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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. DR21-72
)	
KENNETH S. CHURCH AND JOAN E.)	OFFICE OF PLANNING AND
HILDAL)	SUSTAINABLE DEVELOPMENT'S
)	STATEMENT OF POSITION FOR
For review of Boundary Reclassification,)	PETITION FOR A DECLARATORY
Boundary Interpretation, the 1974 State)	ORDER; EXHIBITS 1, 2, 3 AND 4; AND
Land Use District Boundaries Map H-65,)	CERTIFICATE OF SERVICE
Reimbursement of Filing Fees for Petition)	
A18-805 and this Petition For a Declaratory)	
Order, Waiving of Court Reporter fees for)	
this Petition)	
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OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT'S
STATEMENT OF POSITION FOR A DECLARATORY ORDER

The Office of Planning and Sustainable Development ("OPSD") would have no objection to the Land Use Commission's granting of Kenneth S. Church's and Joan Hildal's ("Petitioners") request to the Land Use Commission ("LUC") for a Declaratory Order to clarify the December 16, 1992 Boundary Interpretation No. 92-48 for Tax Map Keys: (3) 2-9-003: 29 and 60. The petition area is comprised of two lots; parcel 29 contains 1.116 acres and parcel 60 contains 2.252 acres for a total of approximately 3.368 acres of land ("Petition Area"). The 1992 Boundary Interpretation for the Petition Area indicated that the two parcels were within the

Conservation District. TMK parcel 2-9-003: 48 which borders the Petition Area is within the State Agricultural District.

I. BACKGROUND

A. Boundary Interpretation No. 92-48 (McCully)

On November 24, 1992, Mr. James McCully, the previous owner of the Petition Area, requested a Boundary Interpretation from the LUC. The survey map and letter submitted for the interpretation indicated that the boundary between State Conservation and Agricultural Districts should be the midpoint of the railroad right-of-way, inland of the cliff edge which also delineates the petitioner's property line. By letter dated December 16, 1992, the LUC Executive Officer delineated the Conservation/Agricultural Land Use District boundary at the railroad right-of-way, as indicated on the petitioner's survey map. The LUC letter further stated that a boundary amendment to reclassify the Conservation District boundary would require LUC approval. See (OPSD Exhibit 2)

Land Use Commission ("LUC") Docket A05-757 (McCully)

The previous owner filed a petition, A05-757, with the LUC in March 2005, to reclassify these parcels and parcel 13, approximately 3.54 acres of land from the Conservation District to the Agricultural District. The petitioner at that time, James and Francine McCully, proposed to consolidate and re-subdivide the lots into three lots. The petitioner proposed to construct a 2,000 square foot greenhouse on the petition area. At the time, the Office of Planning supported the reclassification. During hearings on the docket, several Commissioners questioned the necessity of reclassification given that the proposed uses are allowed in the Conservation District under Department of Land and Natural Resources ("DLNR") rules. Further, several Commissioners expressed concern that the petitioner had no clear plans for agricultural use for the entire petition

area, other than their own plans to build a home and a greenhouse. Later in the hearings, DLNR Office of Conservation and Coastal Lands (“OCCL”) staff was asked by the LUC to testify on the Conservation District Use applications in the region and provided testimony expressing concern about the precedent of removing lands from the Conservation District in this region, due to coastal erosion and cliff collapse risks, loss of scenic resources, and other conservation resource values.

The 2005 petition was denied by the LUC in 2006 due to the lack of affirmative votes. A motion to reconsider filed by the petitioner was also denied. The petitioner had proposed to retain a 40-foot buffer from the makai edge of the petition area in the Conservation District, however, a buffer did not materially change the nature of the petition, and there had been no change in facts or circumstances to justify a change in the Commission’s prior decision.

B. Docket No. A09-783 (McCully)

In 2009, the previous petitioner filed a second petition for the same proposal to reclassify approximately 3.54 acres of land from the State Conservation District to the Agricultural District. On October 20, 2010, the Office of Planning filed testimony in opposition to the petition based on a review of the subject petition and issues raised in LUC hearings on the previous Docket No. A05-757. Subsequently, the petition was withdrawn prior to a decision by the LUC.

