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HONOIPU HIDEAWAY, LLC



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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

**SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF PETITION FOR
DECLARATORY ORDER FOR
BOUNDARY INTERPRETATION**

**DECLARATION OF NATHAN
EGGEN**

**DECLARATION OF MILES S.
HORIE**

EXHIBITS 1-32

CERTIFICATE OF SERVICE

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR
DECLARATORY ORDER FOR BOUNDARY INTERPRETATION**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. SUPPLEMENTAL POINTS AND AUTHORITIES.....	4
A. A 300-foot Setback From the “Line of the Wave Action” Was Not Used to Draw the Conservation District Boundary Line on the Property.	4
1. The LUC maps do not support a 300-foot setback.	4
2. The text of the 1969 Review does not support a 300-Foot setback.	7
3. The current boundary interpretation does not support a 300 foot setback.	10
4. Scaled overlay maps do not support a 300-foot setback.....	10
B. Additional Evidence Supports Petitioner’s Position that the Conservation District Boundary Line Was Not Drawn in the Intended Location on the LUC Maps.	13
C. Interpreting the Conservation District Boundary Line Along the Road Is Consistent with Existing Boundary Lines.....	16
D. Precedent Supports Petitioner’s Request.....	19
E. Concerns Raised in a Separate and Unrelated Commission Hearing Can Be Addressed.....	22
III. CONCLUSION.....	26

I. INTRODUCTION

The Petition uses the only available procedure for asking the Land Use Commission (“**Commission**” or “**LUC**”) to correct a mistake that was made when drawing the Conservation District boundary line on a specific parcel. Within the Petition Area,¹ the Commission intended to locate the boundary between the Agricultural and Conservation Districts by following location of the Old Coast Guard Road (the “**Road**”). Laying the boundary along the Road was consistent with the Land Use Commission’s (“**LUC**”) practices and rules. *See* Eckbo, Dean, Austin & Williams, State of Hawaii Land Use Regulations Review 86 (1969) (“**1969 Review**”), Exhibit 1; Land Use Commission Rules of Practice & Procedure (“**LUCRPP**”) Rule 2.11(b)(1) (1964) (“Whenever a district lines falls within a street If the actual location varies slightly from the location as shown on the district maps, then the actual location shall be controlling.”); Exhibit 2. The 1969 Review explained four conditions the Commission used to draw the Conservation District boundary line. The first of those conditions expressly stated that, if a road existed within a reasonable proximity of the shoreline, it was used to draw the boundary. *See* 1969 Review at 86 (“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.”).

¹ The “**Petition Area**” or “**Property**” refers to 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.

While the Commission intended to follow the location of road, the map that it used to draw the boundary depicted the Road in an outdated location. Specifically, the 1969 LUC Map set the boundary using the 1964 LUC Map, which was based on the 1957 USGS Map. The problem is that the Road was realigned in 1961. We know this because photos taken before 1964 and USGS maps and areial photos dated after 1964 correctly depict the Road. Thus, the 1957 USGS map was outdated before the Conservation District boundary had been set. As a consequence, the 1964, 1969 and 1974 LUC Maps depict the road in the wrong location. Using the wrong map, the Commission drew the line in a location that it did not intend. Based on the Commission's guiding practices and rules, we know that the Commission would have placed the Conservation District boundary line in the correct location using the existing Road if the Commission had been using a current map.

This interpretation is confirmed by considering the other possible conditions the LUC could have used. Conditions 2 and 3 related to a vegetation line to clearly mark the edge of an agricultural use or steep pali. *See* 1969 Review at 86. We know that the Commission did not use these Conditions, because the 1969 Report does not make mention of a clear vegetation line to clearly mark the edge of an agricultural use or steep pali for the area that includes the Property. Condition 4 is a catch-all provision pursuant to which a 300-foot setback from the "line of the wave action" will be used if "no readily identifiable physical boundary such as any of [those described in] the above" conditions was present. *See id.* ("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.”). As we explain below, we know that Condition 4 was not used to set the Conservation District line on the Property. Instead, the records are clear that the LUC used Condition 1 to draw the boundary line and simply drew the line in the wrong location because it placed the road in the wrong location.

Consistent with the Commission’s intent to follow the Road, the Conservation District boundary should be interpreted as following the Road. Because a boundary line that follows a road is interpreted as being located in the center of the road, the center of the Road should be interpreted as the line separating the Conservation and Agricultural Districts. *See* LUCRPP Rule 2.11(b)(1), Exhibit 2; HAR § 15-15-22(e).

This memorandum supplements the Petition filed on June 25, 2021. Part II.A below explains why the 300-foot setback line was not used to draw the Conservation District boundary line. Section II.B provides additional evidence to support the Petition. Section II.C further explains the correct location of the Conservation District boundary line through the Petition Area. Part II.D reviews additional legal authority, particularly the Commission’s decision in the *Stengle* case. In *Stengle*, the LUC held that where, as here, a boundary is based on a landmark, but the map shows the wrong location of the landmark, the boundary should be interpreted as being the actual location of the landmark. Finally, Part II.E addresses concerns that were raised by the Commission during a recent hearing on a separate petition for declaratory order.

II. SUPPLEMENTAL POINTS AND AUTHORITIES

A. A 300-foot Setback From the “Line of the Wave Action” Was Not Used to Draw the Conservation District Boundary Line on the Property.

The fourth condition in the 1969 Review provides that, if there was no readily identifiable landmark for a given area, a 300-foot setback from the line of the wave action or shoreline was used. *See* 1969 Review, at 86. Although LUC staff initially took the position that the Commission in 1969 had interpreted the Conservation District boundary as following the (wrong) location of the road, staff changed its position and now believes that the Commission used a 300-foot setback—Condition 4—when it set the Conservation District Boundary. Contrary to staff’s revised view, the (1) LUC maps, (2) text of the 1969 Review (3) current boundary interpretation and (3) mapping 300 feet inland of the line of the wave action all demonstrably show that a 300-foot setback was not used to draw the boundary line. The following four sections explain these points.

