

October 11, 2021

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State Land Use Commission  
Attn: Director Orodénker  
235 S. Beretania Street  
Suite 406  
Honolulu, HI, 96804

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

Dear Director Orodénker:

I write in response to the errata letter dated September 15, 2021 (“**Errata**”), regarding the Conservation District boundary line 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 (the “**Property**”).

For nearly a year, we have been working to address the Boundary Interpretation dated October 27, 2020. As noted in the Errata, the original interpretation “concluded the conservation district was in part delineated **by a trail or roadway.**” Errata, at 1-2 (emphasis added). In communications following the original interpretation, staff reinforced the conclusion that the line is based on a roadway that existed on the Property at the time the Conservation District was established. Because the road referred to by staff had been relocated before the Conservation District was established, we worked to show staff that its Boundary Interpretation is incorrect. When that effort proved unsuccessful, we filed a Petition for Declaratory Ruling before the Land Use Commission (the “**Commission**”).

Days before we were scheduled for hearing, the Errata informed us that staff's prior Boundary Interpretation was in error. Specifically, the Errata concluded that the boundary line is based on a 300-foot setback inland of the “line of the wave action.” Errata, at 2. Despite the entirely distinct basis for the boundary interpretation, the Errata attached exactly same survey map delineating the boundary as was provided in the October 2020 Boundary Interpretation. In other words, the **location of the boundary** separating the Conservation and

Agricultural Districts as interpreted in the Errata **did not change** from the original interpretation. Instead, only the **basis** for the interpretation changed.<sup>1</sup>

After reviewing the Errata and supporting materials and mapping 300 feet inland of the “line of the wave action,” it is clear that the new basis for the Boundary Interpretation is erroneous. The boundary drawn in 1969 was demonstrably not based on “a 300 feet setback from the ‘line of the wave action’ or shoreline for the subject parcel and the surrounding area.” Errata, at 1 (referencing Eckbo, Dean, Austin & Williams, State of Hawaii Land Use Regulations Review 86 (1969) (“**1969 Review**”). We know this (1) from the LUC maps, (2) from the text of the 1969 Review and (3) by the mapping 300 feet inland of the line of the wave action. The following sections explain these points.

The Errata had expensive consequences. We wasted time and effort researching, reviewing, analyzing and discussing the basis for the prior Boundary Interpretation. We wasted time and effort preparing the Petition to correct the prior Boundary Interpretation. Given the time and effort, I would be remiss if I did not convey our frustration over the timing and substance of the Errata.

I have the utmost respect for the Commission and its staff. I remain optimistic that an objective review of the facts demonstrates the correct interpretation of the boundary. I would appreciate the opportunity to meet with you to discuss these issues.

## **I. The LUC Maps Do Not Support a 300-Foot Setback.**

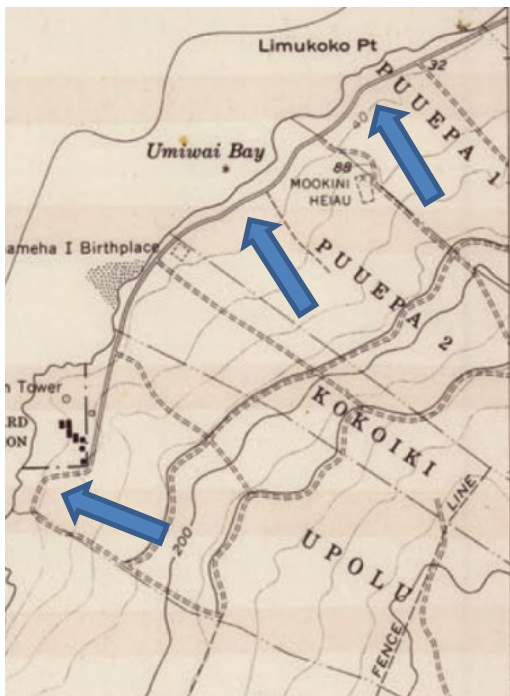
The boundary line on the 1969 Map follows along the roads near the shoreline. Specifically, the boundary line separating the Conservation and Agricultural Districts follows the location of a road where a road exists within a

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<sup>1</sup> The Errata explains that the prior statement that the Conservation District boundary line was first established in 1964 was an error because it was first drawn in 1969. *See* Errata, at 1. Based on this observation, the Errata concludes that “the actual demarcation or reference point was redefined in 1969, rendering the 1964 determination inapplicable.” *Id.* at 2. This is not new information. As we explained in our March 4, 2021 memorandum to staff and the Petition for Declaratory Ruling filed with the Commission on June 25, 2021, the line separating the Conservation and Agricultural Districts for the H-3 Quadrangle was drawn in 1969. *See* Mem. at 5 (“There is no Conservation district boundary line on the 1964 LUC map. The first map on which the ‘C’ boundary line appears is the 1969 map.”); Pet. at 10 (“The Conservation boundary line first appears on the LUC map dated 1969.”). Accordingly, the action taken in 1969 controls.

reasonable proximity to the shoreline, excepting areas of historical or cultural significance. The 1964 Map, 1969 Map and 1974 Map support this conclusion.

