

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter of the Petition of) Docket No. _____
)
 Kenneth S. Church and) **PETITION FOR A DECLARATORY**
 Joan E. Hildal) **ORDER**
)
 for review of)
 Boundary Reclassification,)
 Boundary Interpretation,)
 the 1974 State Land Use District)
 Boundaries Map H-65,)
 Reimbursement of Filing Fees for Petition)
 A18-805 and this Petition For a)
 Declaratory Order,)
 Waving of Court Reporter fees for this)
 Petition)
 _____)

PETITIONERS' MEMORANDUM IN
SUPPORT FOR A DECLARATORY ORDER

§15-15-99 HAR

(6) A memorandum of authorities, containing a full discussion of reasons and legal authorities in support of such position or contention. The commission may require the petitioner to file additional data or memoranda;

Property locator map, *Exhibit 2*

I. BACKGROUND

1. During a period, beginning before 1905 and up until 1992, the Property was part of a larger field that was in intensive agricultural ("Ag.") use located in an area that is known as the "Hamakua Coast", *Exhibits 13, 9, 8*
2. The field was contiguous to a steep Oceanside cliff, which "top of cliff " formed the makai boundary of the field, *Exhibits 9*
3. Around 1917 a railway bisected the field north south leaving approximately 4.659 acres makai, *Exhibit 12*

4. Around 1947 a new coastal highway also bisected the field north south leaving approximately 13 acres makai, *Exhibit 9 (field Map) and exhibit 8, 1953 aerial photo*.
5. At Statehood none of the area of the historic field was in the State's Conservation District,
6. During a period leading up to 1969 (the "Report Period"), when the State's first five year boundary review was due, the State hired the firm, Eckbo, Dean, Austin & Williams (the "Firm"), to study existing land use laws, existing land uses and submit recommendations, maps etc. to the Land Use Commission (the "LUC") in order that the LUC may consider recommended district boundary amendments and hold public meetings in the State's Counties in order that the LUC may formally establish new Land Use District Boundaries and identify the new District Boundaries as lines overlaid on existing USGS Quadrangle Maps, *Exhibit 1, photographs of selected pages from the Report*
7. The Firm's recommendations were submitted incrementally during the Report Period to the LUC which LUC conducted hearings in the various Counties of the State in order that the LUC may deny, approve or partially approve the incrementally submitted review recommendations and maps, *Exhibit 1, photographs of selected pages from the Report (see Page 1 and page 36, item C and the footnote in the bottom right hand corner of the Report's page 36)*

HAR§15-15-63 states in part.

(j) If any matter contained in the petition or in a document filed as a public record with the commission is offered in evidence, unless directed otherwise by the presiding officer, the document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of the document are specifically identified and are otherwise competent, relevant, and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the presiding officer. (emphasis added)

8. The Petitioner(s) apologize that the quality of the prints in Exhibit 1, which are photographs of a few pages of the August 15, 1969, "STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW" Book (the "Report"), the Exhibit's pages are not always clearly legible. The pages in Exhibit 1 were first

reproduced as photographs of pages in a Report book which the Petitioner(s) found and photographed at the local public library in Hilo. The Petitioner(s) subsequently printed the photographs out and scanned them into a pdf format on a computer. Therefore some of the print quality is less than crisp and clear. The Report is an Official LUC document. If uncertainty results due to the poor quality of Exhibit 1's pages the Petitioner(s) refer the Commissioners to the LUC's original Report book, which is an Official Commission Record, in order to clarify any uncertainty that may exist. Only pages which the Petitioner(s) feel relevant to this Petition are exhibited in Exhibit 1 and Exhibit 18.

9. At a final community meeting (the "Meeting"), that the LUC conducted in the County of Hawaii on July 18, 1969, an area of coastline, on the windward side of the Island of Hawaii, leading north to south, beginning at *the steep pali coast of east Kohala..... extended to include the sandy beach at Waipio Valley and then to include the pali land of the **Hamakua Coast***, and ending at Hilo was considered for rezoning into the State Conservation District. The Report included one Island wide map with references to USGS State Quadrangle Maps (Exhibit 18). The Quadrangle maps had proposed State Land Use District lines drawn on to them. *Exhibit 1, photographs of selected pages from the Report (see Page 36, item C and the footnote in the bottom right hand corner of the Report)*
10. Eckbo, Dean, Austin & Williams submitted a recommendation, at that Meeting on July 18, 1969, that the coastal zone be zoned Conservation using the ridge top as a boundary line between the Conservation and Ag Districts, *Exhibit 1, photographs of selected pages from the Report (see Page 36, item C and the footnote in the bottom right hand corner of the Report)*
11. An island-wide map (the "Map") was presented by the LUC at the 1969 Community Meeting for consideration against the Report's recommendations by the Commissioners and the meeting attendees,, *Exhibit 18, Map*
12. The Map had a legend on it that described colored coding and lines shown on the Map in order that new proposed State Land Use Districts and District ("SLUD") Lines may be considered by the meeting attendees.

