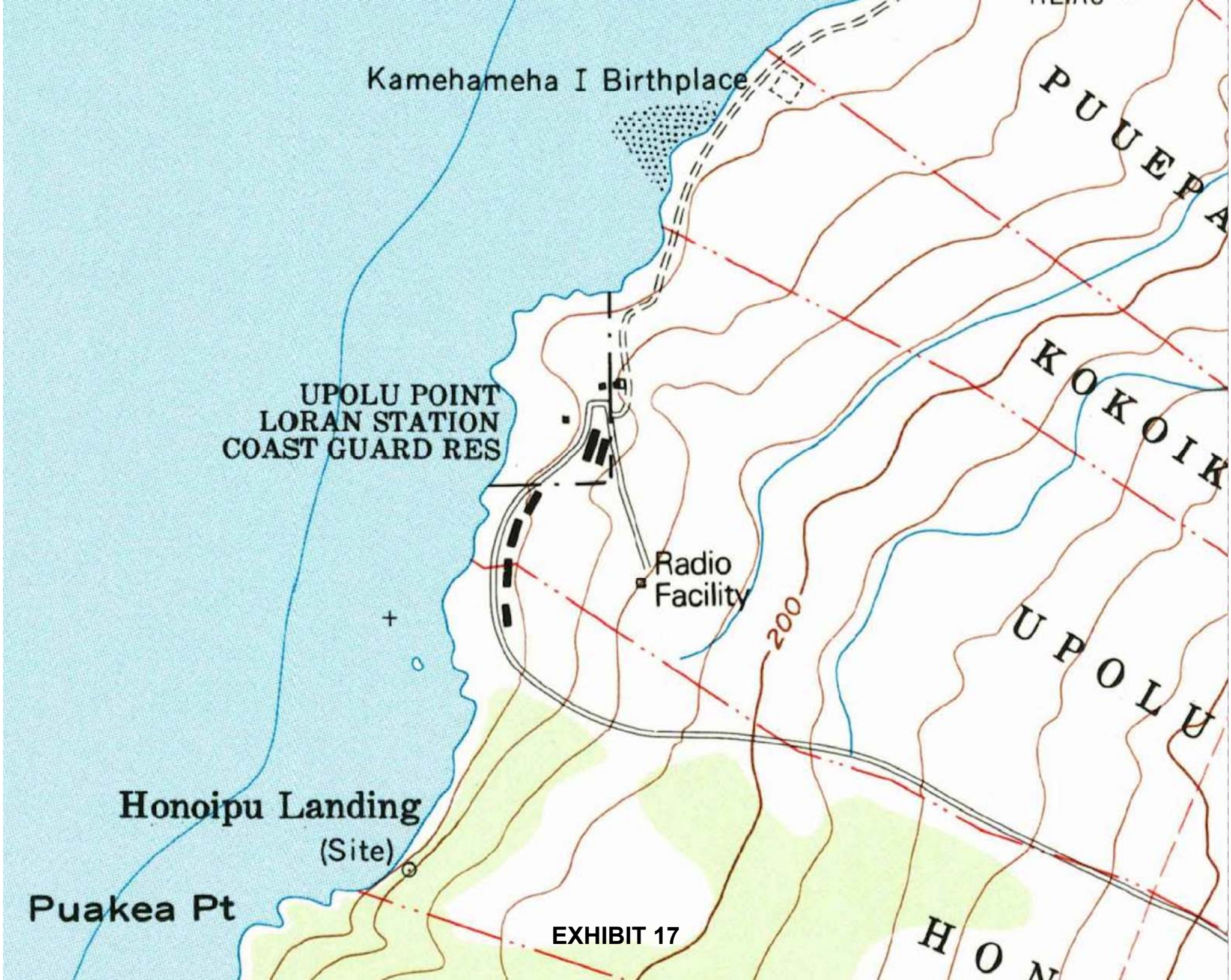

Kamehameha I Birthplace
PUUEPA
KOKOIK
UPOLU POINT
LORAN STATION
COAST GUARD RES
Radio
Facility
200
UPOLU
Honoipu Landing
(Site)
Puakea Pt
HO

EXHIBIT 17

Limukoko Pt
Umiwai Bay
KOOKINI HEIAU
Kamehameha I Birthplace
Loran Tower
COAST GUARD RESERVATION
Honoipu Landing (Site)
Puakea Pt
Holana Bay
Hilanaula Pt
Water Hole
Haena Pt
PUUEPA 1
PUUEPA 2
KOKOIKI
UPOLU
HONOIPU
PUAKEA
KUKUIPAHU
AWA
LINE
FENCE
TRAIL
JEEP
PIPELINE
HAWI 2.9 MI.
WT
16'
13'30"
A

EXHIBIT 18


Limukoko Pt
C
Umiwai Bay
PUUEPA 1
88
MOOR
HEIAU
Kamehameha I Birthplace
PUUEPA 2
Loran Tower
COAST GUARD
RESERVATION
KOKOIKI
LINE
UPOLU
FENCE
Honoipu Landing
(Site)
Puakea Pt
FENCE
HONOIPU
Holana
Bay
Hianaula Pt
A
LINE
PUAKEA
Water Hole
WT
HAWI 2.9 MI.
(HAWI)
27
16'
13'30"
TRAIL
JEEP
C
PIPELINE
Haena Pt
AWALU
WT

EXHIBIT 19

Limukoko Pt

C

Umiwai Bay

PUUEPA 1

MOOKUI HEIAU

Kamehameha I Birthplace

PUUEPA 2

Loran Tower

COAST GUARD RESERVATION

KOKOIKI

LINE

UPOLU

Honoipu Landing (Site)

Puakea Pt

FENCE

HONOIPU

Holana Bay

Hianaula Pt

A

PUAKEA

Water Hole

WT

HAWI 2.9 MI.

KUKUIPAHU

TRAIL

JEEP

C

PIPELINE

Haena Pt

AWALAU

16'

13'30"

EXHIBIT 20

STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW

Prepared for the
STATE OF HAWAII
LAND USE COMMISSION
By
ECKBO, DEAN, AUSTIN & WILLIAMS

The preparation of this report was financed in part through an urban planning grant from the Department of Housing and Urban Development, under the provision of Section 701 of the Housing Act of 1954, as amended.

August 15, 1969
Honolulu, Hawaii

ECKBO
DEAN
AUSTIN &
WILLIAMS

August 15, 1969

Mr. C. E. S. Burns, Jr., Chairman
Land Use Commission
State of Hawaii
State Capitol Building
Honolulu, Hawaii

Dear Mr. Burns:

We take great pleasure in transmitting this report to the Land Use Commission in the conclusion of our review of the Hawaii Land Use District Boundaries and Regulations. May we take the occasion to thank each member for the friendly and cooperative spirit which made possible the successful completion of this year of work.

A great amount of the satisfaction we feel at this time is due to the fact that many good things have been accomplished during the review program. As a result of our mutual efforts, beneficial alterations have been made by the Commission in the Rules of Practice and Procedure, District Regulations and District Boundaries.

We hope that additional benefits will accrue from this study when, in the future, other recommendations contained herein receive consideration.

We wish to thank each Commissioner for our good fortune in being able to experience the most pleasurable working environment we have ever realized.

Respectfully submitted,

ECKBO, DEAN, AUSTIN & WILLIAMS

Edward A. Williams

Don B. Austin

Landscape Architecture, Urban Design, Environmental Planning San Francisco, Los Angeles and Honolulu
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does not materialize, the State and counties will be left with great areas of largely unbuilt subdivisions and the need for providing the usual maintenance, police, fire and educational services at the usual levels of quality demanded elsewhere without an adequate tax base to pick up the area's fair share of the bill—precisely what the Land Use Law was intended to help avoid.

While many findings have resulted in recommendations, two stand out as most important. Inspection of petitions for boundary changes and past actions of the Commission on very large petitions indicated that there should be a systematic method of zoning in increments. The purpose of establishing such a method would be twofold. First, it would protect the public interest against large rezonings for projects that might fail. Second, it would protect the interests of developers who have to make large advance investments and need some guarantee that they will not suffer because of administrative caprice or change.

It was also concluded that more attention should be given to the marketability and economic feasibility or projects, and that both incremental zoning provisions and special permits should have performance time limits attached.

I. *Rural District Issues*

The danger inherent in the Rural District is its potential for converting mile after mile of open farmland into low density residential use on one-half acre house lots mixed with small farms. Hawaii cannot afford such wasteful use of land. Fortunately Oahu, the most populated island, has no Rural Districts. The State General Plan Revision Program recommends their minimization, and we can see good reason for their elimination largely through rezoning to Agriculture and Urban Districts, thereby stopping low density sprawl and permitting more efficient land use under county guidance and control.

J. *Rules of Practice and Procedure*

The purpose of the Rules is to govern proceedings before the Commission in an orderly way to provide for prompt and fair processing of petitions for boundary changes. We found that the document was basically sound, but needed improvement in a number of technical areas. These are explained along with the recommendations in Chapter 3. In our opinion the most serious shortcoming in the Rules was the lack of a requirement that the Commission employ written majority opinions on all decisions.

K. *District Regulations*

The Regulations are intended to clarify and implement the Land Use Law. Our findings indicated that rather large improvements could be made in both of these functions. We have recommended very extensive changes to make the criteria for establishing district boundaries more clear. Clarification of word and phrase meanings took many hours of preparation and discussion with the Land Use Commission.

The recommendations for implementing the Law included: better standards for economic feasibility reports; time limits on special permits and developments for which boundary changes are made; and, a system of incremental zoning for very large developments. All of these recommendations are explained in more detail in Chapter 3.

L. *District Boundaries*

The review of district boundaries was the most extensive phase of the study. All previous research was directed toward providing information that would be helpful in reviewing the rationale behind existing boundaries, in their substantiation, or to help determine where and how boundaries should be changed. Extensive mapping and field work on existing and proposed boundaries was carried on throughout the study. The assistance of many people intimately knowledgeable with various locales and land uses was also enlisted.

It was found that the original boundaries had been established with extreme care. Our recommendation to more precisely establish the differences between Agriculture and Conservation Districts, as a result of clearer definitions in the Regulations, accounted for recommendations for some of the major changes. The desire to more clearly define the shoreline of the Conservation District at some point inland from the water's edge resulted in other substantial recommendations for boundary changes. Urban and Rural District Boundary changes were recommended on the basis of need for future growth, county recommendations, owner-developer intentions and the other criteria of the Law and Regulations.

Chapters 4 through 7 summarize the specific recommendations for boundary changes for each county. The maps included with these chapters show the boundaries as adopted by the Land Use Commission.

M. *State and County Relations in Planning and Zoning*

1. Communications

One of the goals of the 1967 General Plan Revision Program is, "Harmonize State and County planning". During our study we made great efforts to coordinate our activities with all State and County planning agencies. We found that considerable conflict often exists between the various levels of government. The conflict between the Land Use Commission and the Land Board of the Department of Land and Natural Resources has been touched on briefly. State and county conflicts on plans and goals seem to exist mostly because of lack of understanding of roles and sometimes appear to be more of a feeling than an objective reality.

In our opinion, these conflicts could be eased by a conscious direct and vigorous attack on what we think is the main source — lack of face-to-face and frequent communication. The Land Use Commission is one of the best agencies to lead the way in improving communication because of its contact with all levels of government.

2. The Status of County Planning

The present study has suffered from a lack of up-to-date county planning as the basis for zoning decisions. Following is the status of County General Plans.

Honolulu County — General Plan, 1963. Detailed land use maps have been adopted since then for many areas of Oahu.

Hawaii County — Hilo Area Plan, 1961. Hilo Development Plan, 1968.

Kona District Plan, 1959.

Hamakua — Kohala District Plan, 1962.