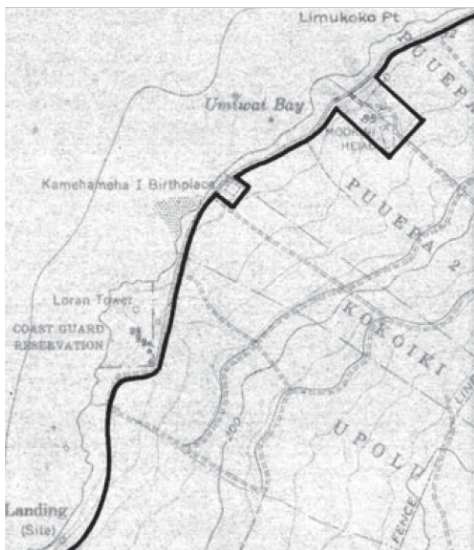
Roads are clearly shown on the 1964 Map. Although the boundary line is not shown on the 1964 Map, the analysis starts from the 1964 Map because it shows the H-3 Quadrangle for Mahukona **before** the line separating the Conservation and Agricultural District boundaries was drawn. Roads are clearly visible on this map. Dirt roads near the shoreline can be seen up and down the coast. Some roads are marked by a solid line, other roads—labeled “jeep trail” in some locations—are marked by dashed lines. These roads are identified by the arrows on the 1964 Map below:



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The line drawn on the 1969 Map follows these mapped roads. On the 1969 Map—the first map to depict the boundary separating the Conservation and Agricultural Districts—the boundary line follows the mapped roads:



Even in areas where the road closely abuts the shoreline, **the boundary line still clearly follows the road**, excepting areas of historical or cultural significance. Indeed, an example of the line north of the Property on the 1969 Map shows the line nearly touching the shoreline:



This pattern is carried forward to the 1974 Map, which appears to be a republication of the lines that were drawn on the 1969 Map for the H-3 Quadrangle.

Thus, the line represented on the 1969 Map followed the road that was depicted on the maps.

## II. The Text of the 1969 Review Does Not Support a 300-Foot Setback.

The text of the 1969 Review does not support a 300-foot setback from the “line of the wave action” for the Property. Three points make that quite evident.

First, the Errata’s reference to “line of wave action” is taken out of context. Specifically, the reference to “line of wave action” is taken from the 1969 Review general standards for Conservation District boundary lines, which states:

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 with-in reasonable proximity to the shore-line, 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.

1969 Review, at 85-86. Thus, the language relied on is taken from the general standards.

Applying the general standards to the Property, the 300-foot setback would not have been used because there is a “readily identifiable physical boundary” that

was used to mark the boundary line, *i.e.*, **the road**. Because the road is the correct landmark under paragraph 1, the catch-all in paragraph 4 would not have come into play.

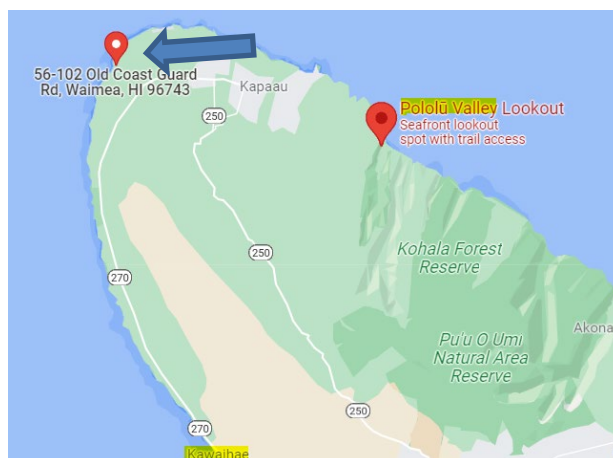
Second, the specific description of the action taken during 1969 Review for the area where the Property is located does not support a 300-foot setback. The Errata claims “that the [C]ommission proposed and approved a 300 f[oo]t setback from the ‘line of the wave action’ or shoreline for the subject parcel and the surrounding area.” Errata, at 1. The “subject parcel” is located in the ahupua‘a of Honoipu, which is near what the 1969 Review calls the “North Point” of Hawai‘i island.

The 1969 Review describes the action taken by the Commission in drawing the Conservation district boundaries in this area as follows:

The shoreline from **Kawaihae around North Point to Pololo Valley** is marked by numerous historic artifacts such as King Kamehameha I's birthplace, and a variety of **different conditions** such as rocks, **steep pali** and occasional beaches. The lands should be recognized by inclusion in the Conservation District.