13. The colored coding and lines showed a very narrow strip of coastal land leading from Kohala down to Hilo indicating that area was recommended to be zoned into the Conservation District.
14. The Map was of such a large scale that proposed SLUD Lines could not be interpreted to the proposed definition that is proposed in the Report particularly as it related to the "Hamakua Coast", Island of Hawai'i. Exhibit 18 Map
15. The legend on the Exhibit 18 Map also referred to the Report's Appendix D, which Appendix D referred to 73 USGS Quadrangle maps for the Island of Hawaii which were of a larger scale than the Map on page 41 of the Report. Exhibit 18 Map
16. The 73 USGS Quadrangle maps had a scale (the maps "Scale") of one inch equals 2,000 feet.
17. The area of the Property, which is represented on Official Map H-65, is in an area under one square inch.
18. The 73 USGS Quadrangle maps scale also could not be interpreted to the definition that is proposed in the Report.
19. Today's pdf versions of the maps can be magnified, through the use of a computer, to the point that the SLUD boundary lines can be more easily seen in much finer detail as it may relate to individual properties but this would not have been available to the Meeting attendees, *Exhibit 5, State OP written testimony page to Petition A09 787 3 maps, 'before' and as 'adopted' by the Commission.*
20. The Report does not describe that the 73 individual USGS Quadrangle maps were available for a more magnified consideration by the Hawai'i County Community Meeting attendees.
21. Page 36, section C, of the Report, describes proposed zoning for coastal areas from Kohala down to Hilo, at that meeting,
22. On July 18, 1969 the Commission held the Meeting on the Island of Hawai'i to consider the Report's recommendations,
23. The Commission only "Partially Approved" the Report's proposed boundary line separating the Conservation District from the Agricultural District in the area of the Hamakua Coastal at the Meeting, *Exhibit 1, photographs of selected pages*

from the Report (see Page 36, item C and the footnote in the bottom right hand corner of the Report) and Exhibit 18 Map.

24. Further clarity and definition was shown as "Approved" by the LUC in the Report at the Meeting in order to correct any deficiencies in the visual presentation of the general Map, which showed the entire Island of Hawaii on a single page, or even individual quadrangle maps if they were available at the Meeting for consideration. Exhibit 18
25. The Report's page 36 describes that while the ridge top was "Approved" to be the SLUD boundary line between the Conservation and Agricultural ("Ag.") Districts, further clarification to Eckbo, Dean, Austin & Williams recommendation was added to and "Approved" at the Meeting that areas in agricultural use were to be excluded from the Conservation District rezoning of agriculturally used lands along the Hamakua Coast and such agriculturally used lands were specifically stipulated to be zoned in the State's Agricultural District, *Exhibit 1, photographs of selected pages from the Report (see Page 36, item C and the footnote in the bottom right hand corner of the Report)*
26. At least two contiguous USGS Quadrangle maps for the coastal area from Kohala to Hilo were not subsequently corrected to reflect what was "Approved" by the LUC at the Meeting as is described on the Reports page 36, item C. *Exhibit 3, Papaikou Quadrangle map and Exhibit 4, Papaaloa Quadrangle map.*
27. The Property is shown on the northern end of Exhibit 3, Papaikou Quadrangle map.
28. The SLUD Boundary in the area of the Property on the Map which is shown on the Report's page 41 and Papaikou Quadrangle map H-65 showed the SLUD line to not go along the "top of ridge" but rather it bisected an agricultural use field along the mauka boundary of a railroad which crossed the field area redistricting 3.369 acres, more or less, from the State Agricultural District into the State Conservation District, Exhibit 18 Map
29. In 1999 the LUC considered Petition A99-21 for very similar land in the Papaaloa Quadrangle that lies approximately 5 miles to the north of the Petitioner(s) Property, which Quadrangle map area is contiguous to the Papaikou Quadrangle map area where the Property is located.

30. In the case of Petition DR 99-21 the Commission found Quadrangle map H-59 to be incorrect and ordered that it be corrected to reflect that the 'top of the coastal ridge' be shown to be the SLUD Boundary line on Quadrangle map H-59.