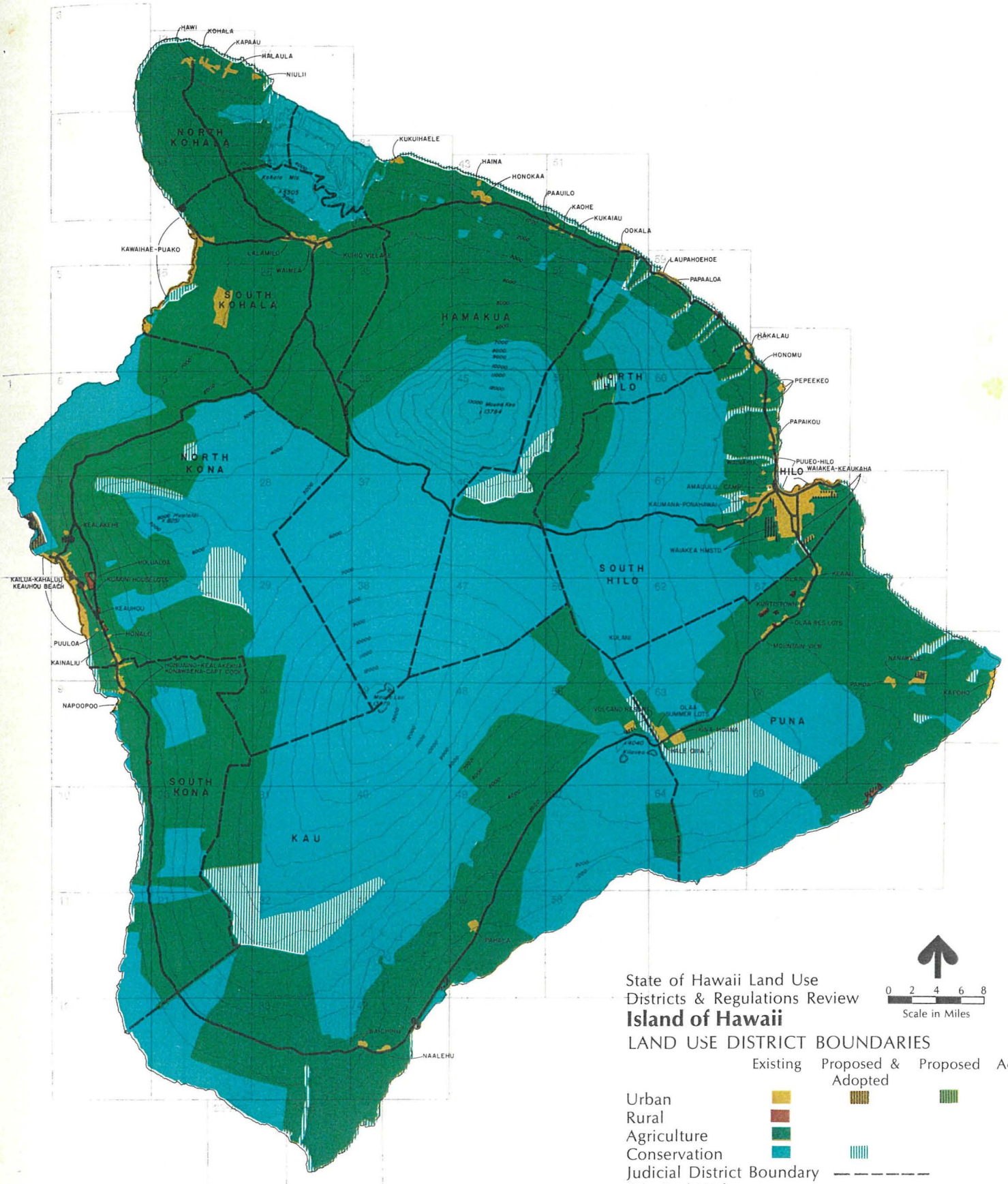
Kauai County, General Plan, 1961. A new one in process.

Maui County — Wailuku — Kahului Planning and Development Study, 1962. Lahaina District General Plan, 1968. Maalaea, Kihei, Makua General Plan.

Molokai General Plan, 1967.

Even though general plans are usually formulated for twenty year periods of time, the rapidly increasing rate of development in the State has out distanced these existing plans, resulting in general plan amendments that are little more than putting out local fires. All of the counties at the present time are involved in some sort of general or development plan revisions. However, the conclusions and results, with some exceptions, were not available to be of help in the Land Use Study.

There is, therefore, no present way of easily finding out what the long and short range demands and recommendations for land utilization are.



State of Hawaii Land Use
Districts & Regulations Review

Island of Hawaii

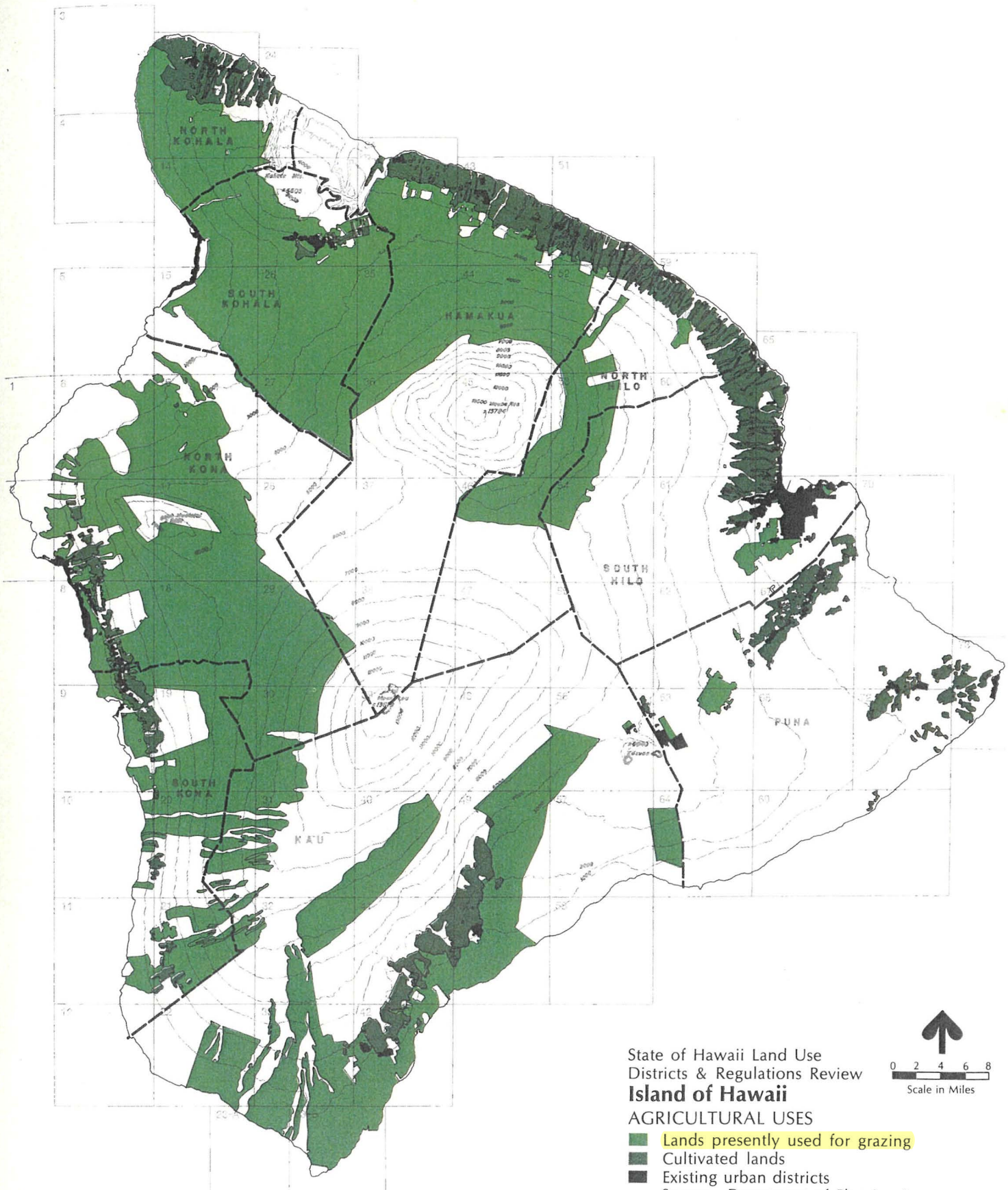
LAND USE DISTRICT BOUNDARIES

0 2 4 6 8
Scale in Miles

	Existing	Proposed & Adopted	Proposed	Adopted
Urban				
Rural				
Agriculture				
Conservation				
Judicial District Boundary				
Principal Highway				
District Boundary Map Key				

See Appendix D

Eckbo, Dean, Austin & Williams
August 1969



State of Hawaii Land Use
Districts & Regulations Review

Island of Hawaii

AGRICULTURAL USES

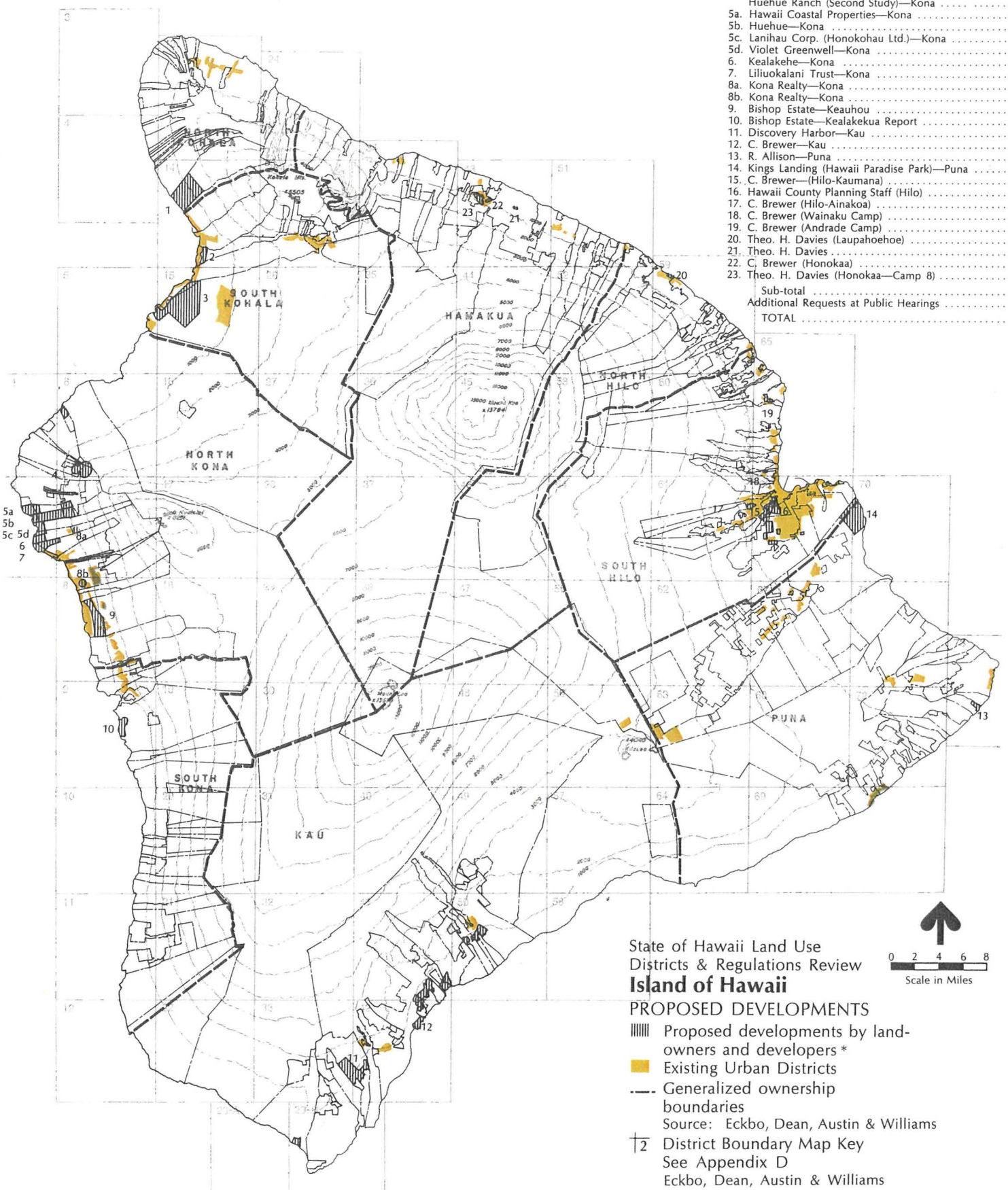
- Lands presently used for grazing
- Cultivated lands
- Existing urban districts

Source: Department of Planning & Economic Development and EDAW

1/2 District Boundary Map Key
See Appendix D

Eckbo, Dean, Austin & Williams
August 1969

0 2 4 6 8
Scale in Miles



HAWAII COUNTY

		ACR
1.	Kahua Ranch—Kawaihae	5,00
2.	Dilrock-Eastern—Kawaihae	55
3.	Signal Oil—Kawaihae	8,00
4.	Huehue Ranch (First Study)—Kona	2,50
	Huehue Ranch (Second Study)—Kona	(23
5a.	Hawaii Coastal Properties—Kona	46
5b.	Huehue—Kona	(59
5c.	Lanihau Corp. (Honokohau Ltd.)—Kona	32
5d.	Violet Greenwell—Kona	8
6.	Kealakehe—Kona	36
7.	Liliuokalani Trust—Kona	1,50
8a.	Kona Realty—Kona	14
8b.	Kona Realty—Kona	16
9.	Bishop Estate—Keauhou	1,45
10.	Bishop Estate—Kealakekua Report	65
11.	Discovery Harbor—Kau	1,30
12.	C. Brewer—Kau	2,86
13.	R. Allison—Puna	20
14.	Kings Landing (Hawaii Paradise Park)—Puna	2,12
15.	C. Brewer—(Hilo-Kaumana)	21
16.	Hawaii County Planning Staff (Hilo)	80
17.	C. Brewer (Hilo-Ainakoa)	15
18.	C. Brewer (Wainaku Camp)	1
19.	C. Brewer (Andrade Camp)	8
20.	Theo. H. Davies (Laupahoehoe)	1
21.	Theo. H. Davies	1
22.	C. Brewer (Honokaa)	4
23.	Theo. H. Davies (Honokaa—Camp 8)	9
	Sub-total	28,13
	Additional Requests at Public Hearings	4,551
	TOTAL	32,687

State of Hawaii Land Use
Districts & Regulations Review

Island of Hawaii

PROPOSED DEVELOPMENTS

- Proposed developments by landowners and developers *
- Existing Urban Districts
- Generalized ownership boundaries

Source: Eckbo, Dean, Austin & Williams

12 District Boundary Map Key
See Appendix D

Eckbo, Dean, Austin & Williams
August 1969

0 2 4 6 8
Scale in Miles

*Prior to public hearing

of the waterfront should be planned together."