1. *The LUC maps do not support a 300-foot setback.*

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

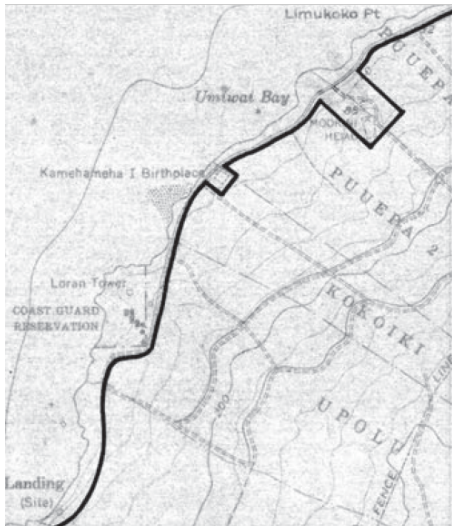
Roads are clearly shown on the 1964 Map. Although the boundary line is not shown on the 1964 Map, the analysis starts from the 1964 Map because it shows the H-3 Quadrangle for Mahukona **before** the line separating the Conservation and

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, and 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:



See Exhibit 3 (1964 LUC Map).

The boundary 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 and continues along the same contour of the road where the roads turn *mauka* or otherwise disappear:



See Exhibit 4 (1969 LUC Map).

Even in areas where the road closely abuts the shoreline, **the boundary line 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. See Exhibit 5 (1974 LUC Map). Thus, the line represented on the 1969 Map followed the road that was depicted on the maps.

2. *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 conditions outlined in the 1969 Review are organized in order of preference, and the three site-specific, physical conditions take precedence over the fourth catch-all provision.² Specifically, the 1969 Review general standards for Conservation District boundary lines 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.

² Conditions 2 and 3 do not appear to be applicable. The Review makes no mention of a clear vegetative line in this area, nor is the Property bounded by steep pali.

1969 Review, at 85-86.

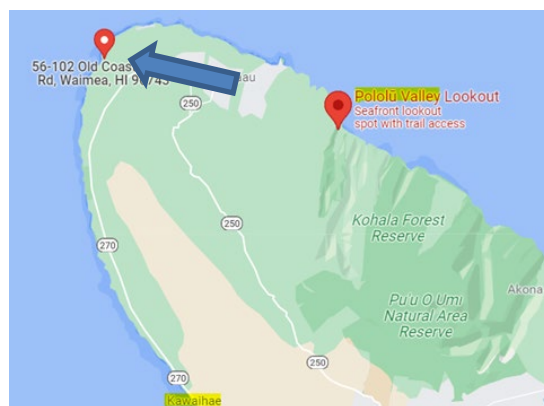
Applying these standards to the Property, the 300-foot setback would not have been used because there is a “readily identifiable physical boundary” that was used to mark the boundary line, *i.e.*, **the road**. Because the road is the correct landmark under paragraph 1, the catch-all in Condition 4 would not have come into play.

Second, the specific description of the action taken during the 1969 Review for the area where the Property is located does not support a 300-foot setback. The Property 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.

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.

3. *The current boundary interpretation does not support a 300 foot setback.*

The location of the current boundary interpretation on the Property eviscerates the contention that the Commission used a 300-foot setback. As you can see below, the “300’ Setback Line” on the Property does not align with the interpreted boundary:

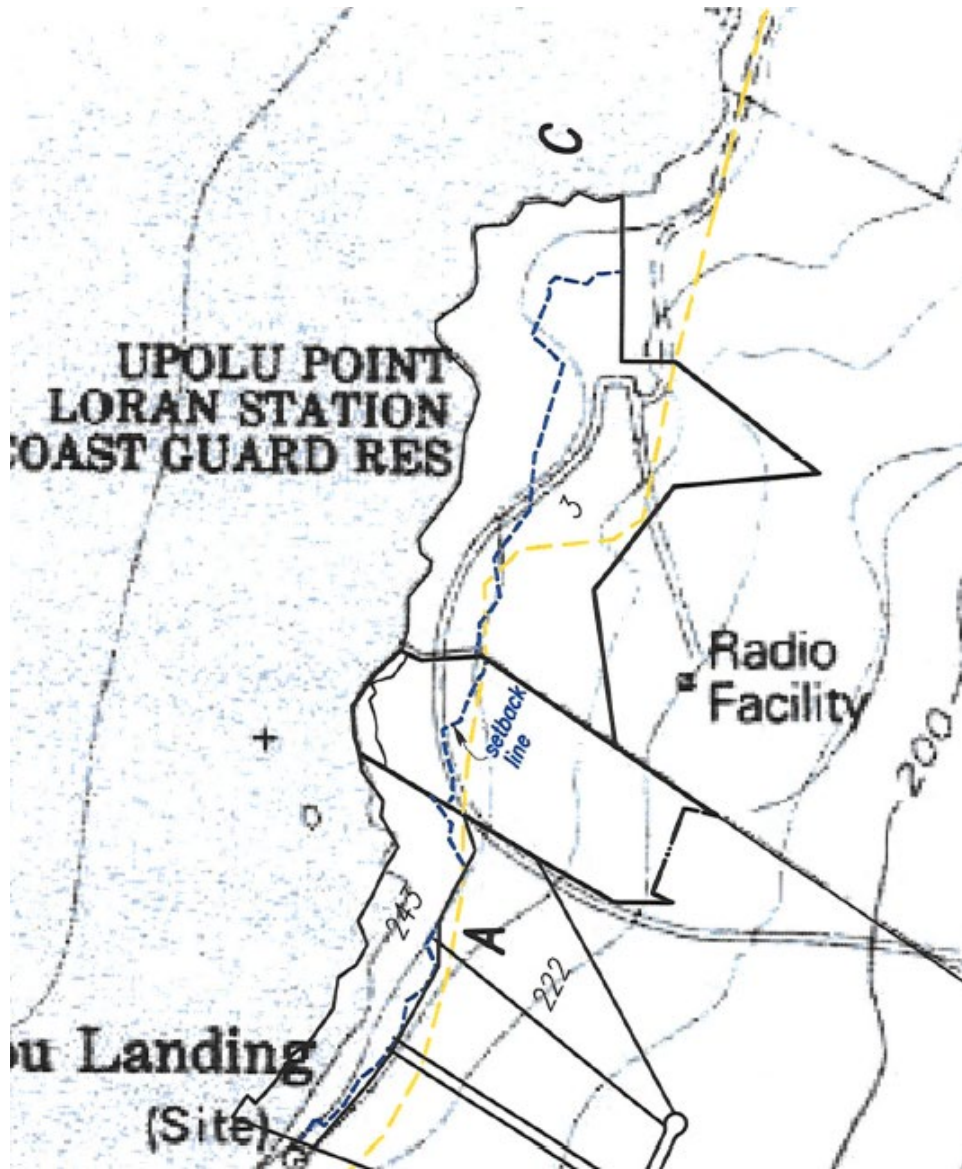


See Exhibit 6.