31. On August 15, 1969 Eckbo, Dean, Austin & Williams published the final review, in the form of a book which exceeded 200 pages (the "Report"), *The entire book is an official LUC record.*

32. The Report's page 1's, Preface page, describes.....

"Chapters 4 through 7 are a summary of the recommended changes to the district boundaries in the four counties. Since these were acted upon during the preparation of this report, we are able to provide the Commission's decisions with respect to them. In this way, the text becomes not just a report to the Commission but a record of its actions as well." (emphasis added)

Exhibit 1, see the Report's page which bears the number 1

33. The Report's Chapter 5, page 36, item C describes in part.....

"C. 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 land of the Hamakua Coast, using the ridge top as a boundary line " ,

"Commission Action Partially Approved. Areas in agricultural use were excluded."* (emphasis added)

Exhibit 1, photographs of selected pages from the Report (see Page 36, item C)

34. The next paragraph in the Report's page 36, following the above quote, appears to then begin from Hilo leading southward.....

From Hilo to Kapoho....." , (emphasis added)

Exhibit 1, photographs of selected pages from the Report (see Page 36, item C)

35. Effectively this section of the Report was referring to all of the coastal land between Kohala and Hilo, the southern portion of which coastal area was described in the Report as the Hamakua Coast,

36. The * notation on the quoted text in 33. above refers to the footnote box which is found in the lower right hand corner of the Report's page 36 which reads.....

" * Approved recommendations adopted at the action meeting held in Hawaii County July 18, 1969." (emphasis added)

Exhibit 1, photographs of selected pages from the Report (see Page 36, item C and the footnote in the bottom right hand corner of the Report)

37. In 1974 the LUC adopted the Official Map H-65 for the Papaikou Quadrangle wherein the Property is found in the top left hand corner of Official Map H-65 which showed an area including the Property to lie entirely within the State Conservation District, *Exhibit 3*
38. In 1992 the previous owners of the Property purchased the field area, that was then described by the County as TMK (3) 2-9-003; 013, that lay between the present day Coastal Highway and the top of the coastal ridge, and applied to the LUC for a Boundary Interpretation according to what is provided for in HAR 15-15-22, *Exhibit 9 field map F31 B)*
39. The Executive Officer of the LUC issued Boundary Interpretation 92-48 that showed the entire area of TMK's (3) 2-9-003; 013, 029, 060 to lie in the State's Conservation District, *(Boundary Interpretation 92-48 is an Official Commission Record so it is not required to be Exhibited hereto)*
40. During a period ending in 1999 another Hamakua coastal land owner applied twice for a Boundary Interpretation for a very similar coastal, former sugar cane field, comprising two TMK lots (herein referred to as the Stengle's property), *(LUC DR 99-21 relates to the above referenced Boundary Interpretation, as it is an Official Commission Record it is not required to be Exhibited hereto)*
41. The Stengle's property lay approximately five miles to the north of the Petitioned Property along the Hamakua Coast and it comprised many similar characteristics and coastal location to the Property, *(LUC DR 99-21 relates to the above referenced Boundary Interpretation, as it is an Official Commission Record it is not required to be Exhibited hereto)*
42. Each time the Executive Officer of the LUC issued a Boundary Interpretation for the Stengle's property the Executive Officer interpreted a State Land Use District line, separating the Conservation and Ag. Districts, which line bisected a field

area of the Stengle's property, placing a portion of the field in the Conservation District and another portion of the field in the Ag. District, *(LUC DR 99-21 relates to the above referenced Boundary Interpretation, as it is an Official Commission Record it is not required to be Exhibited hereto)*

43. The Boundary Interpretation for the Stengle's property did not apply that the top of the coastal ridge be the District Boundary line but rather the topographical 200 ft. elevation line crossing the field was generally applied, *(LUC DR 99-21 relates to the above referenced Boundary Interpretation, as it is an Official Commission Record it is not required to be Exhibited hereto)*
44. The Stengles, applied to the LUC with the authoritative reference to the 1969 Report, HAR 15-15-22(f) and HAR 15-15-98 to consider and issue a Declaratory Order that the District Boundary be the top of the coastal ridge , *(LUC DR 99-21 relates to the above referenced Declaratory Order, as it is an Official Commission Record it is not required to be Exhibited hereto)*
45. By Declaratory Order DR99-21 the Commission ordered that the top of the coastal ridge was the Boundary Line separating the Conservation and Ag. Districts, that a new Boundary Determination be issued to reflect that Order and the Commission also Ordered that the State Land Use Districts Map H-59 be amended to reflect that the top of the coastal ridge be reflected on Map H-59, *(LUC DR 99-21 relates to the above referenced Declaratory Order, as it is an Official Commission Record it is not required to be Exhibited hereto)*
46. Following Declaratory Order DR99-21 the 1974 State Land Use Boundaries Map H-59 was corrected, *Exhibit 4, Papaalooa Quadrangle map*
47. In 2005 the previous owner of the field area in which the Petitioner(s)' land is located, the McCully(s), filed Petition A05 757 with the LUC that the area between the mauka boundary of the former railroad, which crossed the field north south, be rezoned from the Conservation District to the Agricultural District, *(LUC Petition A05 757 is an Official Commission Record, it is not required to be Exhibited hereto)*
48. During the due process period of Petition A05 757 an Environmental Assessment was done followed by a Finding Of No Significant Impact by the