One of the accomplishments of the current study was the recommendation and subsequent inclusion of a new and uniquely Hawaiian definition of the shoreline in the Land Use District Regulations. Another was the clear-cut action of the Land Use Commission in reaffirming that all fishponds are to be in the Conservation District.

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 of wave action" at varying distances relating to topography and other use factors. A number of criteria have been developed as the result of a search for physical boundaries that more easily and better designate shoreline conditions from adjacent agricultural uses and districts. Similar problems do not exist in relation to Urban or Rural Districts along the sea because the Land Use Commission has designated shorelines in these situations as part of the Urban or Rural Districts and these areas are therefore under county control.

Four major conditions have been recognized and recommendations based upon these conditions have been made for the new Conservation District boundaries.

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.

It has become increasingly clear during the course of this study that an action plan should be prepared for the conservation and development of the Hawaii shoreline. This is an agreement with the conclusions of the State General Plan Revision Program, Part 5, page 48, where it is stated:

> "This is an appropriate field for the preparation of an 'independent functional plan' (as defined in the Summary Volume, Part 1, of these documents). Such a plan can help to reduce conflict and ensure proper and satisfying use of this resource. The plan would not only serve as a heuristic device, but as an important part of long-range comprehensive physical planning for the State. 'Hawaii's Shoreline; prepared by the Department of Planning and Economic Development in 1964, is the first step in functional planning for this area."

VI. THE CONFLICT BETWEEN AGRICULTURE AND CONSERVATION DISTRICT DESIGNATIONS

In applying the criteria of the Land Use Law and District Regulations, many areas of land fit well in both or neither of the Conservation or Agriculture Districts. This was difficult in the original boundary review and presented difficulties in this review. It has been a source of puzzlement and ridicule when lava flows with little or no grazing potential have been placed in Agriculture Districts, and it provides part of the public confusion. It is recognized that the Law does not specifically provide for these marginal lands which have been called wastelands, residual areas and a number of other names for lack of better definition. If the subzones of the Conservation District were designed to allow for these kinds of areas, the problem could be resolved administratively. The Law would not have to be changed.

When such situations arose in determining boundaries under the present review, they were resolved by establishing priorities. Where agricultural practices were intensive and not destructive to natural resources, they received priority for Agriculture Districts. Where agricultural uses were marginal, such as in the case of a forested area partially grazed, and where the conservation values were highly significant, then these received priority for Conservation Districts. Where this system worked, it was fine, but where there was vague definition and where areas suitable for urban development were classified Conservation, or lava flows were classified Agriculture, it became obvious that a gap existed. When the values or lack of values were equal or there were other factors present, difficult and sometimes inconsistent choices had to be made.

In addition to the above conflict arising from loose criteria, one of the principal "other factors present" was a conflict arising from a "choice" of controlling agencies. With the Department of Land and Natural Resources in complete control of land uses in Conservation Districts, and the Land Use Commission's sharing control with the counties over Agricultural Districts, many owners and officials found their judgment being conditioned by what they thought the various potentials might be, not by what they were. To make the situation more complex to judge, one can speculate about how the tax administrator might judge the differences between the zoning and permitted uses of the two districts. At a joint work session with State and County planning officials and representatives of the Department of Taxation, this provided subject matter for one of the more frustrating discussions because of the absence of a ready solution.

VII. ANALYSIS OF REGULATION NO. 4 OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES

A. *History*

Regulation No. 4 is the instrument under which land uses are regulated in the Conservation Districts. The Regulation was authorized by Act 234 (Section 19-70 R.L.H.) in 1957 and adopted by the Board of Land and Natural Resources seven years later. The sections of the Act pertaining thereto are as follows:

1. "The (department) as soon as feasible after (July 1, 1957), shall undertake to review the boundaries of all forest and water reserve zones within each county with the view of making necessary corrections and establishing subzones within such zones, and fixing permissible uses therein. The (department) shall, after such review, prepare a proposed set of regulations, complete with necessary maps, establishing zone and subzone boundaries, and designating permitted uses therein."
2. "Scope of zoning regulations. The (department) shall, after notice and hearing as provided herein, adopt such regulations governing the use of land within the boundaries of the forest and water reserve zones as will not be detrimental to the conservation of necessary forest growth and the conservation and development of water resources adequate for present and future needs. The (department) by means of such regulations may establish subzones within any forest and future needs. The (department) by means of such regulations may establish subzones within any forest and water reserve zone and specify the land uses permitted therein which may include, but are not limited to, farming, flower gardening, operation of nurseries or orchards, growth of commercial timber, grazing, recreational or hunting pursuits, or residential use."

Adoption of Regulation No. 4 came one month before the Conservation District boundaries were established by the Land

23 Conn.App. 636
Appellate Court of Connecticut.

Theodore COPPOLA et al.
v.
ZONING BOARD OF APPEALS
OF the CITY OF DERBY.

No. 8715.
|
Argued Oct. 2, 1990.
|
Decided Dec. 18, 1990.

Synopsis

Owners of parcel of property sought determination that property was not divided into two zones. The Zoning Board of Appeals upheld building inspector's decision that property was divided. Owners appealed. The Superior Court, Judicial District of Ansonia-Milford, Joseph Chernauskas, State Referee, dismissed appeal. Owners appealed. The Appellate Court, Lavery, J., held that property was not divided into two zones since building ordinance required that boundary lines follow lot lines in absence of specific dimensions expressed on zoning map.

Reversed and judgment directed.

West Headnotes (7)

[1] **Administrative Law and Procedure** Questions of law or fact
Statutes Questions of law or fact

Question of whether particular statute or regulation applies to given set of facts is question of statutory interpretation, and thus a question of law.

12 Cases that cite this headnote

[2] **Zoning and Planning** Questions for jury

Although position of municipal land use agency is entitled to some deference, interpretation of provisions of zoning ordinance is question of law for the trial court.

30 Cases that cite this headnote

[3] **Zoning and Planning** Meaning of Language

Trial court determines legislative intent from language used in zoning ordinance and regulations, and is not bound by legal interpretation of zoning ordinance made by town.

21 Cases that cite this headnote

[4] **Zoning and Planning** Meaning of Language

Words used in zoning ordinances are interpreted according to their usual and natural meaning and regulations should not be extended, by implication, beyond their expressed terms.

15 Cases that cite this headnote

[5] **Zoning and Planning** Boundaries of districts

Fixing of boundaries in zoning districts is legislative function and not activity to be left to discretion of enforcement officials.

[6] **Zoning and Planning** Boundaries of districts

Parcel of property was not divided into two zones, even though zoning district boundary line as shown on map appeared to cross property, where zoning ordinance incorporating zoning map required that boundary lines follow lot lines unless specific dimensions in feet are stated on zoning map and no such dimensions appeared on map.

[7] **Zoning and Planning** Ordinance as a whole, and intrinsic aids

Where zoning map is incorporated in and made part of zoning regulations, text of those

EXHIBIT 22

regulations and zoning map must be considered as whole when regulations are construed.

1 Cases that cite this headnote

Attorneys and Law Firms

****651** ***636** Peter M. Sipples, Clinton, for appellants (plaintiffs).

Francis A. Teodosio, Corp. Counsel, Ansonia, for appellee (defendant).

Before DUPONT, C.J., and FOTI and LAVERY, JJ.

Opinion

***637** LAVERY, Judge.

The plaintiffs[1] appeal from the judgment of the trial court dismissing their appeal from a decision of the defendant Derby zoning board of appeals (board). The board upheld the building inspector's decision that the plaintiffs' property was in two zones, R–5 and R–15, and that the zoning district boundary line did not follow the plaintiffs' lot lines. The plaintiffs claim that the trial court's dismissal should be reversed because (1) the court failed to find that the board acted illegally, arbitrarily, and in abuse of its discretion when it did not follow the clear language of the zoning ordinance indicating that the zoning district boundary was at the plaintiffs' rear lot lines, (2) the court failed to consider the theory of estoppel presented by the plaintiffs, (3) the court found that a building inspector is empowered to determine the location of zone district boundaries, and (4) the court failed to find that a change in regulations eliminating condominiums in an R–15 district, by implication, changed the meaning of regulations pertaining to boundary locations.

The dispositive issue is the plaintiffs' first claim, whether the zoning regulations and the zoning map of Derby provide that in the absence of zone boundary designation by specific footage on the zoning map the zoning boundary affecting the plaintiffs' property runs along their rear lot line.

We conclude, as a matter of law, that the regulations when taken together and strictly construed, place the zoning boundary at the plaintiffs' rear lot line thereby placing the plaintiffs' property completely within the R–5 zone. We reverse the trial court's dismissal of the appeal.

The trial court in its memorandum of decision filed on October 18, 1989, found the following facts. The ***638** plaintiffs are the owners of a three acre rectangular piece of property with a depth of approximately 675 feet and frontage of approximately 143 feet on New Haven Avenue in Derby. The plaintiffs' lot lines have been the same since the creation of the zoning regulations. The parcel, as shown on the Derby zoning map, appears to be divided by a zoning district boundary placing the front portion of the property in an R–5 zone and the rear of the parcel in an R–15 zone. Prior to February 18, 1987, multifamily dwellings could be built by special exception anywhere in the city of Derby. On that date, the regulations were amended forbidding the construction of multifamily dwellings in an R–15 zone. On February 28, 1987, the plaintiffs received a certificate of zoning compliance from the zoning enforcement officer indicating that the plaintiffs' entire property is located within an a R–5 zone.

Section 25–5(b) of the Derby zoning ordinance provides: "The boundaries of the several districts are hereby established as shown on the map entitled 'Zoning Map of the City of Derby, New Haven County, Connecticut,' dated May, 1969 and signed by the Mayor and the City Clerk, as the same may be amended from time to time, which map accompanies this Ordinance and is hereby declared to be a part of this Ordinance...."

Section 25–5(b)(2) provides: "The district boundary lines are intended generally to follow the center lines of streets and similar rights-of-way, shorelines of the Naugatuck River, *lot lines* or city boundary lines, all as shown on the zoning map, *but where* ****652** *a district boundary line does not follow such a line, its position is shown on such zoning map by a specific dimension expressing its distance in feet from a street line or other boundary line as indicated.*" (Emphasis added.) The zoning map itself bears the following notation: "Note: Zone boundaries ***639** are parallel to street and property lines and *are not intended to divide properties.*" (Emphasis added.)

Section 25–5(b)(3) of the Derby zoning regulations provides: "In case of uncertainty as to the true location of a district boundary line in a particular instance, the determination thereof shall be made by the Building Inspector. An appeal may be taken to the Zoning Board of Appeals...."

Pursuant to this ordinance, the plaintiffs sought a ruling from the building inspector on the issue of the zoning boundary line. On October 19, 1987, the building inspector determined that the property is in two zones, R–5 and R–15. He further stated, "I do not believe that there is any 'uncertainty' as to the location of the line. The parcel is very large and not of the type the notation on the zoning maps was intended to address."

The building inspector further advised the plaintiffs that "the new revisions in the Derby zoning regulations unequivocally intended that no condominiums be developed in an R–15 Zone. Your proposed relocation of the line *would make a mockery of the regulation. No longer does movement of a zoning boundary merely affect density. It changes the use which is allowed.*" (Emphasis added.)

The building inspector concluded: "[You] may appeal my ruling to the Derby Zoning Board of Appeals. I do, however, feel the more prudent course would be to seek a zone change before the Zoning Commission."

The plaintiffs appealed to the defendant board and, at a hearing on November 19, 1987, pointed out that where lot lines were not followed specific footage dimensions of the zone boundary were noted on the map. The two examples given by the plaintiffs were Chestnut Drive and Sodom Lane. At each of these locations, ***640** the distance noted on the map was 300 feet from the named streets and in most instances the zone boundary on those streets went beyond the lot lines. The record reveals that the board treated the appeal as a zone change. The board denied the plaintiffs' appeal. The plaintiffs' subsequent appeal to the Superior Court was dismissed. In this case, both the board and trial court placed undue emphasis on the uses allowed in the zones and a determination of who is authorized to decide zoning boundary disputes.

It matters not one whit what uses are allowed in R–5 or R–15 zones or who is the officially designated arbiter of zoning boundary disputes. The only issue presented here is what the regulation provides as to the location of the zone boundaries.