C. Docket No. A18-805 (Church)

On July 20, 2018, the current Petitioners filed a petition similar to A09-783 (McCully) to reclassify approximately 3.368 acres from the State Conservation District to the Agricultural District. By letter dated August 1, 2020, the LUC informed the Petitioners that the petition was incomplete and listed six concerns and issues with the petition. Item No. 5 was the need for an

accepted Environmental Impact Statement (EIS) or Finding of no Significant Impact (FONSI). This requirement was met with the Final FONSI accepted by the LUC and published in The Environmental Notice dated November 23, 2020. However, no hearing or letter confirming acceptance was conducted or issued by the LUC.

II. **OTHER SIMILAR LUC ACTIONS IN THE AREA** (See OPSD Exhibit 1 Map)

A. Docket No. A18-806 (Barry Trust)

The petition in Docket No. A18-806, Kevin M. Barry and Monica S. Barry, Trustees of the Barry Family Trust Dated November 15, 2006 was approved by the LUC, and the Findings of Fact, Conclusions of Law and Decision and Order was adopted on April 21, 2021 to reclassify 0.51 acre of land from the State Conservation District situated along the coastline, to the Agricultural District. This petition site is similar to the Petitioners' previous requests for the "Top of the Sea Pali" to be the boundary between the State Conservation and Agricultural Districts.

We note that the petitioner's parcel was designated as Conservation District along the coastal area as a result of the 1969 Five-Year Boundary Review report titled, *State of Hawaii Land Use Districts and Regulations Review*. The coastal parcels in the entire subdivision were reclassified into the State Conservation District for the purpose of protecting the shoreline from development. Subsequently, the subdivision in which this petitioner's lot is situated, except for a few parcels such as the Barry Trust parcel, was the subject of a multi-lot district boundary amendment that reclassified 56.82 acres of land and 110 parcels from the Conservation District to the Agricultural District. (A76-419 Paradise Hui Hanalike Association, et al.)

B. Docket No. DR99-21 (Stengle)

Robert E. & Christine M. Stengle in DR99-21 requested that the “Top of Pali” be designated as the correct boundary between the State Conservation District and the Agricultural District. The request indicated that the Boundary Interpretation No. 98-50 which removed the State Agricultural/Conservation District boundary from the “Top of Pali” to the area inland, such that approximately 46,699 square feet of land planted in macadamia nuts is within the Conservation District, was incorrect. The 1969 Boundary Review Report listed four (4) major conditions to delineating the State Conservation and Agricultural Districts in the Hamakua area. The LUC based their approval on Condition No. 3 which said that “In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used.” The Office of Planning’s testimony in this matter on February 24, 1999 indicated no objection to this re-interpretation. (See OPSD Exhibit 3)

C. Boundary Interpretation No. 07-19 (Muragin)

The LUC Executive Officer issued a boundary interpretation for Lisa Muragin of Ninole, North Hilo for her coastal property. The LUC letter dated March 3, 2008 indicates that the State Land Use District Boundary was the “Top of Sea Pali.” The Conservation District was located seaward of the top of the pali, and the Agricultural District was landward of the top of the pali. As shown on the survey map this lot also contains a portion of the railroad right-of-way, similar to the Petition Area. (See OPSD Exhibit 4)

**III. 1969 ESTABLISHMENT OF THE BOUNDARY LINE BETWEEN THE
CONSERVATION AND AGRICULTURAL DISTRICTS**

The first State Land Use District Boundary Review, titled the *State of Hawaii Land Use Districts and Regulations Review*, was completed in 1969 by Eckbo, Dean, Austin and Williams (“Boundary Review Report”). (See Petitioner’s Exhibit 1 Excerpt of report). The Boundary

Review Report designated a band of coastal lands around each island in the Conservation District, for lands not already designated as Urban or Agricultural District when the first State Land Use District boundaries were established following the enactment of the State Land Use Law in 1961. This action reflected strong public sentiment and support from interviews and surveys conducted at the time for recognition of the shoreline as a precious and high priority resource for Hawaii, deserving and warranting conservation. Two studies informed the designation of shoreline resources: (1) a *Hawaii Seashore and Recreation Areas Survey* performed by the National Park Service in 1962; and (2) a general development plan, *Hawaii's Shoreline*, prepared by the State Department of Planning and Economic Development in 1964. The final boundaries were "the LUC's judgement as a result of considerable input from studies, site inspections, public hearings, talks with landowners, and the Commissioners' own personal knowledge and experience." (Eckbo, Dean, Austin and Williams, 1969, Pg. 85).