LUC, (*LUC Petition A05 757 is an Official Commission Record, it is not required to be Exhibited hereto*)

49. Petition A05 757 was narrowly denied by the LUC, (*LUC Petition A05 757 is an Official Commission Record, it is not required to be Exhibited hereto*)
50. In 2009 the McCully(s) filed Petition A09 783 to again rezone the land, (*LUC Petition A09 783 is an Official Commission Record, it is not required to be Exhibited hereto*)
51. Subsequently the McCully(s) withdrew Petition A09 783 after the State Office of Planning's submitted its written testimony, which written testimony included exhibits and which Office of Planning written testimony recommended that the LUC deny Petition A09 783 and before Petition A09-783 was heard by the Commissioner(s), *Exhibit 5, 3 maps, referenced to be proposed and adopted.*
52. Neither of the McCully(s) two Petitions made reference to the 1969 Report nor the LUC's DR 99-21,
53. Neither the LUC's administrative office nor the State's Office of Planning appeared to be aware that the top of the coastal cliff was "Approved" by the LUC to be the State Land Use Boundary Line for LUC DR 99-21 and all of Quadrangle Map H-59,
54. The State Office of Planning's written testimony's to Petition A09 783 exhibit 10 referred to the Report, *Exhibit 5*
55. The State Office of Planning's exhibit 10 incorrectly asserted that the map, shown on "Panel C" in its exhibit 10, reflected what was "Approved" at the July 18, 1969 "Action" Meeting that the Commission held in Hawaii County, *Exhibit 5*
56. It is believed likely that the referred Office Of Planning exhibit 10's maps (this Petition's Exhibit 5) are a magnified version of the Papaikou quadrangle, which unmagnified map, the Commissioner(s) likely considered at that July 18, 1969 Meeting. All three maps shown in the Office Of Planning's exhibit 10 appear to show the State Land Use Districts line separating Conservation from Ag., in the area of the Property to be the same during the period from April of 1969 through July 18, 1969. The Districts line on the three plates clearly show the District line to follow the mauka boundary of the former railroad which crossed the field area of the Property and not the top of the coastal ridge. As the area was also a

historic Ag. use field that was in cane production at that time. Panel C also appeared to not reflect both "Approved" guiding criteria at the July 18, 1969 LUC Meeting. It is clear that all three maps are the same yet the Commission did not "Approve" what the final map showed but rather that the Commission did "Approve" the 'top of the coastal ridge' be the boundary and that 'Ag. lands be excluded'. The notation on Panel C, of the State Office of Planning's Exhibit 10 (this Petition's Exhibit 5) says the map was "Approved" at the Meeting. That map is in conflict with what was "Approved".

57. In 2014 the Petitioner(s) purchased three TMK Lots (3) 2-9-003; 013, 029 and 060, an area of 4.659 acres, more or less, that lay makai of the mauka boundary of the former railroad right of way and mauka of the State owned Oceanside pali property from the McCully(s),
58. The Petitioner(s) sold TMK Lot (3) 2-9-003; 013, an area of about 1.291 acres, more or less to an unrelated third party, as it was surplus to their needs,
59. Presently TMK Lots (3) 2-9-003; 029 and 060 (the "Property") comprise an area of 3.368 acres, more or less,
60. TMK Lot (3) 2-9-003; 013 remains undeveloped and is maintained as an open field area by regular mowing of grasses,
61. In 2018 the Petitioner(s) submitted Petition A18-805 to the LUC that the Property be rezoned from the Conservation District to the Agricultural District, (Petition A18-805 text has never been published on the LUC's web page), on August 1, 2018 the Executive Officer of the LUC issued a letter to the Petitioner(s) describing his determination that Petition A18-805 was incomplete, the Petitioner(s) corrected the deficiencies on 9/21/2020 in a submission titled "Petitioner's Guide to Petition" and submitted it to the LUC for review, the Petitioner(s) are not aware that the LUC has taken any particular action subsequently regarding Petition A18-805)
62. An EA and FONSI exists for Petition A18-805, *(the EA and FONSI are Official Commission Records, they are not required to be Exhibited hereto, no public comments were recorded during the EA and FONSI public review periods)*
63. In June of 2020 the Petitioner(s) submitted a request (the "Request") for a Boundary Determination for the Property by the Commissioner(s) according to