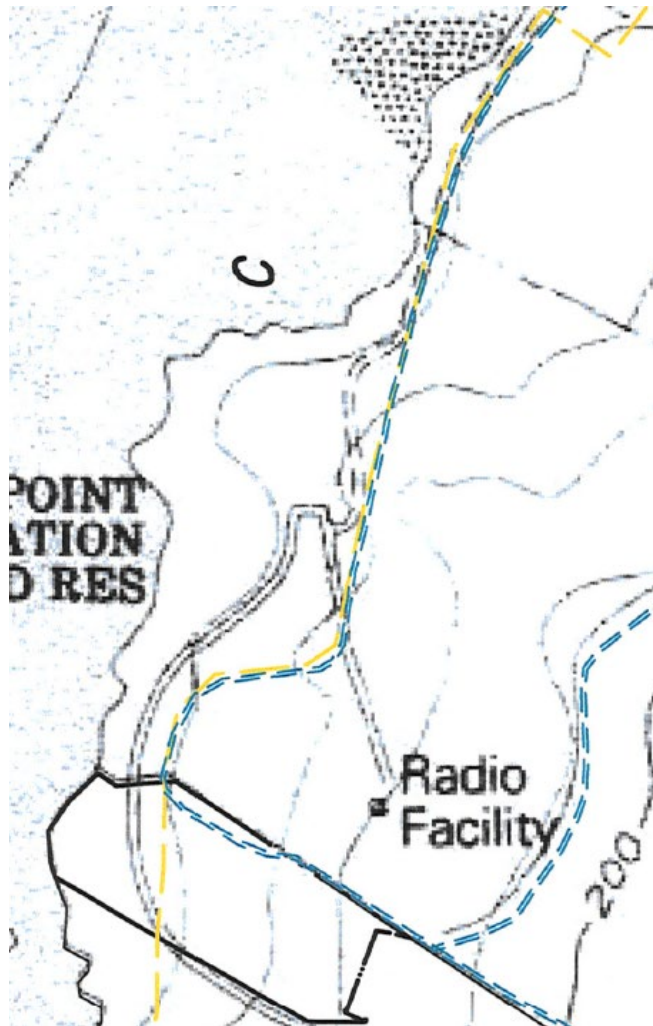
4. *Scaled overlay maps do not support a 300-foot setback.*

As you can see below, when a scaled 300-foot setback is applied to the parcels to the north and south of the Property, it is clear 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:



See Exhibit 7 (300-ft Setback Overlay). Instead, the Conservation District Boundary depicted on the LUC maps follows what the Commission believed was the location of the road, which is shown as the light blue dashed line below:

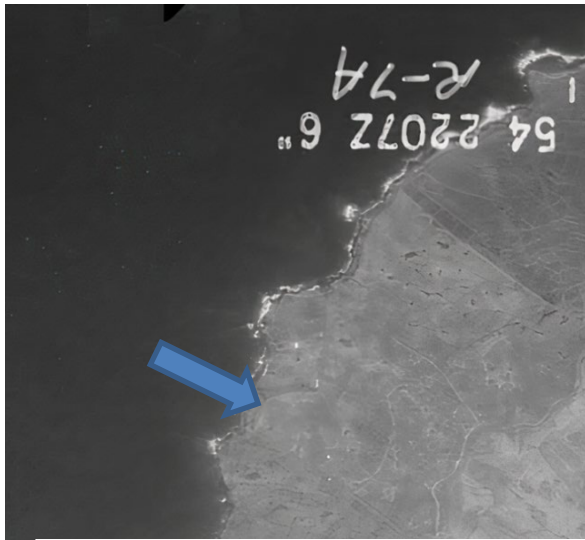


See Exhibit 8.

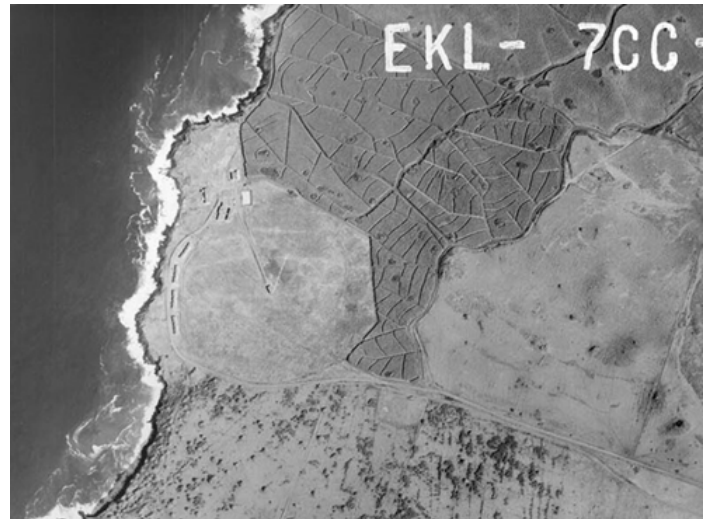
The Commission clearly used a road to set the Conservation District boundary. The problem is that the Commission used an outdated map. Consistent with the guidance that we know the Commission followed, if the Commission had used the correct base map when it drew the lines, it would have followed the road as it existed at that time.

B. Additional Evidence Supports Petitioner’s Position that the Conservation District Boundary Line Was Not Drawn in the Intended Location on the LUC Maps.

The following additional evidence shows that (1) the dirt road depicted on the 1957 USGS Map was relocated before 1964; (2) the LUC Maps contain the same mapping error because they are based on the 1957 USGS Map that did not accurately reflect the physical conditions as they existed in 1964; and (3) the Road still exists today in the same location as it did when it was built in 1961.



