

2022 FEB 28 A 9:48



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of

HONOIPU HIDEAWAY, LLC

DOCKET NO. DR 21-73

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.

ORDER DENYING
PETITION FOR
DECLARATORY ORDER

ORDER DENYING PETITION FOR DECLARATORY ORDER

AND

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT
COPY OF THE DOCUMENT ON FILE IN THE OFFICE OF THE
STATE LAND USE COMMISSION, HONOLULU, HAWAII.

Date 2/28/2022

BY _____
DANIEL E. ORODENKER
Executive Officer

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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.

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On June 6, 2021, Honoipu Hideaway LLC ("Petitioner"), through their attorney Calvert G. Chipchase Esq., filed a Petition For Declaratory Order ("Petition"); Verification of Petition, pursuant to Hawai'i Revised Statutes ("HRS") §91-8, and Hawai'i Administrative Rules ("HAR"), §15-15-98 *et seq.*; Exhibits 1 – 26, and Certificate of Service.

Petitioners requested a declaratory order for Boundary Interpretation from the State of Hawai'i Land Use Commission ("Commission") to determine the location of the State Land Use district boundary line pursuant to is authority under Hawai'i Administrative Rules ("HAR") §15-15-22.

Petitioner sought an interpretation of the land use district lines of certain lands consisting of approximately 17.5470 acres of Tax Map Key No. (3) 5-6-001-074, situated at Kapaa- Upolu, North Kohala, Island and County of Hawai'i ("Petition Area"), in the State Land Use Agricultural and Conservation District pursuant to HAR §15-15-22(f).

Specifically, Petitioner sought a ruling that would find:

- 1) That the Conservation district line has not been placed in the correct location following an apparent mapping error on the State Land Use District Boundaries Map H-3, dated 1974 ("1974 LUC map").
- 2) The boundary interpretation that Commission staff provided to Petitioner on October 19, 2020, was also incorrect.
- 3) The error is not due to any fault of the Commission staff. The source of the problem is an error in the map used by the Commission to draw the original State Land Use Conservation district lines and that because of this error, the usual application of HAR § 15-1522(a)- (e) is ineffective to determine the location of the Conservation line; and accordingly, uncertainty regarding the correct location of the Conservation boundary line remains.
- 4) That the Commission will determine the location of the Conservation district line and, consistent with the Petition and the intent of the drafters of the State Land Use Conservation district lines, set the district line along the *mauka* edge of the road.

This Commission having heard and examined the testimony and evidence presented by Petitioners, the State Office of Planning and Sustainable Development ("OPSD"), the County of Hawai'i ("County"); and the filings and public testimony submitted via electronic mail; at its

meeting on December 22, 2021 via ZOOM virtual meeting technology, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

Procedural History

1. On June 6, 2021, Honoipu Hideaway LLC (“Petitioner”), through their attorney Calvert G. Chipchase Esq., filed a Petition for Declaratory Order, Verification of Petition Exhibits 1 – 26, and Certificate of Service.
2. On June 28, 2021, the Commission received Petitioner’s filing fee with cashier’s check for \$1000.
3. On September 8, 2021, the Commission received Petitioner’s survey of the subject property reflecting the location of the Conservation District Boundary along the edge of the road.
4. On September 14, 2021, the County of Hawai‘i (“County”) filed a Statement of No Position and Notice of Non-Appearance.
5. On September 15, 2021, the Commission sent an Errata letter regarding Boundary Interpretation to Petitioner.
6. On October 11, 2021, the Commission received Petitioner’s Response to the LUC Errata letter.
7. On December 6, 2021, Petitioner through their attorney filed a Supplemental Memorandum in Support of Petition for Declaratory Order for Boundary Interpretation; Declaration of Nathan Eggen, Declaration of Miles S. Horie, Exhibits 1 – 32, and Certificate of Service.