HAR 15-15-22(f), *(the Request is an Official Commission Record, it is not required to be Exhibited hereto)*

64. HAR 15-15-22 describes the format of application for an Interpretation of District Boundaries by the Executive Officer of the LUC, which is usually in the form of a letter from a land owner to the LUC's administrative office accompanied by a registered surveyor's map of the property,
65. HAR 15-15-22 (f) does not specify a different format of application for a Interpretation of District Boundary, if uncertainty remains, by the Commissions like other matters that are normally considered by the Commissioners,
66. For reasons unknown to the Petitioner(s) the Request has not been scheduled to be heard by the Commissioners and, in fact, the Petitioner(s) were told by LUC staff that the Request, in its current format, was unlikely to be heard by the Commissioners,
67. The Request was filed by the Petitioner(s) with the LUC 6/12/2020, approximately one year ago, *(the Request is an Official Commission Record, it is not required to be Exhibited hereto)*
68. Not understanding why the Request was not scheduled to be heard the Petitioner(s) subsequently submitted a Motion and an Amended Motion that the Commissioners Determine the correct location of the District Boundary in the area of the Property, *(the Motion and Amended Motion are Official Commission Records, they are not required to be Exhibited hereto)*
69. The Petitioner(s) have not received any formal communications from the LUC's administrative office regarding the Request nor the referenced Motion nor the Amended Motion regarding the Property's LUC Interpreted Conservation District zoning,
70. During the month of May, 2021, the Petitioner(s) were able to access a copy of the 1969 Report and the Petitioner(s) determined that the Property was never correctly rezoned into the State Conservation District,
71. When the Petitioner(s) purchased the Property it was undeveloped land substantially with field grasses which were regularly mowed,
72. Presently the Property comprises;

- an Ag. use storage and processing structure, with County supplied running water, plumbing for a toilet and washroom area, a processing counter with a sink wherein the Petitioner(s) store a Kubota farm tractor and a three point hitch roto tiller attachment for the tractor, a shop bench, shelving units, and various Ag. use tools and the like,
- a two bedroom, two bath residence with County supplied running water,
- several dozens of orchard species fruiting trees,
- potted plant development nursery areas,
- a cultivated field area which was first used for three years for a crop of 300 pineapple plants and dragon fruit which portion of pineapple use is currently under renovation for other plantings pending the outcome of this Petition,
- generally the balance of the Property is maintained in regularly mowed grasses.

73. The residence and the accessory structure are fully permitted by both the County and the DLNR,

74. The Petitioner(s) repeatedly sought formal Approval, from the DLNR, that the Property qualified for extensive nonconforming Ag. use and that such use be "Allowed" to be resumed on the Property for a period exceeding three years without a formal "Approval" ever being issued by the DLNR, (*see the "Guide to the Petition", Chapter 1, item 24. . The Guide to the Petition and the exhibits it refers to are Official Commission Records, they are not required to be Exhibited hereto*)

75. Nonconforming Ag. use is an "Allowed " use under the DLNR's HAR 13-5-7's Nonconforming Use Rule,

76. To be clear the Petitioner(s) were aware of the apparent Conservation District zoning when they purchased the land but they were also aware that a historic cane agribusiness had continued to use the land for Ag. following its apparent Conservation District zoning. The Petitioner(s) had met with the former cane field manager who stated that the DLNR did not interfere in any way with their use of the land for cane production at any time. The Petitioner(s) had also read HAR 13-5 and reasoned that their use of the land for Ag. would not also be unreasonably resisted by the DLNR. The Petition and the Motion evidences that

the DLNR appeared to strongly resist the Petitioner(s) use of the land for Ag. and uses incidental and accessory to the Ag. use.