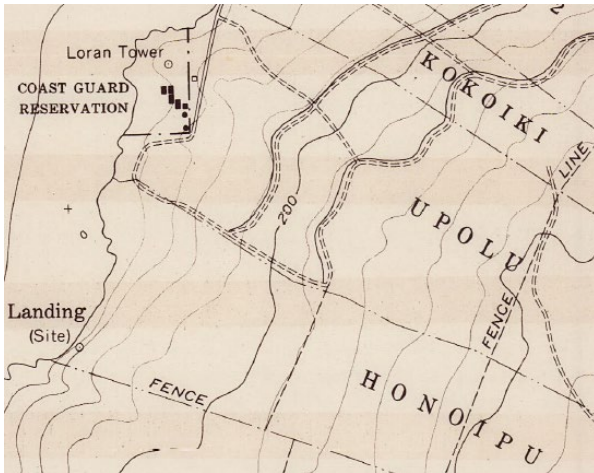
USGS Aerial Photo, April 21, 1954



USGS Aerial Photo, January 18, 1965

Exhibit 9 (1954 Aerial Excerpt); Exhibit 10 (1954 Aerial Original); Exhibit 11 (1965 Aerial Excerpt); Exhibit 12 (1965 Original).

First, prior to 1961, a dirt road (often labeled “jeep trail” on the maps)—depicted as a dashed line on the 1957 USGS Map—ran along the boundary between Upolu and Honoipu. *See* Exhibit 13A (1957 USGS Map). Conversely, as shown on the 1982 USGS Map, the Road dips into Honoipu and takes on a more circular shape. *See* Exhibit 13B (1982 USGS Map).



1957 USGS Map



1982 USGS Map

The Road shown on the 1982 USGS Map existed in the same location at the time the first LUC map was adopted in 1964. See U.S. Coast Guard, *Loran Station General Information Book*, at 1-1 to 1-2 (1969), Exhibit 14; *250 Kohalans Tour Coast Guard Facility At Upolu*, HAW. TRIB.-HERALD, Oct. 3, 1961, at 2, Exhibit 15. In addition to the aerial photos and other evidence discussed in the Petition, USCG photos of the Petition Area dated May 11, 1961 show the newly-graded road and buildings:

Photo of Newly Graded Road



Photo of North Building and Newly Graded Road



Exhibit 16 (1961 Photo Road); Exhibit 17 (1961 Photo House).

These buildings along the curve of the Road are visible on the 1982 USGS Map. The buildings and the Road were completed in 1961. *See also 250 Kohalans Tour Coast Guard Facility At Upolu*, HAW. TRIB.-HERALD, Oct. 3, 1961, at 2 (“All of the old buildings at the station were torn down in the project, and four new buildings were put up.”), Exhibit 15. Today, the two southerly buildings fall within the Petition Area. As explained in the Petition, while the 1957 USGS map was correct when it was drafted, it was no longer accurate by 1961. *See Pet. Mem.* at 10-11.

Second, the 1957 USGS Map was used as the “base” for the 1964, 1969 and 1974 LUC Maps. We know this because the 1964 LUC Map is marked on the bottom right-hand corner with the date “1957.” *See Exhibit 3 (1964 LUC Map)*. The same “1957” date appears in the same place on the 1969 LUC Map—the map on which the original Conservation District boundary line was drawn for the Mahukona quadrangle. *See Exhibit 4 (1969 LUC Map)*. The Conservation District boundary

line on the 1974 LUC Map appears to be a republication of the boundary line on the 1969 Map. *Compare* Exhibit 4 (1969 LUC Map) (showing the Conservation District boundary line along the coastline) *with* Exhibit 5 (1974 LUC Map) (showing the Conservation District boundary line in substantially the same location).

Finally, the Road, which was subsequently paved, remains in the same location today. *See* Pet. Mem. at 7-8. This is confirmed by aerial photos and other evidence included in the Petition, *id.* at 4-8, as well as the aerial photo taken from GIS shown below:



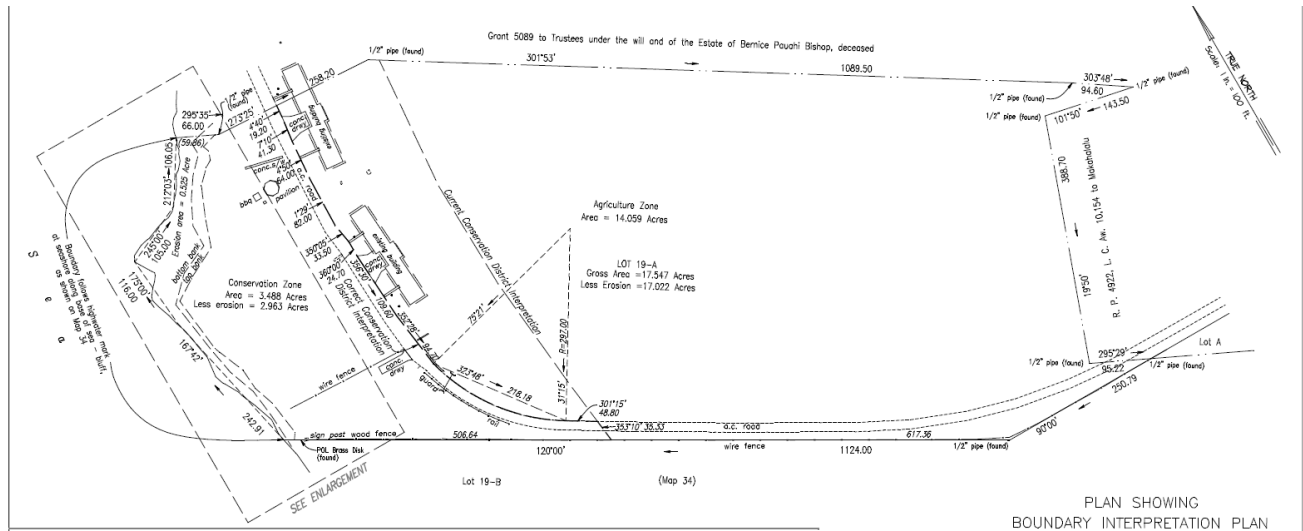
See Image Overlay, HAWAII STATEWIDE GIS PROGRAM, <https://geoportal.hawaii.gov/maps/image/explore?location=20.245807%2C-155.880985%2C16.00> (last visited September 10, 2021), attached as Exhibit 18.

C. Interpreting the Conservation District Boundary Line Along the Road Is Consistent with Existing Boundary Lines.

The Conservation District boundary line follows paved and dirt roads that are within a reasonable proximity to the coastline for the entire Mahukona area. The only exceptions are areas of historical or other significance, such as the birthplace of

Kamehameha I. This pattern is clear from both the 1969 and 1974 LUC Maps and was confirmed by the 1969 Review.³ See 1969 Review at 86; Pet. Mem. at 5, 15-17.