[1] **[2]** **[3]** **[4]** The question of whether a particular statute or regulation applies to a given set of facts is a question of statutory interpretation. *Plastic Distributors, Inc. v. Burns,* 5 Conn.App. 219, 225, 497 A.2d 1005 (1985). Although the position of the municipal land use agency is entitled to some deference; *Roy v. Centennial Ins. Co.,* 171 Conn. 463, 473, 370 A.2d 1011 (1976); the interpretation of provisions in the ordinance is nevertheless a question of law for the court. *Robinson v. Unemployment Security Board of Review,* 181 Conn. 1, 6, 434 A.2d 293 (1980); *Pascale v. Board of Zoning Appeals,* 150 Conn. 113, 116–17, 186 A.2d 377 (1962). The court is not bound by the legal interpretation of the ordinance by the town. See *Schwartz v. Planning & Zoning Commission,* 208 Conn. 146, 152–53, 543 A.2d 1339 (1988). Rather, the court determines legislative intent from the language used in the regulations. *Weigel v. Planning & Zoning Commission,* 160 Conn. 239, 246, 278 A.2d 766 (1971). "We interpret an enactment to find the expressed intent of the legislative body from the language it used to manifest that intent.... Zoning regulations, as they are in derrogation of common law ***641** property rights, cannot be construed to include or exclude by implication what is not clearly within their express terms." (Citations omitted.). *Planning & Zoning Commission* ****653** *v. Gilbert,* 208 Conn. 696, 705, 546 A.2d 823 (1988). The words used in zoning ordinances are to be interpreted according to their usual and natural meaning and the regulations should not be extended, by implication, beyond their expressed terms. *Schwartz v. Planning & Zoning Commission,* 208 Conn. 146, 153, 543 A.2d 1339 (1988).

[5] In *State v. Huntington,* 145 Conn. 394, 399, 143 A.2d 444 (1958), our Supreme Court stated that "[t]he districts must be described with reasonable certainty and must have definite boundaries so that the regulations may be practically applied. The district lines and boundaries must be fixed by the regulations and not by administrative officials or courts." In other words, the fixing of the boundaries is a legislative function and not an activity to be left to the discretion of any enforcement official.

[6] The language of the Derby zoning ordinance is clear. It provides that the established zoning boundaries are as shown on the zoning map, incorporates that map by reference into the ordinance, and states that in the absence of a specific dimension expressing distance from a street line or other boundary, district boundaries are to follow street center lines, shorelines or *lot lines.* The note on the incorporated zoning map itself indicates that zoning boundaries are not intended to divide properties.

[7] Where, as here, the zoning map has been incorporated in and made part of the zoning regulations, the text of those regulations and the zoning map must be considered as a whole when we construe the regulation. *Planning & Zoning Commission v. Gilbert,* supra, 208 Conn., at 707, 546 A.2d 823. Thus a " 'zoning map is an integral part of the ***642**

zoning regulations, without which the regulations are said to be meaningless.' " Id., at 706–707, 546 A.2d 823.

In clear and unambiguous language, the ordinance and the map that is part of the ordinance require that zoning district boundary lines follow lot lines unless specific dimensions in feet are given. No such "specific dimension" appears on the zoning map in the area of the plaintiffs' property, even though such dimensions do appear on other sections of the map such as Chestnut Drive and Sodom Lane. When taken as a whole and construed strictly, there can be no interpretation of the Derby ordinance that would allow the zoning district to divide the plaintiffs' property. We hold, therefore, that under the clear language of Derby's zoning regulations the zoning boundary between the R–5 and R–15 zones is the plaintiffs' rear lot line leaving the plaintiffs' property completely within the R–5 zone.

The judgment of the trial court is reversed and the case is remanded to that court with direction to render judgment remanding the matter to the defendant zoning board of appeals with direction to sustain the plaintiffs' appeal.

In this opinion the other Judges concurred.

All Citations

23 Conn.App. 636, 583 A.2d 650

Footnotes

1 The named plaintiff is joined in this action by his wife, Josephine Coppola, who also has an ownership interest in the subject property.

18 Mass.App.Ct. 265
Appeals Court of Massachusetts,
Middlesex.

Thomas F. JENKINS

v.

TOWN OF PEPPERELL.

Argued March 19, 1984.
|
Decided June 14, 1984.

Synopsis

Landowner brought action seeking declaration that town's zoning bylaw was invalid as applied to his land. The Superior Court, Middlesex County, Land Court Department, Randall, J., ruled that zoning boundary on town's zoning map was fatally indefinite and entered judgment declaring landowner's property to be unzoned, and appeal was taken. The Appeals Court, Brown, J., held that: (1) the zoning boundary was indefinite, but (2) declaration that landowner's property was unaffected by the zoning bylaw was error.

Judgment vacated, and case remanded.

West Headnotes (8)

[1] **Zoning and Planning** Boundaries of districts

Where town's zoning bylaw defined district boundaries by official zoning map, landowner was bound by the map unless, carrying the burden of proof, he could demonstrate that a different boundary was intended. M.G.L.A. c. 240, § 14A.

7 Cases that cite this headnote

[2] **Zoning and Planning** Boundaries of districts

Landowner was entitled to full benefit of ambiguity regarding official zoning map boundary line that was subject to more than one reasonable interpretation, absent extrinsic evidence offered by town that might have resolved which interpretation was intended.

3 Cases that cite this headnote

[3] **Zoning and Planning** Boundaries of districts

Trial judge's declaration that, in light of ambiguity in boundary line in town's official zoning map, landowner's property in the vicinity of the boundary line, which separated an "urban residence" district allowing multifamily housing from a "suburban residence" district in which no new development could take place, was unzoned was an unjustified windfall to landowner and was erroneous. M.G.L.A. c. 240, § 14A.

3 Cases that cite this headnote

[4] **Zoning and Planning** Validity of regulations in general

Zoning is entitled to a strong presumption of constitutional validity. M.G.L.A. c. 240, § 14A.

1 Cases that cite this headnote

[5] **Constitutional Law** Zoning, planning, and land use

Courts should be wary of declaring zoning fatally indefinite. M.G.L.A. c. 240, § 14A.

1 Cases that cite this headnote

[6] **Zoning and Planning** Boundaries of districts

Where a determination of an uncertain zoning boundary is possible, courts should endeavor to make such a determination, notwithstanding the fact that the determination is often a troublesome one to make. M.G.L.A. c. 240, § 14A.

1 Cases that cite this headnote

[7] **Zoning and Planning** Map

Zoning and Planning Maps, plats, and plans; subdivision regulations

EXHIBIT 23

In a situation where a landowner has demonstrated ambiguity in a town zoning map and the town has not offered extrinsic evidence to resolve which interpretation was intended, proper remedy is not invalidation of the zoning, but rather the fixing of the boundary in accordance with the interpretation most favorable to the landowner. M.G.L.A. c. 240, § 14A.

2 Cases that cite this headnote

[8] **Zoning and Planning** Map

Fact that, even if there had been no ambiguity in town's official zoning map, precise location of zoning boundary in dispute would not have been immediately apparent because of the map's lack of detail was not sufficient to invalidate the zoning.

2 Cases that cite this headnote

Attorneys and Law Firms

****269** ***265** Joseph P. Hannon, Town Counsel, Lowell, for defendant.

Richard E. Duggan, Sudbury, for plaintiff.

Before BROWN, DREBEN and WARNER, JJ.

Opinion

BROWN, Justice.

This case involves the plaintiff Jenkins' efforts to determine the zoning that applied to land that he owned in the town of Pepperell. Jenkins brought an action in the Land Court pursuant to G.L. c. 240, § 14A, seeking a declaration that the zoning was invalid as applied to his land. The Land Court judge ruled that the zoning boundary was fatally indefinite and entered judgment declaring Jenkins' property to be unzoned. We concur with the conclusion of indefiniteness but think that the judge erred as to the consequences which flow from that determination.

Drawing on the judge's findings, supplemented in some minor respects from the evidence, we summarize the facts. In 1977, Jenkins purchased three contiguous, four-acre lots[1] that ***266** are the subject of this action. On each of the lots was a twelve-unit apartment building that was apparently built in late 1972. Before purchasing the property, Jenkins sought to determine what zoning applied. He purchased a copy of the 1974 zoning by-law—sold by the town in booklet form—which incorporated by reference an official map kept on file at the town clerk's office. A small reproduction of the official map was included in the booklet that Jenkins obtained. The map revealed that there was a boundary line in the vicinity of his property that separated an "urban residence" district on the west from a "suburban residence" district on the east. If the property was in the urban residence district, he could develop multi-family housing in addition to the existing apartment buildings. If the property was in the suburban residence district, no new development could take place.

It was difficult to ascertain from the reproduced zoning map where the boundary line in fact fell in relation to the property because of the map's small scale and because neither the lot lines nor the subdivision roads were shown. Jenkins did not ****270** at this time examine the official map,[2] nor did he consult any town official.[3] Nevertheless, after receiving an appraisal from the prospective seller and investigating the history of the development of the lots, Jenkins satisfied himself that the entire property was in the less restrictive urban residence district.[4]

***267** Serious efforts to develop the property further appear to have begun in January of 1981, when Jenkins hired an engineering and surveying firm to prepare a topographic map of the property. In February of that same year he sought a clarification from the town of what zoning applied.[5] Instead of making inquiries of the board of appeals (see note 3, *supra*), Jenkins sent a letter to the Pepperell building inspector,[6] in which he stated "since the zoning map seems to be unclear as to the zoning applicable to the property, I would like your ruling as to the proper zone for my land." Jenkins admitted in the letter that "the dividing line may seem to bisect the property" but urged that under § 2 of the by-law, the building inspector would be warranted in deciding that the entire parcel should be included in the urban residence district.[7]

The building inspector responded that, because the apartment buildings were built prior to the adoption of the current zoning by-law, "it is reasonable to assume that the district line between Urban Residence and Suburban Residence was established to include the existing apartment houses ...."

Jenkins then proceeded to apply for building permits for the construction of multiple family housing on the lots, development that was permissible under the urban residence classification but prohibited under the suburban residence classification. In the course of the application process, Jenkins learned that the planning board disagreed that the land should be classified as in the urban residence district. Jenkins instructed his surveyor to examine the town's zoning proceedings and to plot the zoning ***268** boundary on the topographic map that had been drawn. The surveyor studied the by-law and the official map as well as a separate metes and bounds description of the district boundaries written by the planning board.[8] Based on his study, the surveyor concluded that there were two ways that the line could be drawn, both of which ran through Jenkins' property.

****271** Meanwhile, the planning board had appealed the "ruling" of the building inspector to the board of appeals. In a decision rendered August 6, 1981, the board of appeals stated that the building inspector's letter was merely an advisory opinion and not a permit to act and that therefore the planning board's appeal was premature. For the sake of clarification, though, the board gave its own interpretation of where the line should be drawn, an interpretation which differed from the two possibilities found by Jenkins' surveyor.[9]

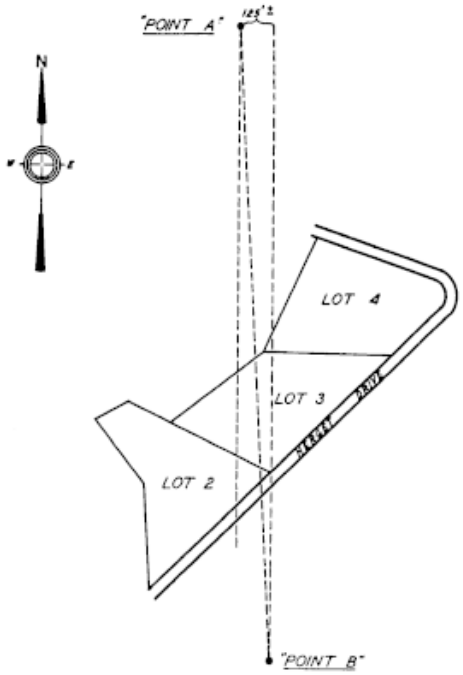
The different theories as to where the boundary line should be drawn apparently stem from an ambiguity in the official map. The line in controversy appears to connect two points, the intersection of Reedy Meadow Brook and the Nashua River on the north (see appended map, point A) and the intersection of Lowell Road and Leighton Street on the south (see appended map, point B). On the official map, there is an annotation to the line which states "true north from intersection," with arrows leading from the annotation to points A and B.[10] Point A, however, is not exactly true north of point B, but some 125 feet to the west of such a true north line. This discrepancy generates three possible interpretations. The first is that the ***269** line was intended to connect point A and point B, irrespective of the annotation.[11] The second is that the line was intended to be a northerly projection from point B, irrespective of the fact that it did not intersect point A.[12] The third is that the line was intended to be a southerly projection from point A, irrespective of the fact that it did not intersect point B.[13]

[1] **[2]** **[3]** Under § 2 of Pepperell's zoning by-law, district boundaries are defined by the official zoning map. A land owner is thus bound by this map unless, carrying the burden of proof, he can demonstrate that a different boundary was intended. See *Parmenter v. Board of Appeals of Grafton,* 360 Mass. 852, 274 N.E.2d 351 (1971). What Jenkins was able to demonstrate at trial was not that a different boundary line was intended from what was drawn on the map,[14] but that the line that did appear on the map was susceptible to more than one reasonable interpretation. This ambiguity prevented him from determining where the boundary was intended to fall within a 125 ft. wide strip.[15] At trial, the town offered no extrinsic evidence that might have resolved which interpretation was intended. See ***270** ****272** *Parmenter,* 360 Mass. at 852, 274 N.E.2d 351. Cf. *Selectmen of Sudbury v. Garden City Gravel Corp.,* 300 Mass. 41, 43, 14 N.E.2d 112 (1938). This being the case, Jenkins is entitled to the full benefit of the ambiguity. The trial judge went further, however, and declared all of Jenkins' property to be unaffected by the zoning by-law. This resolution granted Jenkins an unjustified windfall and was error.