8. On December 13, 2021, the Commission received OPSD's Position Statement on Petition for Declaratory Order, Exhibits 1-4.
9. On December 13, 2021, the Commission mailed an agenda and hearing notice for a meeting on December 22-23, 2021 to the Petitioner; and, the Statewide, email, Kaua'i and Hawai'i Island mailing lists.
10. On December 16, 2021, the Petitioner filed a Supplemental Exhibit List, Exhibits 33-34.
11. On December 20, 2021, the Commission received public testimony via electronic mail, from the Marcelle Loren and Linda and Marty Halbritter.
12. On December 22, 2021, the Commission received Petitioner's Revised Exhibit List and Supplemental Exhibits 35-39.
13. On December 22, 2021, the Commission met via ZOOM interactive virtual technology, to consider the Petition pursuant to HAR §15-15-100. Calvert Chipchase, Esq., appeared on behalf of Petitioner and Nathan Eggen, who was also present.
14. OPSD and County were present at the proceeding. Alison Kato, Esq. appeared on behalf of OPSD; and Jean Campbell, Esq. for County.
15. There were no Commissioner disclosures.
16. At the meeting the LUC entered into the record, the written public testimonies received on the Petition, including the written submissions filed by OPSD, and afforded those present the opportunity to provide public testimony on the Petition. There was no public testimony.

Description of the Property

17. The Property is situated in situated at Kapaa - Upolu, North Kohala, Island and County of Hawai‘i, Tax Map Key No. (3) 5-6-001-074 and consists of approximately 17.5470 acres of land. Pet.pg. 1
18. The Property is situated completely within in the State Land Use Agricultural and Conservation Districts. Pet.pg. 1
19. The Property is owned by Petitioner Honoipu Hideaway, LLC, a Hawai‘i limited liability company whose mailing address is 1001 Bishop Street, Suite 2685A, Honolulu, Hawai‘i, 96813. Pet.pg. 2
20. The Loran Transmitting Station Hawaii was originally built in June of 1944 and consisted of seven Quonset huts on about twenty acres of land at Upolu Point, Island of Hawaii. Pet. Ex. 14, pg. 1-1.
21. In March, 1951, permanent buildings were completed to replace the Quonset huts. *Id.*
22. In 1960 eighty more acres of land were acquired, bringing the total to nearly one hundred acres. The existing buildings and equipment were removed and a totally new station was constructed on the site. The new “A-C” Loran Coast Guard Station was completed on June 2, 1961 and consisted of six buildings and four duplex family units. Pet. Ex. 14, pg. 1-2.
23. There is a road that runs parallel to the coastline *makai* of where the Loran Coast Guard Station was built.

Description of the Request

24. Petitioner filed the Petition pursuant HAR§ 15-15-22 Interpretation of district boundaries. Pet.pg. 1
25. HAR§ 15-15-22 provides:
- (a) Except as otherwise provided in this chapter:
 - (1) A district name or letter appearing on the land use district map applies throughout the whole area bounded by the district boundary lines;
 - (2) Land having an elevation below the shoreline as stated by section 205-1, HRS, marine waters, fishponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps, shall be included in the conservation district;
 - (3) All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps; and
 - (4) All water areas within the State are considered to be within a district and controlled by the applicable district rules.
 - (b) All requests for boundary interpretations shall be in writing and include the tax map key identification of the property and a print of a map of the property. All requests for boundary interpretations involving shoreline properties shall be accompanied by a survey map showing the locations of the shoreline as provided for in section 205A-42, HRS. Any erosion or accretion through natural processes shall be reflected on the map. Further, any shoreline structure, piers, and areas of man-made fill which were constructed or completed since the date of adoption of the state land use district boundaries existing as of the date of the request for interpretation shall be verified on the map.
 - (c) The executive officer may request the following information:
 - (1) Additional copies of the print, including a reproducible master map of the print or an electronic copy in a recognized format of the executive officer's designation; and
 - (2) Additional information such as, but not limited to, tax map key maps, topographic maps, aerial photographs, certified shoreline surveys, and subdivision maps relating to the boundary interpretation.
 - (d) The executive officer may use all applicable commission records in determining district boundaries.
 - (e) The following shall apply whenever uncertainty exists with respect to the boundaries of the various districts:
 - (1) Whenever a district line falls within or abuts a street, alley, canal, navigable or non-navigable stream or river, it may be deemed to be in the midpoint of the foregoing. If the actual location of the street, alley, canal, navigable or non-navigable stream or river varies slightly from the location as shown on the district map, then the actual location shall be controlling; and
 - (2) Whenever a district line is shown as being located within a specific distance from a street line or other fixed physical feature, or from an ownership line, this distance shall be controlling; and