Correcting the Conservation District boundary line to run along the Road through the Petition Area, as shown below, makes a limited and targeted change. See Exhibit 19 (Corrected Boundary Survey).



Survey Showing Corrected Boundary Line Separating Conservation and Agricultural Districts on the Property

Correcting the Conservation District boundary in this matter does not have the potential to affect other properties. To illustrate this point, we have depicted the

³ The location of the Conservation District boundary lines as following roads within a reasonable proximity to the coastline is not as clear on the publicly available GIS SLUD Locator map as it is on the official 1974, 1969 and 1964 LUC Maps. On the GIS overlay maps, the boundary line mostly follows the road to the north of the Petition Area, but it is not exact. The 1974 Map represents the official SLUD boundaries, see HAR § 15-15-111, and “the SLUD Locator map is for visualization and information purposes only and is not an authoritative map,” see SLUD Locator Map, available at <https://histategis.maps.arcgis.com/apps/Viewer/index.html?appid=0f2a898e7d164359aa1c77aaa8e6085b>.

actual location of the Road at the time the Conservation District was drawn (the correct Conservation District boundary) in green and the currently mapped Conservation District boundary (following a jeep trail that did not exist at the time the Conservation District was drawn) in yellow. The depiction is below:

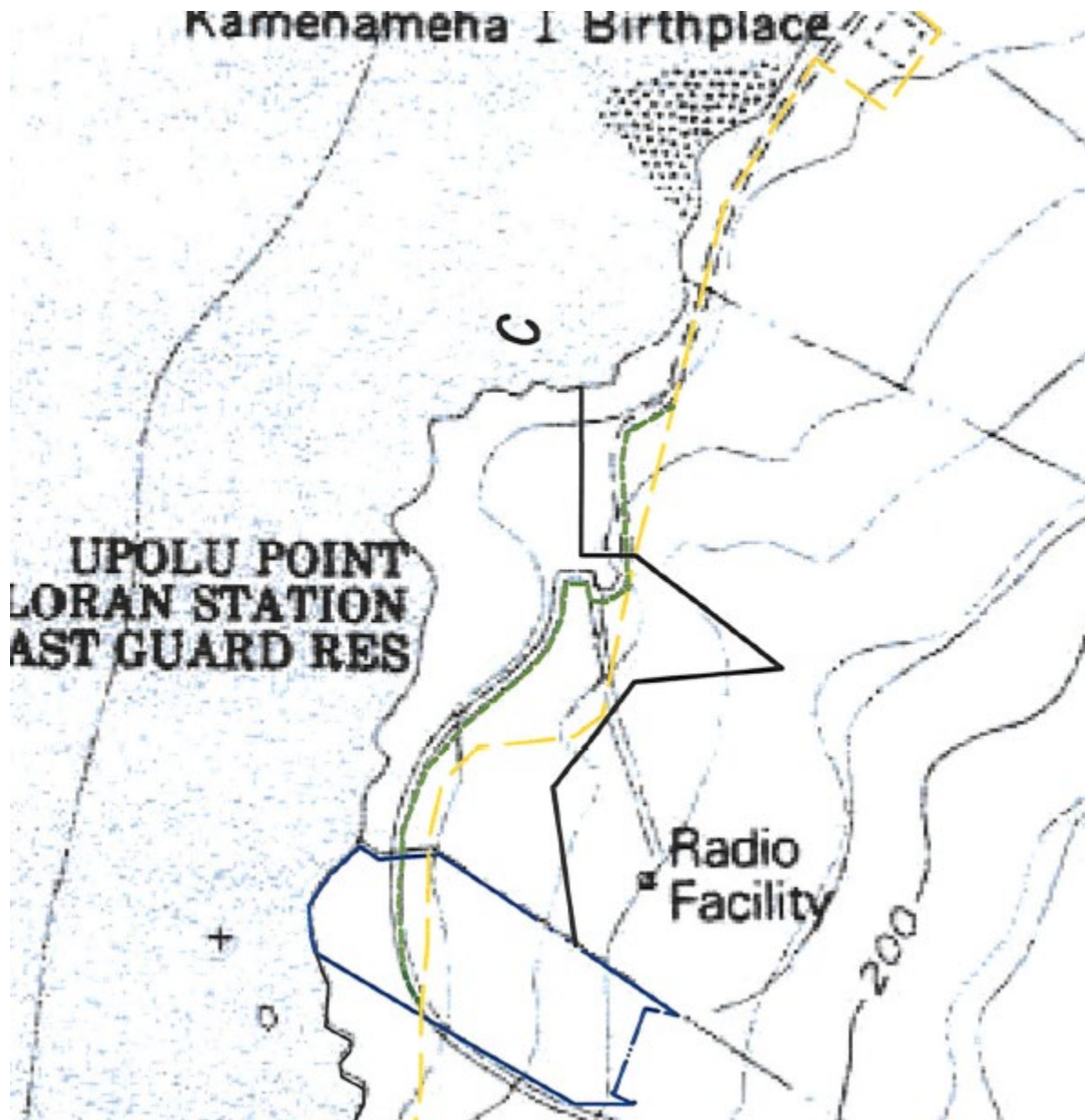


Exhibit 20 (Overlay Map).

As you can see, even if the adjacent owner requested a correction to the line (the adjacent owner is the Department of Hawaiian Home Lands, which is not subject to district boundaries), the correct district boundary line (noted in green) only slightly deviates from the existing Conservation District boundary (noted in yellow),⁴ and the deviation only truly impacts one property.⁵ Specifically, the Conservation District boundary line is correct beginning at the southern edge of the Petition Area because the Road curves in a southeasterly direction. To the north, the correct Conservation District Boundary line quickly meets the existing Conservation District line at the point where the Road was constructed over the prior road.

D. Precedent Supports Petitioner’s Request.

Petitioner’s request that the Commission interpret the location of the Conservation District boundary line in accordance with the location of the Road in 1961 is consistent with action the Commission has taken in the past.

On the role of precedent in administrative decision-making, the Hawai‘i Supreme Court has explained:

[A]djudicated cases may and do serve as vehicles for the formation of agency policies, which are applied and announced therein, and such cases **generally provide a guide to action that the agency may be expected to take in future cases**. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents.

⁴ The deviation is approximately the same as the deviation between the current and correct Conservation District line on the Property.