[4] **[5]** **[6]** **[7]** **[8]** A distinction should be drawn between zoning schemes that, as here, simply contain an ambiguity as to which of a small, finite number of alternatives was intended, and those that are so inherently indefinite and vague as to violate constitutional principles. See *O'Connell v. Brockton Bd. of Appeals,* 344 Mass. 208, 210–212, 181 N.E.2d 800 (1962). Zoning is entitled to a strong presumption of constitutional validity (*Rosko v. Marlborough,* 355 Mass. 51, 53, 242 N.E.2d 857 [1968]), and courts should be wary of declaring zoning fatally indefinite. Where a determination of an uncertain zoning boundary is possible, courts should endeavor to do so, notwithstanding the fact that that determination is often a troublesome one to make. See *Ciaffone v. Community Shopping Corp.,* 195 Va. 41, 48, 77 S.E.2d 817 (1953). The problem that faced the trial judge was that the town did not offer such extrinsic evidence as would have allowed him to choose between the three competing interpretations derived from the zoning map. The proper remedy, however, in such a situation is not invalidation of the zoning, but rather the fixing of the boundary in accordance with the interpretation most favorable to the landowner. See *H.P.V.T. Corp. v. McGuire,* 58 Misc.2d 159, 163, 294 N.Y.S.2d 787 (N.Y.Sup.Ct.1968).[16]

The judgment is vacated, and the case is remanded to the Land Court for further proceedings consistent with this opinion.

So ordered.



All Citations

18 Mass.App.Ct. 265, 465 N.E.2d 268

Footnotes

1 These lots were originally laid out in a subdivision plan approved by the Pepperell planning board in 1970. We adopt as do the parties, the subdivision plan's designations of the lots as lots 2, 3, and 4. See appended map.

2 The official map also did not include the lot lines and the subdivision roads but was of a larger scale and greater detail. It further differed from the small reproduction in that it included an important annotation discussed *infra.*

3 Section 2 of the zoning by-law provided a method of clarifying zoning boundaries as follows: “In cases of uncertainty or disagreement concerning the exact location of a district boundary line or where physical or cultural features existing on the ground are at variance with those shown on the ... Zoning Map or in other circumstances not covered herein, the district boundary shall be determined by the Board of Appeals....”

4 The zoning that had been in effect at the time the apartments were constructed showed a similar dividing line between a more restrictive district to the east and a less restrictive district to the west. Under that earlier zoning, apartments could have been constructed in either of the two classifications, but their construction required a special permit in the more restrictive one. After Jenkins' investigation revealed that no special permits had been granted for the apartments constructed on the lots, he decided that the property must have been in the less restrictive district. Because the 1974 zoning appeared to incorporate the same dividing line, Jenkins concluded that the property was in the less restrictive of the new zoning classifications.

5 The 1974 by-law was amended in 1980, but the amendment is not material to the instant matter.

6 Under the by-law, zoning enforcement duties were delegated to the building inspector. See G.L. c. 40A, § 7.

7 In his letter, Jenkins argued that the existing apartment buildings on the lots were the type of “physical characteristic” that would support a ruling that the lots were fully within the urban residence classification notwithstanding the boundary which the line might appear to define (see note 3, *supra*).

8 The metes and bounds description appeared in a letter to the board of appeals dated December 16, 1980, and was not written in response to the present controversy.

9 Jenkins appealed the decision of the board of appeals to the District Court, and that action ended in an agreement for judgment on October 23, 1981. The parties agreed that the building inspector's letter would not be construed as a permit to build or an assurance that a permit to build would issue, and that the board of appeals' decision be annulled and its remarks as to the location of the line declared a nullity. In the meantime, the instant action had been filed on October 2, 1981.

10 This annotation does not appear on the small reproductions of the map that were included in the zoning by-law booklets.

11 This was the opinion of the board of appeals in its decision dated August 6, 1981, later declared a nullity.

12 This was one of the possibilities found by Jenkins' surveyor. On appeal, the town argues that it is the only plausible interpretation.

13 This was the other possibility found by Jenkins' surveyor, and was based on the interpretation that the planning board gave in its metes and bounds description.

14 The trial judge made no finding as to the plausibility of the view originally held by Jenkins and by the building inspector that the line fell to the east of the property, contrary to the indications of the zoning map. Jenkins based his initial assessment primarily on his assumptions as to the legality of the apartment use when built and as to the relationship of the 1968 and 1974 zoning by-laws (see note 4, *supra*). He made no study of the official map until much later and presented no testimony that the line illustrated on the map was not meant to be determinative. The only direct evidence on this point is the building inspector's conclusory statement in his letter that "it is reasonable to assume that the district line between Urban Residence and Suburban Residence was established to include the existing apartment houses ...."

15 This strip fell mainly within lot 3, and overlapped small portions of lots 2 and 4 (see appended map).

16 Even had there been no ambiguity in the official map, the precise location of the zoning boundary would not have been immediately apparent because of the map's lack of detail. This fact, however, is not enough to invalidate the zoning. See *Beechwood Acres, Inc. v. Hamilton,* 350 Mass. 655, 658–659, 216 N.E.2d 94 (1966). See also *Maki v. Yarmouth,* 340 Mass. 207, 211, 163 N.E.2d 633 (1960); *Farrugia v. Board of Appeals of Marshfield,* 14 Mass.App.Ct. 720, 721–722, 442 N.E.2d 1161 (1982); *Fogelman v. Chatham,* 15 Mass.App.Ct. 585, 588–591, 446 N.E.2d 1112 (1983); *The Auditorium, Inc. v. Board of Adjustment,* 47 Del. 373, 383, 91 A.2d 528 (1952).

112 A.D.3d 945
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of S & R DEVELOPMENT ESTATES, LLC, respondent,
v.
Paul J. FEINER, et al., appellants.

Dec. 26, 2013.

Synopsis

Background: Property owner brought article 78 proceeding to challenge the determination of zoning board of appeals (ZBA) that owner's property was located in a one-family residence zoning district instead of a multihousing district. The Supreme Court, Westchester County, Loehr, J., annulled ZBA's determination. Town appealed.

[Holding:] The Supreme Court, Appellate Division, held that ZBA's determination was arbitrary and capricious and affected by and error of law.

Affirmed.

West Headnotes (2)

[1] **Zoning and Planning** Boundaries of districts

Determination of the zoning board of appeals, that the depiction of owner's property in town's official zoning map as located in a multihousing district was a result of a scrivener's error, was arbitrary and capricious and affected by an error of law, where the official zoning map of the town was the final authority as to the current zoning classification of any land located within, and there was no other zoning map or evidence to support finding a scrivener's error.

[2] **Zoning and Planning** Decisions of boards or officers in general

Zoning and Planning Illegality

Zoning and Planning Decisions of boards or officers in general

In a proceeding pursuant to article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action taken is illegal, arbitrary and capricious, or an abuse of discretion. McKinney's CPLR 7801 et seq.

2 Cases that cite this headnote

Attorneys and Law Firms

****378** Timothy W. Lewis, Town Attorney, Greenburgh, N.Y., for appellants.

Bleakley Platt & Schmidt, LLP, White Plains, N.Y. (William P. Harrington and James W. Glatthaar of counsel), for respondent.

PETER B. SKELOS, J.P., THOMAS A. DICKERSON, JEFFREY A. COHEN, and SYLVIA O. HINDS–RADIX, JJ.

Opinion

***945** In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Town of Greenburgh dated November 9, 2007, that the petitioner's real property is properly zoned in an R–20, one-family residence zoning district, rather than a CA–I zoning district that permits multi-family housing, the appeal is from an order and judgment (one paper) of the Supreme Court, Westchester County (Loehr, J.), entered January 11, 2011, which denied the appellants' motion to dismiss the petition and granted the petition to the extent of annulling the determination.

***946** ORDERED that the order and judgment is affirmed, without costs or disbursements.

On May 24, 2006, the petitioner acquired title to the subject property, a 2.26–acre parcel in Edgemont (hereinafter the subject property), an unincorporated area within the Town of Greenburgh. The subject property was depicted on the official zoning map of the Town as located in the CA–I district, in which multi-family residential complexes are

EXHIBIT 24

permitted. During the performance of due diligence prior to its purchase of the subject property, the petitioner reviewed prior zoning maps of the Town, all of which indicated that the subject property was situated in the CA–I district. On February 2, 2007, the petitioner submitted an application for site plan approval to the Town's Department of Community Development and Conservation (hereinafter the Department). In a letter dated February 26, 2007, Mark Stellato, then-Commissioner of the Department, notified the petitioner that, following a review of the "initial zoning history" of the subject property, it had "come to [the] attention" of the Department that the subject property was actually situated in an R–20 district, in which only one-family residences could be developed. The petitioner contended that Stellato then unilaterally directed the Town's engineer to alter the Town's official zoning map to reflect that the subject property was situated in an R–20 district, which the petitioner alleges, upon information and belief, that Stellato accomplished "with the stroke of a pen." The petitioner appealed Stellato's determination to the Town's Zoning Board of Appeals (hereinafter the ZBA). In a determination dated November 9, 2007, the ZBA denied the appeal, concluding that the evidence before it demonstrated that the subject property was not situated within the CA–I district when that district was adopted, and that the subject property was never rezoned from R–20 to CA–I, notwithstanding the existence of official Town zoning maps that depicted the subject property in the CA–I district. Accordingly, the ZBA concluded that the proper zoning designation of the subject property was R–20.

The petitioner commenced this proceeding pursuant to CPLR article 78 against present and former members of the Town Board of the Town, the ZBA, and Stellato (hereinafter collectively the appellants) to review the ZBA's determination. The appellants moved to dismiss the petition. In ****379** an order and judgment, the Supreme Court denied the motion and granted the petition to the extent of annulling the ZBA's determination.

The Supreme Court, upon the denial of the appellants' motion to dismiss the petition, granted the petition without the ***947** benefit of an answer or the filing of the full administrative record pursuant to CPLR 7804(e) (*see generally Matter of Bethelite Community Church, Great Tomorrows Elementary School v. Department of Envtl. Protection of City of N.Y.,* 8 N.Y.3d 1001, 839 N.Y.S.2d 440, 870 N.E.2d 679). Nonetheless, where, as here, the "facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require answer," this Court may review the merits of the proceeding without remitting it to the Supreme Court for the filing of an answer and the administrative record (*Matter of Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educ. Servs. of Nassau County,* 63 N.Y.2d 100, 101–102, 480 N.Y.S.2d 190, 469 N.E.2d 511; *see Matter of Rizvi v. New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.,* 98 A.D.3d 1049, 1051, 950 N.Y.S.2d 754; *Matter of Kuzma v. City of Buffalo,* 45 A.D.3d 1308, 1310–1311, 845 N.Y.S.2d 880; *cf. Matter of Shepherd v. Maddaloni,* 103 A.D.3d 901, 960 N.Y.S.2d 171).

[1] **[2]** "In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action taken is illegal, arbitrary and capricious, or an abuse of discretion" (*Matter of Hejna v. Board of Appeals of Vil. of Amityville,* 105 A.D.3d 843, 844, 964 N.Y.S.2d 164; *see Matter of Mejias v. Town of Shelter Is. Zoning Bd. of Appeals,* 298 A.D.2d 458, 458, 751 N.Y.S.2d 409; *see also Matter of Pecoraro v. Board of Appeals of Town of Hempstead,* 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 814 N.E.2d 404; *Matter of Luburic v. Zoning Bd. of Appeals of Vil. of Irvington,* 106 A.D.3d 824, 825, 966 N.Y.S.2d 440). Here, the Supreme Court properly concluded that the ZBA's determination was arbitrary and capricious and affected by and error of law, and properly annulled that determination. As the Supreme Court correctly determined, Stellato's actions violated, inter alia, former Town of Greenburgh Code § 285–7(A), which, at all relevant times, and prior to its amendment in September 2012, provided that the official zoning map of the Town "shall be the final authority as to the current zoning classification of any land within the boundaries of" the Town, as well as Town Law §§ 264 and 265, which set forth certain requirements pertaining to public notice and the opportunity to be heard that must be satisfied prior to the amendment of zoning regulations, restrictions, and boundaries. Moreover, the record is devoid of evidence to support the ZBA's finding that the subject property was depicted in the CA–I district as a result of a scrivener's error. In response to a request pursuant to the Freedom of Information Law (Public Officers Law § 84 *et seq.*), the Town failed to produce any official zoning map for the period between 1957 and June 2000, or any map relating to the alleged scrivener's error.