- (3) Unless otherwise indicated, the district lines shall be determined by the use of the scale contained on the map.
- (f) Whenever subsections (a), (b), (c), (d), or (e) cannot resolve an uncertainty concerning the location of any district line, the commission, upon written application or upon its own motion, shall determine the location of those district lines.
26. Petitioner argued that subsections (a) to (e) do not resolve the uncertainty surrounding the conservation district boundary and is seeking for the Commission to determine the location of the district lines based on HAR§15-15-22(f). Pet.pg. 1-2
27. Petitioner referred to the State of Hawai'i Land Use Districts and Regulations Review prepared for the Commission in 1969 by Eckbo, Dean, Austin & Williams to identify the four major conditions that were recognized and from which recommendations were based upon for the Conservation District Boundaries: Pet. Exh. 21
28. The State of Hawai'i Land Use Districts and Regulations Review provides that:
1. Where a plantation road, farm road, access way or public road exists at the edge of the agricultural use within reasonable proximity to the 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.
29. The Petitioner sought a declaratory order from the Commission requiring that the Commission exercise its authority to determine that the location of the State Land Use Conservation district line that runs through the Petition Area is along the edge of the

Road, rather than through the *mauka* portion of the Petition Area as depicted in an October 19, 2020 LUC boundary interpretation obtained for the Property.

30. It was Petitioners' position that the proper location of the Conservation district line is along the *mauka* edge of the road rather than through the *mauka* portion of the Petition Area. Pet.pg. 18
31. Petitioner requested that the Commission exercise its authority to determine the location of the State Land Use Conservation district line that runs through the Petition Area per HAR §15-15-22(f) and stated that the process set out in the HAR subsections has failed to resolve the uncertainty concerning the location of the district boundary line and looked to the Commission to exercise its jurisdiction to determine the district line. Pet.pg. 4
32. It was Petitioners' position that the current conservation line within the Petition Area is not consistent with how, to the north of the Petition Area, the Conservation district boundary line follows the mauka edge of the Road, excepting areas of historical, recreational or other significance. The land mauka of the land is in the Agricultural District, and the land *makai* of the Road is in the Conservation District. Pet.pg. 6
33. It is Petitioner's position that the conservation boundary line within the Petition Area is not consistent with this pattern. The Petitioner sought a district boundary interpretation on January 8, 2020 (the "Request") and states that the Commission staff relied on a Shoreline Survey completed in October 2019 ("Shoreline Survey") and the 1974 map, and concluded that the entire 4.794 (plus the 0.525 acres comprising the erosion area) was within the Conservation district. Pet.pg. 6

34. It was the Petitioner's position that in conducting the survey of the Petition Area the surveyor drew the Conservation district boundary line as it is shown on the 1974 LUC map and that Commission staff, in issuing the boundary interpretation on October 19, 2020, followed the boundary line as it is shown on the 1974 LUC map and the survey. Because the surveyor and staff both relied on the 1974 map, the 1974 map essentially provided the sole source of information for the boundary interpretation. Petitioner contended that the Road, which has been in its current location since 1961, is incorrectly depicted on the 1974 LUC map. Pet.pg. 7
35. Petitioner recognized that the 1964 LUC map did not include the Conservation district boundary and that the Conservation boundary line first appeared on the LUC map dated 1969 (the 1969 LUC map used the 1964 LUC map as the base), and the 1974 LUC map used the 1969 LUC map as the base. Pet.pg. 10
36. It is Petitioners' position that the 1964 LUC map failed to correctly depict the Road as it existed at the time the map was drawn, and that an accurate rendering would have reflected the Road running along the coastline. (See Petitioner's Exhibit 17- 1982 USGS Map of Mahukona).
37. Petitioner argued that the error on the 1964 LUC map was carried forward to the 1969 and 1974 LUC maps with all three LUC maps incorrectly depicting the dirt road as it existed prior to 1961. Pet.pg. 11
38. Petitioner asserted that the drafters of the 1969 LUC map intended the Conservation boundary line to follow the mauka edge of any roadway in the area and that land makai of what they believed to be the location of the road was placed in the Conservation