Commission Action: Approved.\*

1969 Review, at 36 (emphasis added). For clarity, Google Maps confirms that the Property—marked by the blue arrow—lies in the area from “Kawaihae around North Point to Pololo [sic] Valley:”



There is no discussion in the 1969 Review of a 300-foot setback from the “line of wave action” for the area from “Kawaihae around North Point to Pololo Valley.” Instead, the description of action taken for this area makes reference to “different

conditions” such as “steep pali.” This again supports the conclusion that the general standards outlined in the 1969 Review, which expressly consider “pali,” were used in setting the boundary line separating the Conservation and Agricultural Districts. In this way, the text supports what the map unmistakably shows—one of the site-specific, physical conditions, *i.e.*, the road, marked the line separating the Conservation and Agricultural Districts.

Third, the 1969 Review does **not** state that a 300-foot setback was used for the area from “Kawaihae around North Point to Pololo Valley.” The absence of such a statement is telling. When the Commission adopted a 300-foot setback for other areas, the text said so expressly. For example, the Commission explained:

**From Hilo to Kapoho** the shore is rocky with only occasional beaches such as at Haena. It is the unique product of recent lava flows running directly into the sea. The Conservation District **should include the shoreline and it is recommended that it be extended from the high water mark to a line which is approximately 300' mauka of that line.**

Commission Action: Approved.\*

1969 Review, at 36.

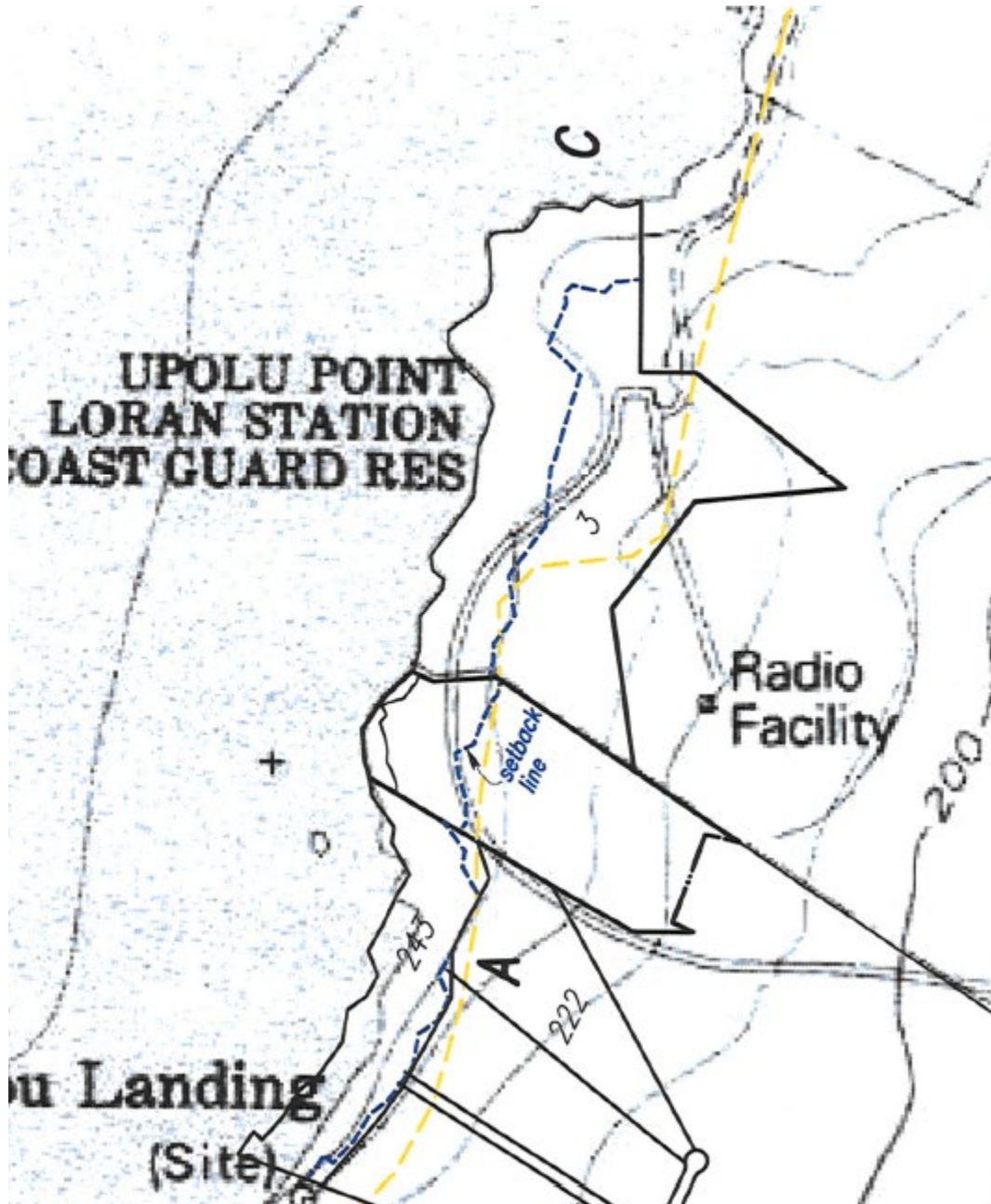
Hawai‘i follows “the canon of construction *expressio unius est exclusio alterius*, [which] holds that ‘to express or include one thing implies the exclusion of the other, or of the alternative.’” *Fagaragan v. State*, 132 Hawai‘i 224, 242, 320 P.3d 889, 907 (2014), *as corrected* (Mar. 21, 2014) (citing Black’s Law Dictionary 661 (9th ed. 2009)). In accord with this rule, if the Commission had intended a 300-foot setback from the “line of the wave action” to apply in the area from “Kawaihae around North Point to Pololo Valley,” it would have stated as much. It did not.