***948** The appellants' remaining contentions are either improperly raised for the first time on appeal or without merit.

All Citations

112 A.D.3d 945, 977 N.Y.S.2d 377, 2013 N.Y. Slip Op. 08641

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192 N.C.App. 391
Court of Appeals of North Carolina.

LAUREL VALLEY WATCH, INC., a North Carolina Nonprofit Corporation, Plaintiff,
v.
MOUNTAIN ENTERPRISES OF WOLF RIDGE, LLC, a North Carolina Limited Liability Company; Haw Mountain, Inc., a North Carolina Business Corporation; Richard Bussey, a North Carolina Resident d/b/a Scenic Wolf Laurel, LLC; Wolf Ridges Ski and Realty, Inc., a North Carolina Business Corporation; Scenic Wolf Development, LLC, a North Carolina Limited Liability Company; Wolf's Crossing, Inc., a North Carolina Business Corporation; Madison County, North Carolina; and Madison County Board of Commissioners, Defendants.

No. COA07–1336.
|
Sept. 2, 2008.

Synopsis

Background: Nonprofit corporation brought action for declaratory and injunctive relief, alleging that developers were violating county land use ordinance by planning to construct an airport on a mountain ridge. The Superior Court, Madison County, C. Philip Ginn, J., entered summary judgment in part against corporation, and following jury trial, entered judgment against corporation. Corporation appealed.

Holdings: The Court of Appeals, Stephens, J., held that:

[1] county rezoned area from residential-agricultural to industrial-district rather than residential-resort, despite minutes of Board of Commissioners meeting;

[2] doctrine of equitable estoppel did not apply; and

[3] corporation failed to exhaust its administrative remedies before bringing claims developers.

Affirmed in part; vacated in part.

West Headnotes (12)

[1] **Declaratory Judgment** Zoning ordinances

A suit to determine the validity of a zoning ordinance is a proper case for a declaratory judgment. West's N.C.G.S.A. § 1–254.

1 Cases that cite this headnote

[2] **Judgment** Absence of issue of fact

An issue is "material" for summary judgment purposes if the facts alleged would constitute a legal defense or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. Rules Civ.Proc., Rule 56(c), West's N.C.G.S.A. § 1A–1.

[3] **Zoning and Planning** Change from residential use to business, commercial, or industrial use

County rezoned area from residential-agricultural to industrial-district, although minutes from board of commissioners' meeting stated that area was rezoned to residential-resort district, where rezoning application stated that developers sought to have the area rezoned industrial, planning board's notice of public hearing stated it would consider request to have area rezoned industrial, planning board's stated that planning board approved request to rezone to industrial, board of commissioners' notice of public hearing stated that it was considering request to rezone to industrial, board of commissioners' minutes stated that the board "voted unanimously to approve the application," newspaper article stated that board voted to rezone "to industrial district," and board of

EXHIBIT 25

commissioners passed later resolution stating that minutes contained a scrivener's error.

[4] **Zoning and Planning** Commencement of limitation period

Evidence did not support nonprofit corporation's contention that it reasonably relied on mistake in planning board's minutes in connection with corporation's failure to timely challenge zoning amendment which allowed construction of airport, as required for doctrine of equitable estoppel to apply; corporation was not formed until after statute of limitations had run, evidence showed that corporation's president first saw the minutes after the statute of limitations had run, both planning board and board of commissioners issued notices of hearing which stated that county was considering application for rezoning, and local newspaper article indicated that board had approved application to rezone area to allow proposed airport.

[5] **Estoppel** Essential elements

The doctrine of equitable estoppel applies when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

[6] **Declaratory Judgment** Statutory remedy

Zoning and Planning Availability and exhaustion of other remedies

Nonprofit corporation failed to exhaust its administrative remedies before bringing claims developers for declaratory and injunctive relief to prevent them from allegedly violating zoning ordinance by building an airport, and thus court was without subject matter jurisdiction to rule on the claims; corporation could have sought and received a ruling from the county's zoning officials, appealed an adverse ruling of the officials to the planning board, and appealed an adverse ruling of the board to the superior court, but the corporation instead bypassed the statutorily prescribed procedures for resolving zoning disputes and filed its case directly to the superior court. West's N.C.G.S.A. § 153A–345.

4 Cases that cite this headnote

[7] **Zoning and Planning** Police power

The enactment and enforcement of county zoning ordinances are exercises of the State's police powers which have been delegated to the counties by the General Assembly.

[8] **Mandamus** Making and enforcement of police and zoning regulations

In the event that a county official refuses to investigate or enforce a county ordinance, an action will lie in mandamus to compel the official to investigate and enforce the ordinance.

1 Cases that cite this headnote

[9] **Certiorari** Scope and Extent in General

Counties Appeals from decisions

It is not the function of the reviewing court, in a proceeding in the nature of certiorari, to find the facts but to determine whether the findings of fact made by the county board are supported by the evidence before the board. West's N.C.G.S.A. § 153A–345.

[10] **Municipal Corporations** Appeal from decisions

The superior court is not the trier of fact when reviewing an order of a municipal board but rather sits as an appellate court and may review both (1) sufficiency of the evidence presented to the municipal board and (2) whether the record reveals error of law.

[11] **Courts** Time of making objection

Courts Determination of questions of jurisdiction in general

An issue of subject matter jurisdiction may be raised at any stage of a case and may be raised by a court on its own motion.

1 Cases that cite this headnote

[12] **Courts** Acts and proceedings without jurisdiction

The proceedings of a court without jurisdiction of the subject matter are a nullity.

1 Cases that cite this headnote

****563** Appeal by Plaintiff from order entered 17 July 2006 by Judge C. Philip Ginn and from judgment entered 26 February 2007, corrected judgment entered 5 March 2007, and order entered 10 May 2007 by Judge James U. Downs in Madison County Superior Court. Heard in the Court of Appeals 2 April 2008.

Attorneys and Law Firms

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Long, Parker, Warren & Jones, P.A., by Philip S. Anderson and Robert B. Long, Jr., and Leake & Scott, by Larry Leake, Asheville, for Defendants–Appellees.

Opinion

STEPHENS, Judge.

***392** Laurel Creek runs through Laurel Valley in Madison County. Plaintiff Laurel Valley Watch, Inc., a nonprofit corporation formed by residents of Madison County on 6 January 2006, initiated this action on 9 March 2006 by filing a complaint in superior court seeking declaratory and injunctive relief on allegations that Defendants Mountain Enterprises of Wolf Ridge, LLC, Haw Mountain, Inc., and Richard Bussey ("Rick Bussey" or "Bussey") were violating Madison County's Land Use Ordinance ("Ordinance") by planning to construct an airport on a mountain ridge above Laurel Valley. Plaintiff subsequently amended its complaint, adding Defendants Wolf Ridges Ski and Realty, Inc., Scenic Wolf Development, LLC, and Wolf's Crossing, Inc. (together with Mountain Enterprises, Haw Mountain, and Bussey, "Developers") on the same allegations. Plaintiff also added Defendants Madison County and the Madison County Board of Commissioners in the amended complaint seeking declaratory relief on allegations that the Board of Commissioners improperly rezoned a tract of land on which the Developers were allegedly violating the Ordinance. The trial court resolved all of Plaintiff's claims in favor of Defendants. Plaintiff appeals.

***393** BACKGROUND

The Ordinance delineates three zoning districts pertinent to this appeal: (1) RA–26, Residential–Agricultural District, (2) R–26R, Residential–Resort District, and (3) I–D, Industrial District. On 28 June 2005, Ronnie Ledford, Orville English, and Rick Bussey submitted an application to the County to have 12 acres rezoned from R–26R to I–D.[1] Subsequently, the County's Planning Board issued a Notice of Public Hearing which stated that it would meet on 25 July 2005 to consider:

> 1. Application by Ronnie Ledford, Orville English and Rick Bussey to rezone approximately 12 acres located at the end of Haw Ridge Summit, off Wolf Ridge Drive, from residential-agriculture to industrial.

According to the Board's minutes from the 25 July 2005 meeting: (1) the first item the Board addressed was "Orville English, Rick Bussey—Rezone 12 acres [from] R–26R [sic] to I–D[,]" and (2) Ronnie Ledford told the Board that the rezoning was necessary in order to construct an airport which would accommodate "private jets and aircraft." Under the Ordinance, an airport is a permitted or conditional use only on land zoned I–D. The Planning Board unanimously voted to "[a]pprove rezoning from R–26R [sic] to I–D[.]"

On 26 July 2005, the Board of Commissioners issued a Notice of Public Hearing which stated that the Board would meet on 8 August 2005 to consider:

> 1. Application by Ronnie Ledford, Orville English and Rick Bussey to rezone approximately 12 acres located at the end of Haw Ridge Summit, off Wolf Ridge ****564** Drive, from residential-agriculture to industrial district.

The Board's minutes from the 8 August 2005 meeting state:

[Item] II.

> Upon motion of Commissioner Moore, seconded by Commissioner Smathers, the Board voted unanimously to approve the application of Ronnie Ledford, Orville English and Rick Bussey to rezone 12 acres located at the end of Haw Ridge ***394** Summit, off Wolf Ridge Drive, from residential-agriculture to residential-resort district.[2]

On 9 March 2006, Plaintiff filed its initial complaint against Mountain Enterprises, Haw Mountain, and Bussey alleging that these Defendants were violating the Ordinance by planning to construct an airport on land zoned "Residential Resort" and that "[a]n airport is only a permitted use in an Industrial Zoning District[.]" Plaintiff sought declaratory relief that these Defendants were in violation of the Ordinance and preliminary and permanent injunctions to stop the airport's construction. On 13 March 2006, the Board of Commissioners met and passed the following resolution:

> WHEREAS, it has been called to the attention of the Board that a scrivener's error occurred with regard to the minutes of the August 8, 2005 meeting of this Board with regard to Item II with regard to the district to which the [a]ffected property was being rezoned; and
>
> WHEREAS, the Board has the authority to and should amend the minutes of the August 8, 2005 meeting to correct this scrivener's error;
>
> WHEREFORE, Item II of the minutes of the August 8, 2005 meeting of the Madison County Board of Commissioners is hereby amended to read as follows:

[Item] II.

> Upon motion of Commissioner Moore, seconded by Commissioner Smathers, the Board voted unanimously to approve the application of Ronnie Ledford, Orville English and Rick Bussey to rezone 12 acres located at the end of Haw Ridge Summit, off Wolf Ridge Drive, from residential-agriculture to industrial district.

Plaintiff filed its amended complaint on 17 March 2006. On 30 June 2006, Plaintiff filed a motion for summary judgment. In support of this motion, Plaintiff filed the affidavits of its president, Garland Galloway, and one of its members, Kim Garrett. In opposition to the motion, Defendants filed the affidavits of Bussey and Madison County's Zoning Enforcement Officer, Ryan Cody ("Cody"). In Cody's affidavit, he averred: (1) that he attended the Board of Commissioners' ***395** 8 August 2005 and 13 March 2006 meetings, and (2) that he was "familiar with Madison County's record regarding the Board of Commissioners' adoption of the amendment rezoning the 12 acres ... to industrial."

In an order entered 17 July 2006, Judge C. Philip Ginn concluded:

> 1. There is a genuine issue of material fact whether the [Developers] are using approximately 15 acres of land, which surround the 12 acres rezoned Industrial, in a manner not permitted under current zoning regulations; and
>
> 2. Otherwise, there is no genuine issue of material fact relating to any of [ ] Plaintiff's claims, and the Defendants are entitled to judgment as a matter of law, pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure.

On the issue surviving summary judgment, Judge James U. Downs presided over a jury trial held during the 16 October 2006 session of Madison County Superior Court. At the conclusion of all the evidence, Judge Downs submitted, and the jury answered, the following issues:

> 1. Have the Defendants erected, moved, altered, constructed, reconstructed, or used any building or part thereof in the 15 acres surrounding and outside the 12 acres zoned Industrial?
>
> ANSWER: No[;]
>
> ****565** 2. Have the Defendants used the 15 acres surrounding and outside the 12 acres zoned Industrial for grading, cut and fill, and erosion and sedimentation control activities and for open space?
>
> ANSWER: Yes[;]
>
> 3. Have the Defendants used the 15 acres surrounding and outside the 12 acres zoned Industrial for any airstrip, taxiway, apron, or airport parking?
>
> ANSWER: No[.]

In a judgment entered 26 February 2007, Judge Downs concluded that the Developers' use of the land surrounding the 12 acres was not in violation of the Ordinance and Judge Downs denied Plaintiff's claims for relief. The judgment taxed the costs of the action against Defendants. In a corrected judgment entered 5 March 2007, Judge Downs taxed the

costs of the action against Plaintiff. Following the entry of judgment, Plaintiff filed a motion to set aside the verdict and ***396** for a new trial on grounds of newly discovered evidence and erroneous jury instructions. Judge Downs denied this motion by order entered 10 May 2007. Plaintiff timely appealed.