⁵ The deviation only impacts one property because the DHHL parcel is not subject to district boundaries.

Application of Hawaiian Elec. Co., Inc., 81 Hawai'i 459, 468, 918 P.2d 561, 570 (1996) (quotations and ellipses omitted and emphasis added), Exhibit 21.

The relevant precedent here is the Commission's decision in *In re Robert E. & Christine M. Stengle*, a copy of which is attached as Exhibit 22. There, the Commission amended the Conservation District boundary line on the 1974 LUC Map for the H-59 Papaaloa Quadrangle to reflect the intent of the drafters as documented in the 1969 Review. *See id.* The official LUC map showed the Conservation District boundary line as following a 200-foot contour line as the "top of the pali." *Id.* at 4-5. Petitioners' pointed out that the Conservation District boundary line as represented on the official map was incorrect because the 200-foot contour line on the map did not reflect the actual location of the top of the pali. *Id.* After submitting two boundary interpretation requests and a topographical survey depicting the accurate location of the pali, petitioners sought a declaratory order pursuant to HAR section 15-15-22(f) requesting that the Commission correct the location of the district boundary line. *Id.* In summarizing the factual background, the Commission recognized that

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

Id. at 5.

Granting the request in part, the Commission relied on the intent of the drafters as recorded in the 1969 Review and interpreted the Conservation District boundary line as being along the actual location of the "top of the pali," rather than along the

200-foot contour line as drawn on the LUC map. *Id.* at 6-7. Consistent with the drafters' intent as recorded in the 1969 Review, the Commission ordered as follows:

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

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

Id. at 7-8.⁶

Here, Petitioner asks the Commission to take similar action. As in *Stengle*, the Conservation District boundary does not follow the actual location of the physical boundary that the drafters intended to follow. *Id.* Instead, the Conservation District boundary line was drawn along a road that did not exist at the time the map was drawn. The Road existed through the Petition Area at the time the map was drawn. The drafters' intended to follow the existing Road as the boundary between the Agriculture and Conservation Districts. *See* 1969 Review at 69. To honor the drafters' intent and follow the precedent of this Commission, the Commission should exercise its authority under HAR section 15-15-22(f), as it did in *Stengle*, to interpret the Conservation District boundary as following the actual location of the Road.

⁶ The decision and order was subsequently amended to correct a typographical error in the original decision. *See* Exhibit 23. The amendment is non-substantive.

E. Concerns Raised in a Separate and Unrelated Commission Hearing Can Be Addressed.

On September 8, 2021, the Commission considered a petition for declaratory order to reinterpret the line separating the Conservation and Agricultural Districts along the Hamakua Coast (the “**Church petition**”). See DR21-72 Pet. for Decl. Order, attached as Exhibit 24. During the hearing, the Commissioners raised several concerns. This section responds to them.

First, the preponderance of the evidence standard does not apply to this Petition. The “preponderance of the evidence” standard referenced in HRS § 91-10(5) only applies “[i]n contested cases.” HRS § 91-10(5). A request for declaratory ruling under HRS § 91-8, HAR § 15-15-98 and HAR § 15-15-22(f) is not a “contested case.” *Id.* § 91-1 (“‘Contested case’ means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.”); accord *Lingle v. Hawaii Gov’t Emps. Ass’n, AFSCME*, Loc. 152, AFL-CIO, 107 Hawai‘i 178, 185, 111 P.3d 587, 594 (2005) (explaining a petition for declaratory order brought under HRS § 91-8 and HAR § 12-429(h)(1) is not a “contested case”), Exhibit 25. A hearing on this Petition will not be a “contested case” because, among other reasons, the hearing is not required by law. See HAR § 15-15-100 (providing that hearings on petitions for a declaratory order are permitted, “but shall not be required”). Thus, the “preponderance of the evidence” standard in HRS § 91-10(5) does not apply.

Any other conclusion would be nonsensical, because a petition for declaratory order asks the Commission to rule on a question of law and not to settle factual

issues. On a petition for declaratory ruling, the evidence is not in dispute. Accordingly, it is impossible not to have a “preponderance of the evidence.” The evidence presented on the petition is all of the evidence to be presented. The only matter for the Commission to decide is the application of the law to those undisputed facts.⁷

Second, the Commission discussed whether the landowner had relied on State zoning when he purchased the property. Reliance is principally relevant to the question of whether a landowner has a vested right to take an action or continue a use that would not be allowed after a change in the law. *See generally Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 86 Hawai‘i 343, 353–54, 949 P.2d 183, 193–94 (App. 1997) (explaining a landowner may rely on zoning ordinance in effect at the time a structure is built because “preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate”), Exhibit 27; *Denning v. Maui County*, 52 Haw. 653, 485 P.2d 1048 (1971) (providing a government entity may be estopped from changing its position if a landowner materially changes their position in reasonable reliance on official assurances from the County in the form of zoning approvals), Exhibit 28. The vested rights analysis comes into play when the government unilaterally takes action against a landowner. Reliance is not a relevant inquiry where the landowner affirmatively asks the government to take

⁷ In any event, this Petition would meet a “preponderance of the evidence” standard, which simply means “that something is more likely so than not so,” *i.e.* 51 percent. Haw. R. Civ. Jury Instr. 3.3, attached as Exhibit 26.

action to correct an error. Looking at this point from another angle, an error cannot be perpetuated simply because the error has been around for a long time.

Section 15-15-100 provides the grounds on which the Commission may deny a petition for declaratory order. The Commission is bound by its rules. *See Nakamine v. Bd. of Trustees of Employees' Ret. Sys.*, 65 Haw. 251, 251, 649 P.2d 1162, 1162 (1982) (explaining a reviewing court may modify the decision and order of the agency to fashion appropriate relief where an agency, by failure to follow its own rules, prejudices the substantial rights of a party before it), Exhibit 29.

Third, correcting the mapping error would not effect a taking of property. In the regulatory context, a total taking occurs when a law leaves a property without economically viable use. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (explaining a total taking occurs when a property cannot be put to economically viable use), Exhibit 30. A partial taking occurs when economically viable use remains, but the regulation goes too far in imposing public burdens on private owners. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (recognizing a partial taking may occur where regulations interfere with distinct, investment-backed expectations and substantially diminish the value of property), Exhibit 31. These issues have nothing to do with correcting the map to put the Conservation District boundary where the drafters intended it to be.