As stated in the Boundary Review Report:

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

In discussing the shoreline areas in relation to the Conservation District, the Boundary Review Report states generally that:

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

Additionally, four major conditions were used in preparing the new Conservation District boundaries in shoreline areas:

1. Where a plantation road, farm road, access way or public road exists at the edge of the agricultural use within reasonable proximity to the shoreline, it was used as the boundary between the Agriculture and Conservation Districts.
2. Where a vegetation line such as a windbreak or row of trees more clearly marks the edge of the agricultural practice, this was used.
3. In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used.
4. Where no readily identifiable physical boundary such as any of the above could be determined, a line 300-feet inland of the line of wave action was used.
(Pg. 86) (emphasis added)

The guidelines and conditions set forth in the Boundary Review Report generally indicated where the boundary between the Agricultural and Conservation Districts should be located, but the boundary was not mapped in detail such that it was unclear where the boundary was located for any particular property. As such, the location of boundary must be identified by applying the above guidelines and conditions to the physical and historical aspects of the subject property.

The Boundary Review Report indicates in two places that the top of the ridge should be used as the boundary between the Agricultural and Conservation Districts. (See Section II.C. on Pg. 36 and Condition 3 on Pg. 86). While the general pattern was to draw the Conservation District Boundary along the pali, there was considerable deviation from this standard, which likely reflected other factors such as a road. Under Condition 1 on Pg. 86, if the land along the shoreline had a road or other access way within reasonable proximity to the shoreline that was at the makai edge of the agricultural use, then that road could be used as the boundary instead of the top of the pali. If the agricultural use went beyond the road or other access way, however, it would not be appropriate to use that road or access way as the boundary. In addition, the Boundary Review Report indicates that the Conservation District excluded those coastal areas that were in agricultural use at that time.

Here, the Petition Area is located along the Hamakua Coast and includes a railroad right-of-way. If the railroad right-of-way was considered to have been “at the edge of the agricultural use within reasonable proximity to the shoreline[,]” then it may have been utilized as the boundary line, as illustrated in the proposed Conservation District boundary and final boundary adopted in 1969 in the immediate vicinity of the Petition Area. If, however, the Petition Area was in agricultural use makai of the railroad right-of way at the time of the boundary adoption, then it is less likely that the railroad right-of-way would have been used as the boundary line under Condition 1 on Pg. 86. Petitioners’ present Petition indicates that the Petition Area may have been in agricultural use at the time the boundary was determined. If so, it is possible that the Boundary Review Report could have intended the boundary at the Petition Area to be located at the top of the sea pali rather than the railroad right-of-way.

CONCLUSION

There is a lack of clarity in the Boundary Review Report and in the subsequent establishment of the boundary line between the Conservation and Agricultural Districts for the Petition Area as to where the boundary line was intended to be drawn. However, as shown in the various dockets and boundary interpretations sharing similar circumstances and brought before the LUC at different times since the 1969 Boundary Review Report established the State Land Use District along the East Hawaii coastal areas, the Conservation District boundary has been determined in some cases to be the “top of the sea pali.” Accordingly, OPSD would have no objection to the LUC’s granting of Petitioners’ requested Boundary Interpretation.

DATED: Honolulu, Hawaii, September 1, 2021.

OFFICE OF PLANNING AND
SUSTAINABLE DEVELOPMENT
STATE OF HAWAII

Mary Alice Evans

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document
was duly served on this date on the below-named parties by U.S. Mail, postage prepaid:

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Dated: Honolulu, Hawaii, September 1, 2021.

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