CLAIM AGAINST MADISON COUNTY

In its sole claim against Madison County and the Board of Commissioners, Plaintiff sought a declaratory judgment that the Board of Commissioners improperly rezoned the 12 acres. On appeal, Plaintiff argues that the trial court erred in entering summary judgment in favor of the County on this claim. We disagree.

[1] **[2]** A suit to determine the validity of a zoning ordinance is a proper case for a declaratory judgment. N.C. Gen.Stat. § 1–254 (2005); *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E.2d 35 (1972); *Woodard v. Carteret Cty.,* 270 N.C. 55, 153 S.E.2d 809 (1967). In such an action, summary judgment is properly granted "where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Williams v. Blue Cross Blue Shield of N.C.,* 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003) (quoting N.C. Gen.Stat. § 1A–1, Rule 56(c) (2003)). Our Supreme Court has stated that " 'an issue is genuine if it is supported by substantial evidence,' *DeWitt* [*v. Eveready Battery Co.*], 355 N.C. [672,] 681, 565 S.E.2d [140,] 146 [(2002)], which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion[.]" *Liberty Mut. Ins. Co. v. Pennington,* 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002). Further, "[a]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston–Salem,* 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

"For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances." N.C. Gen.Stat. § 153A–340(a) (2005). "A cause of action as to the validity of any zoning ordinance, or amendment thereto, [so adopted] shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1–54.1." N.C. Gen.Stat. § 153A–348 (2005).

[3] In this case, the pleadings and affidavits establish that there is no genuine issue as to the material fact that the County rezoned the ***397** 12 acres to the zoning classification I–D on 8 August 2005. The evidence establishing this fact includes: (1) the rezoning application which states that the Developers sought to have the 12 acres rezoned I–D, (2) the Planning Board's notice of public hearing which states that the Planning Board would meet to consider the request to have the 12 acres rezoned I–D, (3) the Planning Board's minutes which state that the Planning Board voted unanimously to approve the request to rezone the 12 acres I–D, (4) the Board of Commissioners' notice of public hearing which states that the Board would meet to consider the request to rezone the 12 acres I–D, (5) that portion of the Board of Commissioners' minutes which states that the Board "voted unanimously to *approve* the application" (emphasis added), (6) a newspaper article published after the Board of Commissioners' ****566** 8 August 2005 meeting which states that the Board voted to rezone the 12 acres "to industrial district[,]" (7) the Board's resolution amending the minutes of the 8 August 2005 meeting which states that the minutes contained a scrivener's error and that the Board voted unanimously at the 8 August 2005 meeting to rezone the 12 acres I–D, (8) Cody's affidavit which states that he was "familiar with Madison County's record regarding the Board of Commissioners' adoption of the amendment rezoning the 12 acres ... to industrial[,]" and (9) Bussey's affidavit which states that he attended the 8 August 2005 meeting and that the Board voted to rezone the 12 acres I–D at that meeting. The only evidence which tends to raise an issue as to this fact is that portion of the Board's 8 August 2005 minutes which states that the Board voted to rezone the 12 acres "from residential-agriculture to residential-resort district." However, this portion of the minutes is clearly opposed to the portion of the minutes which states that the Board voted to " approve" the application, as the application did not seek to have the 12 acres rezoned R–26R. This contradiction is addressed and resolved by the Board of Commissioners' 13 March 2006 resolution which states that the contradiction was the result of a "scrivener's error[.]" Furthermore, Plaintiff did not allege in its amended complaint that the County did not, in fact, rezone the 12 acres I–D at the 8 August 2005 meeting, nor did Garland Galloway or Kim Garrett in their affidavits. Thus, there is no genuine issue as to the fact that the County rezoned the 12 acres I–D at its 8 August 2005 meeting. This fact is material because the statute of limitations had expired by the time Plaintiff

filed its complaint. Thus, the trial court properly granted summary judgment in favor of the County and the Board of Commissioners.

[4] **[5]** ***398** In the alternative, however, Plaintiff argues that even if the County properly rezoned the 12 acres at the 8 August 2005 meeting, Defendants are equitably estopped from asserting the statute of limitations because of the error in the minutes of the meeting. The doctrine of equitable estoppel applies

> "when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (citation omitted). We conclude that the doctrine does not apply in this case.

We begin by noting that Plaintiff was not incorporated until 6 January 2006, almost three months after the statute of limitations had expired. Thus, Plaintiff's assertion in its brief that it "could not have challenged the industrial rezoning within the sixty-day limitations period after the 8 August 2005 meeting, because it reasonably relied upon the minutes" is not entirely accurate. Plaintiff could not have challenged the rezoning decision within the limitations period because Plaintiff was not incorporated until after the limitations period expired.

More importantly, however, there is no evidence in the record that suggests that Plaintiff, or any one of Plaintiff's incorporators or members, read and relied upon the minutes before the statute of limitations expired. To the contrary, the evidence tends to show that Garland Galloway, Plaintiff's president, first saw the minutes in December 2005, by which time the statute had run. Moreover, both the Planning Board and the Board of Commissioners issued notices of hearing which appeared in the local newspaper and which stated that the County was considering an application to rezone the 12 acres I–D.[3] The local newspaper also published an article on 24 August 2005 which stated that the Board of Commissioners

> ****567** ***399** okayed the application ... to rezone approximately 12 acres located at the end of Haw Ridge Summit, off Wolf Laurel Drive, from residential-agriculture to industrial district.
>
> The property will be the site of a proposed jet airport on Wolf Ridge. The project has been okayed by the FAA.

In sum, Plaintiff's incorporators and members had notice that the County had rezoned the 12 acres to I–D to allow for the development of the airport. Because the evidence is insufficient to support a determination that Plaintiff reasonably relied on the 8 August 2005 minutes in filing its lawsuit after the expiration of the statute of limitations, the doctrine of equitable estoppel does not apply to this case.

CLAIMS AGAINST THE DEVELOPERS

[6] In its claims against the Developers in the amended complaint, Plaintiff sought declaratory and injunctive relief on allegations that the Developers had begun construction of the airport on the 12 acres and its environs and were, thus, violating the Ordinance. Having carefully reviewed North Carolina's General Statutes and prior decisions of both our Supreme Court and this Court, we conclude that Plaintiff did not exhaust its administrative remedies before filing its complaint and that the trial court, therefore, was without subject matter jurisdiction to rule on these claims.

[7] **[8]** The enactment and enforcement of county zoning ordinances are exercises of the State's police powers—powers which have been delegated to the counties by our General Assembly. N.C. Gen.Stat. ch. 153A (2005); *Baucom's Nursery Co. v. Mecklenburg Cty.,* 89 N.C.App. 542, 366 S.E.2d 558, *disc. review denied,* 322 N.C. 834, 371 S.E.2d 274 (1988). Typically, counties which have enacted zoning ordinances pursuant to this grant of power designate zoning officials to enforce the ordinances. As discussed above, for example, Madison County appointed Cody as the County's Zoning Enforcement Officer. In the event that a county official refuses to investigate or enforce a county's ordinance, an action will lie in mandamus to compel the official to investigate and enforce the ordinance. *Midgette v. Pate,* 94 N.C.App. 498, 380 S.E.2d 572 (1989).

[9] **[10]** Any decision made by a county official charged with enforcing a county's ordinance may be appealed by following a specific procedure set forth in Chapter 153A:

> (b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority ***400** granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review

> any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance.
>
> ....
>
> (e) The board of adjustment, by a vote of four-fifths of its members, may reverse any order, requirement, decision, or determination of an administrative officer charged with enforcing an ordinance adopted pursuant to this Part, or may decide in favor of the applicant a matter upon which the board is required to pass under the ordinance, or may grant a variance from the provisions of the ordinance.
>
> ....
>
> (e2) Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari.

N.C. Gen.Stat. § 153A–345 (2005). *See, e.g., Riggs v. Zoning Bd. of Adjust. of Carteret Cty.,* 101 N.C.App. 422, 399 S.E.2d 149 (1991) (reversing superior court's order affirming board of adjustment's approval of zoning enforcement official's decision). "It is not the function of the reviewing court, in [a proceeding in the nature of certiorari], to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.,* 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993) (quotation marks and citations omitted). "The superior court is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." *Id.* (citations omitted).

****568** The Ordinance at issue in the case at bar tracks the procedures set forth in Chapter 153A. Section 100 of the Ordinance provides that "[i]f a ruling of the Zoning Enforcement Officer is questioned, the aggrieved party or parties may appeal such ruling to the Board of Adjustment." Section 105 provides:

> In case any building is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building or land is used in violation of this ordinance, the Zoning Enforcement Officer or any other appropriate county authority, or any person who would be damaged by such violation, in addition to other ***401** remedies, may institute an action for injunction or mandamus, or other appropriate action or proceeding to prevent such violation.

Section 114, entitled "Duties of the Zoning Enforcement Officer, Board of Adjustment, Courts and County Commissioners on Matters of Appeal[,]" provides, in part:

> It is the intention of this ordinance that all questions arising in connection with the enforcement of this ordinance shall be presented to the Board of Adjustment only on appeal from the Zoning Enforcement Officer and that from the decision of the Board of Adjustment recourse shall be had to courts as provided by law.

The record before us, however, does not contain any evidence that Plaintiff ever asked Madison County to investigate the Developers' alleged zoning violations. Instead, Plaintiff filed its complaint directly in superior court. We find no authority in our General Statutes, our case law, or in the Ordinance which supports the proposition that such an action is properly brought in superior court in the first instance.[4] In fact, recent decisions of this Court support the proposition that a plaintiff must first seek relief from the county before seeking relief in the courts.

In *Darbo v. Old Keller Farm Prop. Owners' Ass'n,* 174 N.C.App. 591, 621 S.E.2d 281 (2005), plaintiffs submitted a plat to the Watauga County Planning and Inspection Department proposing to subdivide one lot into five new lots. Plaintiffs proposed to service the five new lots by a forty-five-foot right-of-way. Upon learning of the proposed subdivision, defendants "notified the Planning Department that it disputed whether plaintiffs had a sufficient right-of-way to allow the subdivision as proposed[.]" *Id.* at 592, 621 S.E.2d at 282. The planning department refused to consider plaintiffs' subdivision plans and "notified plaintiffs that 'when there has been a dispute regarding right-of-way, ... the Planning Board has taken the position that the parties resolve the dispute themselves, rather than ask the County to ***402** do so, as these are actually private legal issues over which the courts, not the County, have jurisdiction.' " *Id.* Plaintiffs thereafter filed an action in superior court seeking a declaratory judgment concerning the right-of-way. After reviewing, *inter alia,* the Watauga County Ordinance to Govern Subdivisions and Multi Unit Structures, the trial court granted judgment in favor of plaintiffs.

On appeal, this Court reached the merits of the appeal and affirmed the trial court's judgment. It appears from our decision that the parties did not raise the issue of subject matter jurisdiction on appeal. Perhaps in light of the planning board's refusal to rule on plaintiff's proposed plat and directive to resolve the dispute in the courts, this Court did not raise the

issue *sua sponte* before addressing the merits. However, we began our analysis by stating that "the issues presented in this case are issues that are properly addressed to and resolved by county or municipal planning and inspections departments as an initial matter, rather than our courts." *Id.* at 593, 621 S.E.2d at 283.

In *Ward v. New Hanover Cty.,* 175 N.C.App. 671, 625 S.E.2d 598, *disc. review denied,* 360 N.C. 582, 636 S.E.2d 200 (2006), ****569** plaintiffs owned a marina that was subject to a special use permit granted by New Hanover County in 1971. In 2002, plaintiffs asked the county's planning staff to approve the use of a forklift on the marina. Plaintiffs contended that such a use was "covered" by the permit, the planning staff disagreed, and plaintiffs and the County attempted to resolve the dispute. *Id.* at 672, 625 S.E.2d at 599. Before either the planning staff or the County's Superintendent of Inspections reached a formal decision on plaintiffs' request, plaintiffs filed a complaint for declaratory judgment in superior court alleging that "judicial declaration is necessary and appropriate at this time under all of the circumstances [.]" *Id.* at 673, 625 S.E.2d at 600 (quotation marks omitted). Plaintiffs sought: (1) a "decree[ ] that [plaintiffs] are entitled to use a forklift [on the property] in connection with their operation of a commercial marina [,]" and (2) "a permanent injunction enjoining [defendant], its officers and agents from interfering with [plaintiffs'] lawful use of a forklift on [the property] under [the Permit]." *Id.* at 673–74, 625 S.E.2d at 600 (quotation marks omitted). The trial court concluded that there were no material issues of fact between the parties as to whether plaintiffs exhausted their administrative remedies with the county, and the trial court granted summary judgment in the county's favor. Plaintiffs appealed.

***403** On appeal, this Court stated:

> "As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell,* 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citations omitted); *see also Justice for Animals, Inc. v. Robeson County,* 164 N.C.App. 366, 369, 595 S.E.2d 773, 775 (2004) ("If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed.") (citing *Shell Island Homeowners Ass'n v. Tomlinson,* 134 N.C.App. 217, 220, 517 S.E.2d 406, 410 (1999)).