77. The Petitioner(s).....

- request a new boundary interpretation to be issued by the LUC which shows the Property to lie in the State Agricultural District,
- request that State Land Use District Boundaries Map H-65 be amended in the area of the Property to reflect the ridge top to be the State Land Use Boundary between the State Ag. and Conservation Districts,
- seek to harmonize the Property's Ag. use with (1) its County zoning, (2) with its characteristics and resources, (3) with its State District zoning, and in conformance to the Report,
- seek to legally and clearly establish and secure the Property's use and uses incidental and/or accessory to the Ag. use to be consistent with both State and County zoning and the Report,
- seek to secure the Petitioner(s) investments in Ag. and eliminate continuing confusion regarding its State zoning status,
- seek to eliminate uncertainty for the Petitioner(s) and confusion for everyone,
- request that the LUC refund petition filing fees in the amount of \$6,000,
- request that the LUC wave the Court Reporter's fees for the Declaratory Order Petition.

II BASIS FOR AGRICULTURAL / CONSERVATION

BOUNDARY DETERMINATION

There are three reference sources used in determining the location of District boundaries.

Source 1

The 1969 State Of Hawaii Land Use Districts and Regulations Report document,

Source 2

The U. S. Geographical Survey ("USGS") maps which were used by the LUC during the period of the Report in 1969.

Source 3

The 1974 Official Map H-65.

78. The Report details boundary changes made by the Land Use Commission for Hawaii County during the 1969 Report Period. The existing USGS Quadrangle maps, having a scale of 1 inch = 2,000 feet, were used as a foundation for charting the changes stated in the Report and are known as the LUC's official maps during that period.
79. The Report's, page 36, discusses Urban, Agriculture and Conservation District boundary changes for Hawaii County. Section II., Conservation Districts; Subsection C., The Shoreline, states "*The steep pali coast east of Kohala is presently within the Conservation District. This District should be extended to include the sandy beach at Waipio and then to include the pali lands of the Hamakua..Coast, using the ridge top as a boundary line*" which is followed by "Areas in agricultural use were excluded." (*the Report is an Official LUC document and therefore it is not required to be exhibited hereto however Exhibit 1 evidences page 36 therein*)
- The Property lays on the Hamakua Coast, *Exhibit 3, Papaikou Quadrangle map*
 - The Property lays mauka of the coastal pali ridge top,
 - The Property was in agricultural production from before 1905 through 1992, *Exhibits 13, 9,8 and 10*
 - The Official Map H-65 for the Papaikou quadrangle, wherein the Property is located, shows the Property to lie entirely within the State's Conservation District. *Exhibit 3*

- No boundary amendment for the area of the Property was "Approved" by the LUC during the period from Statehood until the adoption of the 1974 Official Map H-65. (see footnote box on the bottom right hand corner of Map H-65) Exhibit 3
- The Official Map conflicts with what was "Approved" by the LUC at it's July 18, 1969 meeting in the County of Hawaii. Five years following the publishing of the Report, in 1974 the Land Use Commission adopted Official Map H-65 titled "*Papaikou, Hawaii*" which pertains to the Property and Official Map H-65 was used in Boundary Interpretation 92-48 for an area which included the Property.

III. BASIS USED IN BOUNDARY INTERPRETATION NO. 92-48.

80. Petitioner(s) met with the LUC's administrative staff in Honolulu to inquire the basis for the LUC's Boundary Interpretation 92-48. Staff stated that Boundary Interpretation 92-48 was because the Official Map had a line on it indicating the division between the Conservation and Agricultural SLUDistricts. The lots that the Petitioner(s) had just purchased lay makai of the apparent district line on the Official Map. (*Boundary Interpretation 92-48 is an Official Commission Record, it is not required to be Exhibited hereto*)

81. Finally HRS **§205-2 Districting and classification of lands.** (a) gave guidance to the Commissioners when determining District Boundaries.....

There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts. The commission shall set standards for determining the boundaries of each district, provided that:

(3) In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation; and..... (emphasis added)

82. The phrase greatest possible is succinct. It means that when determining the location of a State Land Use District Boundary no other district boundary, not even Conservation be applied, without compelling reasoning. While the authority to amend district boundaries has always been the LUC's authority, compelling reasoning, on a case by case basis, with consideration to existing land use, must be applied and the affected land owner be given notice that a

boundary amendment is under consideration. It appears that no inspection of the field area, wherein the Property is located, occurred as it would have been obvious to the inspector(s) that the Property was in Ag. use during the period of the Report.