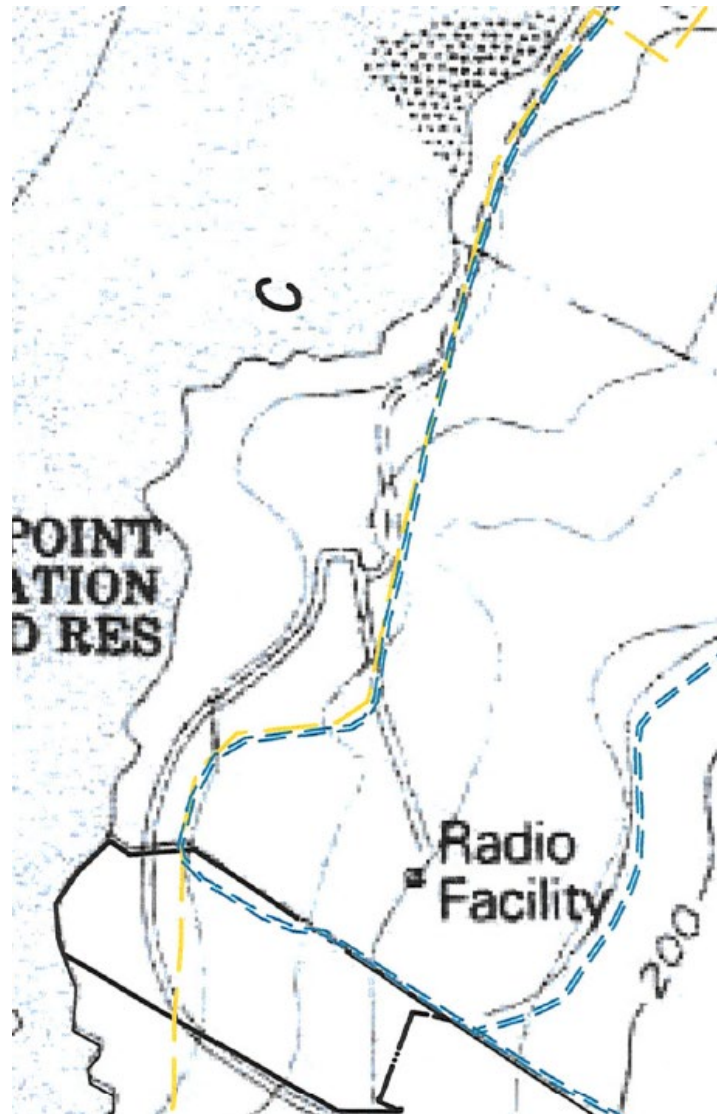




A scaled 300 foot setback applied to the parcels to the north and south of the Property confirms that a 300-foot setback was not used for the boundary line anywhere on the map. The blue dashed line, which represents the 300 foot scaled setback, does not align with the yellow dashed line, which represents the current district boundary line:



Instead, the Boundary Interpretation in the Errata follows the location of the road, which is shown as the light blue dashed line below, as it was depicted on the 1969 Map:



This takes us back precisely to where we were before the Errata. The Commission is using a road to set the Conservation District boundary. The problem is that road was not properly drawn on the map when the Commission set the Conservation District Boundary. If the Commission had used the correct base map when it drew the lines, it would have followed the road as it existed at that time.

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For these reasons, the boundary interpretation expressed in the Errata lacks support. We respectfully ask that staff work with us to properly locate the boundary line along the Road (the road that actually existed in 1964, 1969, 1974 and today).

Very truly yours,

Calvert G. Chipchase

for

CADES SCHUTTE

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