Fourth, this Petition is not “speculative.” “Speculative” is defined as “engaged in, expressing, or based on **conjecture** rather than **knowledge**.” *Speculative*, OXFORD DICTIONARIES, <https://www.lexico.com/en/definition/speculative> (last visited

September 9, 2021) (emphases added). A petition is speculative if answering the specific question “does not involve an existing situation.” HAR § 15-15-100(a)(1)(A) (providing the Commission shall deny the petition where “**The question** is speculative or purely hypothetical and does not involve an existing situation”) (emphasis added). It does not matter whether the landowner’s future uses are “unknown.” The relevant inquiry is whether the question presented to the Commission involves a current situation. Here, the question is clear, the situation is current, the precedent is clear and the facts necessary to determine the question presented—whether the LUC maps contain an error—are known and undisputed.⁸

Fifth, correcting the line will make the state and county land use controls consistent with each other, because the entire parcel is zoned A-20a under the county code. *See* Exhibit 32 (County zoning map). The entire Property will also continue to be within the Special Management Area (“**SMA**”) and subject to SMA regulations.

Finally, the Church petition asked the Commission to relocate the line separating the Conservation and Agricultural District boundary lines along the top of the coastal cliff. *See generally* DR21-72 Pet. Mem, Exhibit 22. This Petition does not present the same question. The Church petition was based on differences

⁸ While irrelevant, the planned use for the small portion of land that would properly be placed in the Agricultural District if this Petition is granted would remain the same. Currently, Mr. Nathan Eggen, who is a member of the Petitioner, lives in a home located within the Conservation District. Mr. Eggen and his family raise cattle and grow avocados and various fruits on the portion of the property that is within the Agricultural District. These uses will continue.

between the actions that were approved by the Commission, as documented in the 1969 Review, and the maps ultimately adopted. This Petition is based on an indisputable mapping error. If the drafters had not relied on an outdated map, it is clear that the boundary line would have followed the Road.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Commission grant the Petition pursuant to its authority under HAR §§ 15-15-98 and 15-15-22(f) and determine the Road as the line separating the Conservation and Agricultural Districts, as described and requested herein.

DATED: Honolulu, Hawai'i, December 3, 2021.

CADES SCHUTTE
A Limited Liability Law Partnership



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HONOIPU HIDEAWAY, LLC

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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
Hawaii, State of Hawaii.

DOCKET NO. DR21-73

**DECLARATION OF NATHAN
EGGEN**

DECLARATION OF NATHAN EGGEN

I, NATHAN EGGEN, hereby declare based upon personal knowledge as follows:

1. I am a member of Honoipu Hideaway, LLC (“Honoipu”).
2. Honoipu is the owner of certain lands consisting of approximately 17.5470 acres identified as Tax Map Key No. (3) 5-6-001-074 (the “Property”).
3. The Property is a shoreline parcel.
4. A road runs through the Property, identified by the name Old Coast Guard Road (the “Road”).
5. Through historical research, I discovered that the Road is not depicted in the correct location on the official 1974 State Land Use District Boundaries Map H-3, Mahukona Quadrangle, effective dated December 20, 1974.
6. I retained counsel on behalf of Honoipu to seek a declaratory order to correct the Conservation district boundary line on the Property.

I declare under penalty of law that the foregoing is true and correct.

DATED: Hawi, Hawai'i, September 10, 2021.



NATHAN D EGGEN

CADES SCHUTTE
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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

**DECLARATION OF MILES S.
HORIE; EXHIBIT "A"**

DECLARATION OF MILES S. HORIE

I, Miles S. Horie, hereby declare based upon personal knowledge as follows:

1. I am a State of Hawaii, licensed professional land surveyor, License No. 10007 with Engineers Surveyors Hawaii, Inc. I have been licensed since 2000 and I have 21 years of experience in surveying property in the County of Hawaii, State of Hawaii.

2. I was retained by Nathan Eggen on behalf of Honoipu Hideaway, LLC (“Honoipu”) to review and survey their property located in Kapaa-Upolu, North Kohala, Island of Hawai‘i.

3. Honoipu is the owner of certain lands consisting of approximately 17.5470 acres identified as Tax Map Key No. (3) 5-6-001-074 (the “Property”).

4. The Property is a shoreline parcel.

5. A road runs through the Property, identified as Old Coast Guard Road (the “Road”).

6. As part of my survey of the Property, I was asked to determine the current location of the Conservation district boundary line in metes and bounds.

7. Approximately 5.319 acres of the Property are within the Conservation district, including the 0.525 acres within the erosion area.

8. I determined the location of the Conservation district boundary line by reviewing the current 1974 State Land Use District Boundaries Map H-3, Mahukona Quadrangle, effective dated December 20, 1974.

9. As part of my survey of the Property, I was also asked to determine the

location of the Conservation district boundary line in metes and bounds if the boundary line was located along the *mauka* edge of the Road (“Corrected Boundary”).

10. If the Conservation district boundary line was located along the *mauka* edge of the Road, approximately 3.488 acres, of the Property would fall within the Conservation district, including the 0.525 acres within the erosion area.

11. A true and correct copy of my survey of the Property depicting the Conservation district boundary line and Corrected Boundary is attached hereto as Exhibit “A.”

I declare under penalty of law that the foregoing is true and correct.