IV. DISCUSSION,

83. The stated intention of the Commission as a result of their 1969 boundary review was to extend the Conservation District "to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line". While this is recorded in the Report to be what was "Approved" by the LUC at its July 18, 1969 meeting in the County of Hawai'i, as it relates to an area which included the Property, it was not correctly reflected on the USGS Map H-65 nor subsequently in 1974 on the Official Map. The entire Property is presented on the Official Map H-65 is less than an inch square. Only when the map is magnified significantly can it be seen that the State Land Use District Boundaries Line between Conservation and Ag. lies along the mauka boundary of the former railroad right of way which crossed the Property. When the Official Map H-65 is magnified significantly the top of the coastal ridge also becomes apparent.

84. Attached to the Petition's memorandum document, as *Exhibit 6*, the County "Approved" subdivision map, wherein the Property is shown and the "TOP OF SEA PALI", is also shown as a line, or ridge top. The survey drawing clearly shows the location of the ridge top as the makai boundary of the Property.

85. From a review of the above, it must be concluded that;

- although the "ridge top" phrase, in the Report's Page 36, item C, states it to be the "Approved" State Land Use Districts Boundary line by the Commission in 1969,
- the Official Map H-65 is in conflict with the Report's page 36,
- a ridge top boundary interpretation for the Property is in keeping with the intent of the Commission and the community in 1969,

- the Property be in the State Ag. District is consistent with the overall purpose of Chapter 205 of the Hawaii Revised Statutes, as amended, and should be adopted by the Commission.

V. LEGAL AUTHORITIES FOR THE CONSIDERATION OF THIS PETITION

86. The Jurisdiction of the Commission to consider the request of Petitioner(s) is authorized under §15-15-98 through 104 HAR and §15-15-22 (a), (d) and (f) HAR, §15-15-19 (1) (3) HAR and §15-15-45.2 HAR. The Petitioner(s) are the fee simple owners of the Property. The Petitioner(s) have the rights granted through §15-15-98 and §15-15-22(f), HAR and the "Report" to bring the Petition before the LUC for a final Land Use District boundary determination through a Declaratory Order of the LUC.

REMEDIES

87. Petitioner(s) are requesting the Commission to issue a declaratory order clarifying and correcting:

- Boundary Interpretation 92-48
- State Land Use District Boundaries map H-65

and that:

- the Land Use Commission refund the filing fee for Petition A18-805 to the Petitioner(s),
- the Land Use Commission refund the filing fee for this Petition for a Declaratory Order to the Petitioner(s),

and that:

- the Land Use Commission wave its Court Reporter's transcribing fees that are normally paid by a petitioner.

FIRST LEGAL AUTHORITY

- §15-15-98, HAR provides that the Petitioner(s) may Petition the Land Use Commission for a Declaratory Order,

SECOND LEGAL AUTHORITY

- The the Land Use Commissssion's record of its first five year boundary review in 1969 titled " STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW" (the "Report") is an Official LUC record.
- The Report documented the Commission's process to establish the Conservation District boundaries during the 1969 Five-Year Boundary Review. The Report recognized four major conditions and provided recommendations based on these conditions for the Conservation District Boundaries. Of relevance to this Petition is Condition No. 3, which states:
 - "In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used." (p. 86)
- The Report further documented the Commission's "Actions" with respect to the establishment of the Conservation District boundaries at the shoreline of the Island of Hawai'i by stating:
 - "The steep pali coast of east Kohala is presently within the Conservation District. This district should be extended to include the sandy beach at Waipio Valley and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line." (p. 36)
- On July 18, 1969 the Commission "Approved" the pali lands of the Hamakua Coast, using the ridge top as a boundary line." (p. 36)
- On July 18, 1969 the Commission further clarified and "Approved" that lands of the Hamakua Coast that were in Ag. production were to remain zoned in the State Ag. District.
- Petitioner(s) map of the Property, which was prepared by a registered professional land surveyor and registered by the County, has a bold line which defines the top of sea pali and which delineates the "TOP OF SEA PALI" in metes and bounds.
- The Property was classified to be in the State's Agricultural District on August 23, 1964 with the final adoption of the State land use districts boundaries.
- The Property is located in an area that is located along the Hamakua Coast,
- The Property was in Ag. production before, during and after the period of the Report.

THIRD LEGAL AUTHORITY

- LUC DR99-21 is an Official Commission Record and it recorded that the Commission recognized the Report as authoritative.
- In 1999 the LUC considered Petition DR99-21 for a very similar coastal property that also lays along the Hamakua Coast approximately five miles north of the Property,
- By DR99-21 the LUC issued a DECLARATORY ORDER which stated:
 "FOR GOOD CAUSE APPEARING, the Commission hereby rules that the Boundary Interpretation No. 98-36 dated October 29, 1998, and Boundary Interpretation No. 98-50 dated January 12, 1999 are clarified and corrected to reflect that the Property mauka of the top of the ridge or pali, approximately shown on Exhibit "A" attached hereto and incorporated by reference herein, is designated within the State Land Use Agricultural District.