Id. at 674, 625 S.E.2d at 601. Quoting *Presnell,* 298 N.C. at 721–22, 260 S.E.2d at 615 (citations omitted), the Court then stated:

> This is especially true where a statute establishes ... a procedure whereby matters of regulation and control are first addressed by commissions and agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of administrative agencies."

Id. at 674–75, 625 S.E.2d at 601. We concluded that plaintiffs "failed to first exhaust their administrative remedies by obtaining a formal determination from defendant regarding their proposed use of the marina and rights under the [p]ermit," and we affirmed the trial court's order granting summary judgment in favor of defendant. *Id.* at 679, 625 S.E.2d at 603.

As in *Ward,* Plaintiff in this case did not exhaust its administrative remedies before seeking relief in the courts. Plaintiff could have: (1) sought and received a ruling from Madison County's zoning officials, (2) appealed an adverse ruling of the officials to the Planning Board, and (3) appealed an adverse ruling of the Planning Board to ***404** the superior court. N.C. Gen.Stat. § 153A–345. Instead, Plaintiff filed its case directly to the superior court. By taking such action, Plaintiff bypassed the statutorily prescribed procedures for resolving zoning disputes. *Id.* The General Assembly did not signify an intent in Chapter 153 to give private citizens the right to initiate an action in superior court to enforce zoning ordinances. Plaintiff having failed to exhaust its administrative remedies, ****570** we conclude that the trial court was without subject matter jurisdiction to rule on Plaintiff's claims concerning the Developers.

[11] **[12]** In reaching this conclusion, we are cognizant of the efforts expended by the parties to resolve Plaintiff's claims on the merits. We recognize that neither this Court, where the parties appeared to present oral arguments, nor the trial court, where Judge Downs conducted a jury trial on Plaintiff's

claims, addressed the issue of subject matter jurisdiction. Indeed, we acknowledge that we raise this issue *sua sponte.* However, it is well-established that an issue of subject matter jurisdiction may be raised at any stage of a case and may be raised by a court on its own motion. Furthermore, " '[a] universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.' " *In re T.R.P.,* 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Burgess v. Gibbs,* 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)).

To the extent that the trial court, in its 17 July 2006 order, granted summary judgment in favor of the County and the Board of Commissioners on Plaintiff's claim that the County improperly rezoned the 12 acres, the trial court's order is affirmed. To the extent that the trial court granted summary judgment in favor of the Developers on Plaintiff's claim that the Developers were violating the Ordinance on the 12 acres, the trial court's 17 July 2006 order is vacated. The judgment and corrected judgment are vacated.

AFFIRMED IN PART; VACATED IN PART.

Judges McGEE and TYSON concur.

All Citations

192 N.C.App. 391, 665 S.E.2d 561

Footnotes

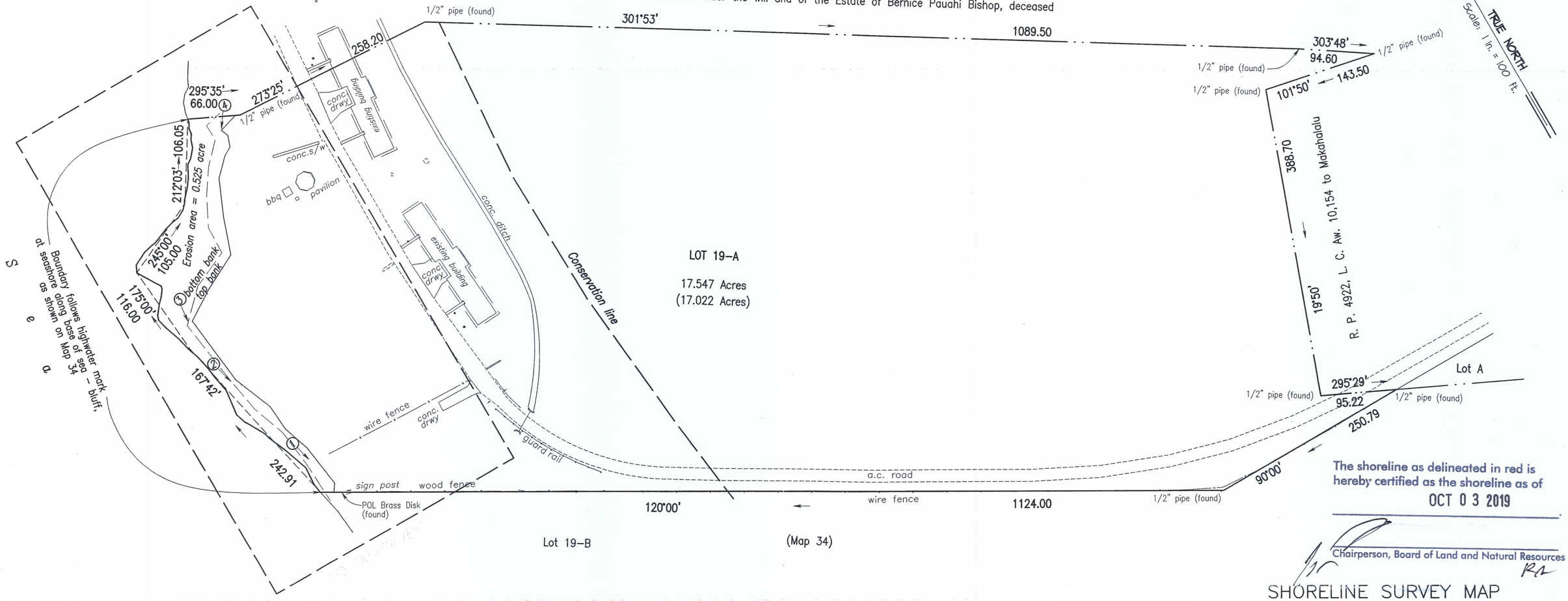
1 Although the application sought to have the 12 acres rezoned from R–26R to I–D, it is clear from the record before us that the 12 acres was zoned RA–26 at the time the application was filed.

2 As discussed below, the statement that the Board voted to rezone the 12 acres "to residential-resort district[ ]" is a source of contention between the parties.

3 Plaintiff's argument that the notices of hearing did not sufficiently describe the property to be rezoned is unavailing. The notices were "reasonably calculated under all circumstances to apprise interested parties of the pendency of the action or proceeding and afford them an opportunity to present their objections." *Frizzelle v. Harnett Cty.,* 106 N.C.App. 234, 239, 416 S.E.2d 421, 423 (citations omitted), *disc. review denied,* 332 N.C. 147, 419 S.E.2d 571 (1992).

4 In *Sedman v. Rijdes,* 127 N.C.App. 700, 492 S.E.2d 620 (1997), plaintiff filed a complaint on allegations that defendant, plaintiff's neighbor, was using land so as to constitute a nuisance and in violation of the Orange County Zoning Ordinance. The trial court granted summary judgment in favor of defendant "on the issue of the alleged violation of the Orange County Zoning Ordinance[,]" *id.* at 702, 492 S.E.2d at 621 (quotation marks omitted), and plaintiff appealed. On appeal, this Court held that defendant's use of the land was exempt from compliance with the ordinance and this Court affirmed the trial court. This Court did not address the issue of subject matter jurisdiction.

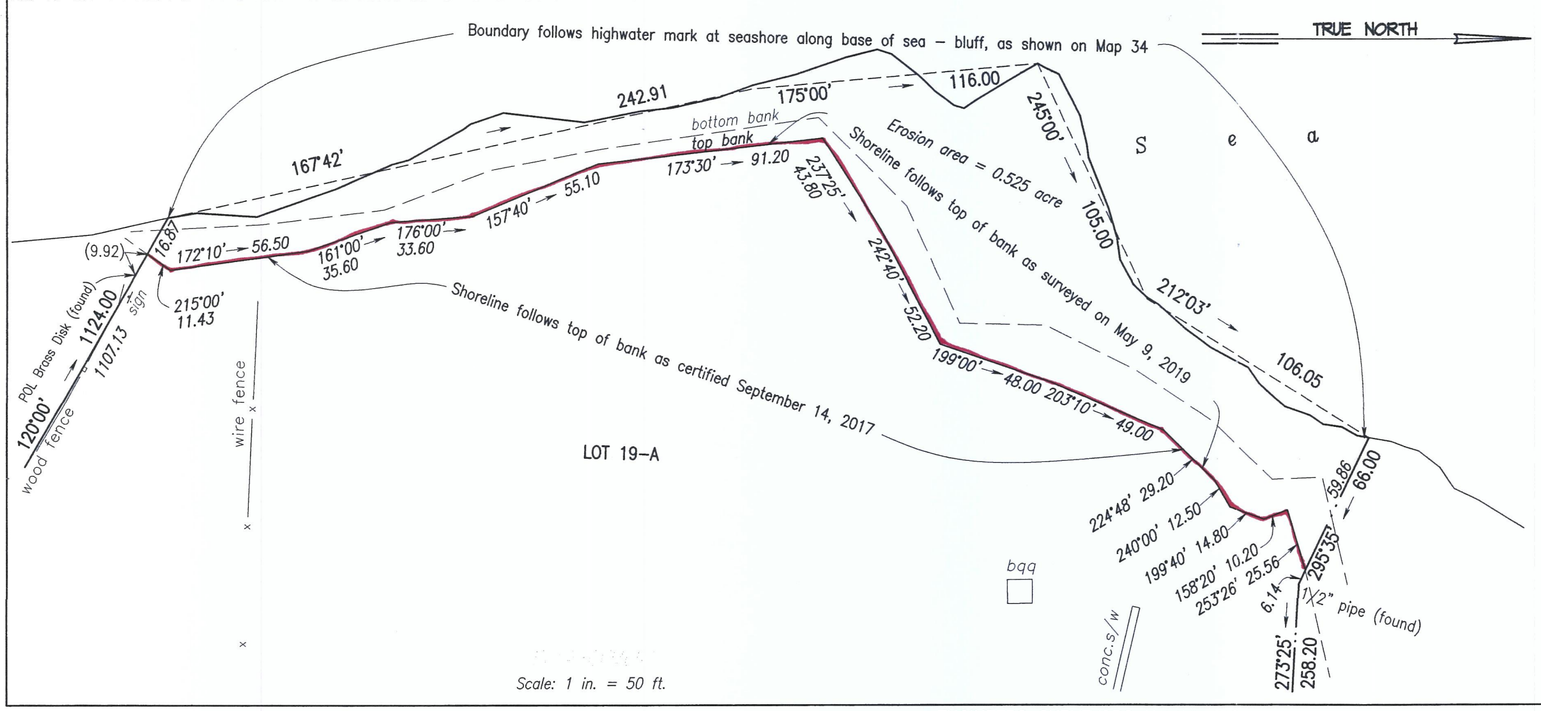
Grant 5089 to Trustees under the will and of the Estate of Bernice Pauahi Bishop, deceased



The shoreline as delineated in red is hereby certified as the shoreline as of

OCT 03 2019

Chairperson, Board of Land and Natural Resources



SHORELINE SURVEY MAP
OF LOT 19-A AS SHOWN ON MAP 34 OF LAND COURT APPLICATION 1120

Situated at Honoipu, North Kohala,
Island of Hawaii, Hawaii
T.M.K. : (3) 5-6-01: 074

Owner: Honoipu Hideaway LLC
Address: 1001 S. Bishop Street, Suite 2685A
Honolulu, Hawaii 96813

Site Address: 56-102 OLD COAST GUARD ROAD
Kapaa-Upolu, Hawaii

ANDY R. HARADA
LICENSED PROFESSIONAL LAND SURVEYOR
No. 5963
HAWAII, U.S.A.

1. *Shoreline survey is for setback purposes*
2. *(1)→ denotes photo number and direction*

This work was prepared by me or under my direct supervision.

Andy R. Harada Exiprre 4/30/20
Licensed Professional Land Surveyor
Certificate Number 5963

Honolulu, Hawaii
16-40

ENGINEERS SURVEYORS HAWAII, INC.
CIVIL ENGINEERS ~ LAND SURVEYORS ~ PLANNERS

EXHIBIT 26

15 X 21 1320 North School St.
June 6, 2019

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of HONOIPU HIDEAWAY, LLC For Boundary Interpretation of certain land consisting of approximately 17.5470 acres situated at 56-102 Old Coast Guard Road, Tax Map Key No. (3) 5-6-001-074, Kapaa-Upolu, North Kohala, County of Hawai'i, State of Hawai'i.	DOCKET NO. DR21-73 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certify that on this date, a copy of the foregoing document was duly served on the following persons at their last known address by depositing a copy in the U.S. mail, postage prepaid:

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State of Hawaii and Office of Planning

DATED: Honolulu, Hawai'i, June 25, 2021.

CADES SCHUTTE
A Limited Liability Law Partnership

CALVERT G. CHIPCHASE
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Attorneys for Petitioner
HONOIPU HIDEAWAY, LLC