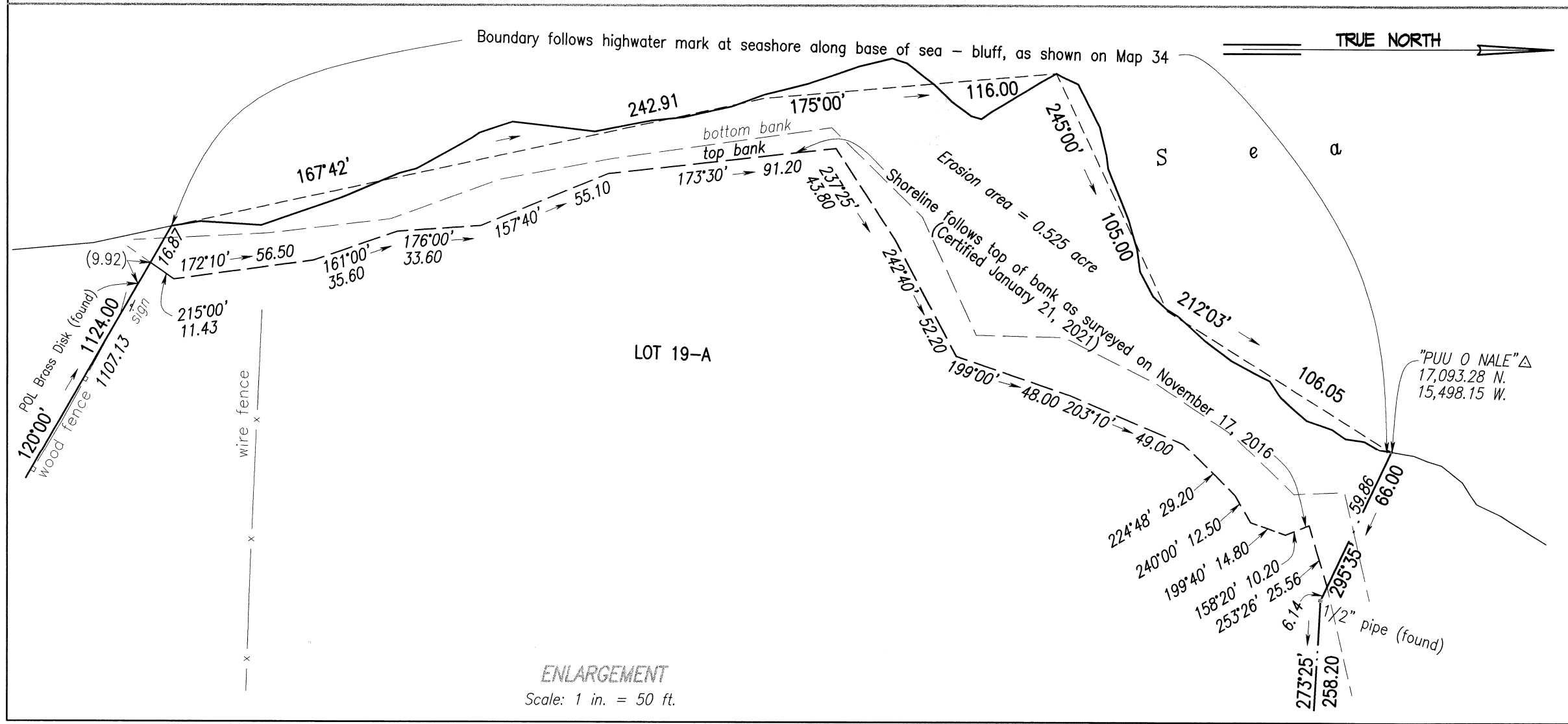
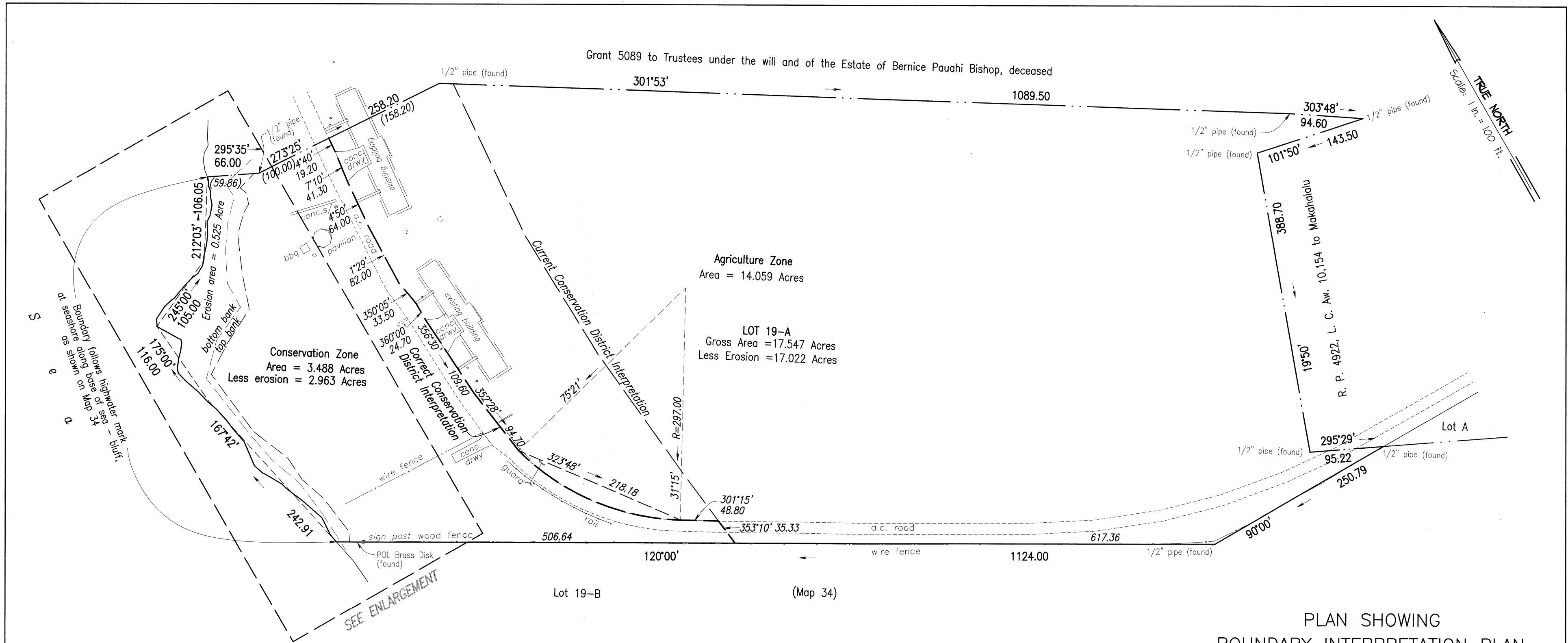
DATED: Honolulu, Hawai‘i, September 10, 2021.



A handwritten signature in cursive script, appearing to read "Miles S. Horie", is written above a horizontal line.

MILES S. HORIE

EXHIBIT A



PLAN SHOWING
 BOUNDARY INTERPRETATION PLAN
 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



This work was prepared by me or
 under my direct supervision.
 Engineers Surveyors Hawaii, Inc.
Miles S. Horie
 MILES S. HORIE Expires 4/30/22
 Licensed Professional Land Surveyor
 Certificate Number 10007

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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, December 3, 2021.

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