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

FOURTH LEGAL AUTHORITY

- Section 205-2(3), HRS, provided the standards for determining the boundaries of the Agricultural District at the time of reclassification in 1969:

" (3) In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation;"

205-2(3), HRS is reflected in §15-15-19, HAR

"Standards for determining "A" agricultural district boundaries. Except as otherwise provided in this chapter, in determining the boundaries for the "A" agricultural district, the following standards shall apply: (1) It shall include lands with a high papacity for agricultural production;"

- The Property is classiffied in the ALISH system of land classification as Prime Class C meaning that it has a high "capacity" for Ag. production. The Property is also classiffied as "C" in the LSB classification system.

- Both of the ALISH and the LSB classification records are Official Commission Records.
- The word "Capacity" refers to a characteristic of land and does not refer to a past, present or future use of land.

FIFTH LEGAL AUTHORITY

88. §15-15-34(b), HAR provides that "[f]or good cause shown the commission may waive or suspend any rule. No rule relating to jurisdictional matters shall be waived or suspended by the commission."

- The no refund schedule requirement in §15-15-45.2 HAR is not jurisdictional. Therefore, the Commission is authorized to refund fees.
- The applicability of the Official Map H-65, Papaikou Quadrangle, as applied in §15-15-22(a) (1) HAR , is not jurisdictional. Therefore, the Commission is authorized to no not apply the Official Map H-65, to a boundary interpretation and the LUC is authorized to correct errors on Official Map H-65.
- The Commissioners have discretionary authority regarding the refund of Petition filing fees and court reporter costs.

SIXTH LEGAL AUTHORITY

- §15-15-22(f), HAR provides tha if "uncertainty remains" the Commission may give further consideration to a boundary interpretation that was previously issued by the Executive Officer of the Commission.

SEVENTH LEGAL AUTHORITY

- §15-15-34(b), HAR provides that "[f]or good cause shown the commission may waive or suspend any rule. No rule relating to jurisdictional matters shall be waived or suspended by the commission."
- §15-15-22 Interpretation of district boundaries states;
 - (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;

The incorrect zoning and/or interpretation of the zoning and/or the error on the Official Map H-65 of the Property is not an error of the Petitioner(s) but it is an error of the LUC. This meets the "[f]or good cause" requirement of §15-15-34(b),

- The applicability of the SLUD Map H-65, as applied in §15-15-22(a) (1) HAR , is not jurisdictional. Therefore, the Commission is authorized to not apply the existing 1974 SLUD Map H-65 to a boundary interpretation and the LUC is authorized to correct errors on Map H-65.
- The no refund schedule requirement in Section §15-15-45.1 HAR is not jurisdictional. Therefore, the Commission is authorized to refund fees.
- § 15-15-45.1 (e), HAR provides that "The petitioner, movant, or applicant for any petition, motion, or application shall, unless otherwise ordered by the commission, reimburse the commission for or pay at the direction of the commission any expenses related to the publication of any required hearing notice, expenses of court reporter services, expenses of the hearing room, expenses for audio/visual services and equipment, and any other hearing-related expenses."
- The incorrect zoning and/or interpretation of the zoning and/or the error on the Official Map H-65 of the Property is not an error of the Petitioner(s) but is an error of the LUC. This meets the "[f]or good cause" requirement of §15-15-34(b), HAR.
- The payment of court reporter services schedule requirement in §15-15-45.1 HAR is not jurisdictional. Therefore, the Commission is authorized to wave the court reporter fees.

VI. CONCLUSION.

For the reasons stated above, the boundary between the Conservation and the Agricultural Districts for the Property should be interpreted and corrected in such a manner that the boundary is delineated by metes and bounds of the ridge top, *Exhibits 6 and 7* and SLUD Map H-65 be amended and corrected.

DATED: Hakalau, Hawaii, _____, June _____ 2021.

Kenneth S. Church
Petitioner

Joan E. Hildal
Petitioner

VERIFICATION

KENNETH S. CHURCH and JOAN E. HILDAL, the persons named, being duly sworn on oath, depose and say that they are the owners of Property; that they have read the foregoing Petition and know the contents thereof, and that the same are true to the best of their knowledge, information and belief.

Kenneth S. Church

Joan E. Hildal