district. Land mauka of what they believed to be the location of the road further was retained in the Agricultural district. Pet.pg. 12

39. Petitioner concluded that if the Road had been drawn in the correct location on the 1964 LUC map, the district boundary line drawn on the 1969 and 1974 LUC maps would have followed the Road as well, resulting in the Conservation district boundary line not including the land *mauka* of the Road. Pet.pg. 15-16, 18-19

LUC Staff Boundary Interpretation

40. LUC staff initially conducted its boundary review on October 19, 2020, and concluded that all 5.319 acres of the Petition Area were within the Conservation District. The LUC staff relied on a copy of the Shoreline Survey, a survey of the Petition area and the 1974 LUC map to make its determination.
41. Subsequent to October 19, 2020, the Commission discovered an error in the dates and map references used in the October 19, 2020, boundary interpretation and mailed an errata notice to Petitioner on September 15, 2021 to confirm that the area in question was in the SLU Agricultural District based on the original 1964 District Boundary Map H3, Mahukona Quadrangle effective dated August 23, 1964. The correct SLU Agricultural/Conservation Districts was established during the 1969 Boundary Review when the Commission proposed and approved the 300' setback from the "line wave action" or shoreline for the subject parcel and the surrounding area. (In the original LUC analysis, the conservation district was in part delineated by a trail or roadway. The actual demarcation or reference point was redefined in 1969, rendering the 1964 determination inapplicable.)

42. The September 15, 2021 boundary errata correspondence noted that the SLU Agricultural/Conservation District designation for the subject parcel as depicted on the SLUC 1969 District Boundaries Map H-3, Mahukona Quadrangle, effective dated August 4, 1969, and is unchanged for the current SLU District Boundaries Map H-3, Mahukona Quadrangle, effective dated December 20, 1974.
43. The Petitioner was also provided with a copy of the survey map entitled "Shoreline Survey Map of Lot 19-A as Shown on Map 34 of Land Court Application 1120", with the certification of the SLU District Boundaries for reference.

LUC Findings

44. The Commission did not find that Petitioner's evidence was conclusive that the Road was intended to be used as a mapping landmark in the manner described by Petitioner.
45. The Commission did not find that Petitioner's evidence was conclusive that a mistake had been made in the 1969 LUC Map or that the mistake was similarly carried through to the 1974 LUC Map.
46. Petitioner did not provide any other plausible theory regarding the basis for the placement of the Conservation district boundary line at the location depicted on the 1969 LUC Map such that the Commission could conclude that the Conservation district boundary line was improperly located on the 1969 LUC Map.
47. Petitioner's assertion that the road was the edge of the agricultural use on the Property was not supported by the evidence as the Agricultural Uses map was not of sufficient detail to determine whether that assertion is correct. Pet. Ex. 21.
48. The existence of the Coast Guard Loran station mauka of the road since 1944 is inconsistent with Petitioner's characterization of the road as the demarcation of the

edge of agriculture as there is no indication that agriculture was practiced in connection with the Coast Guard station. OPSD Memo. at 4. *See also* Pet. Ex. 14, pg. 1-2 (“Landscaping is an endless job, and 100 acres are a lot to cover with grass and shrubs and trees”).

49. There were no records of the Coast Guard or any other party disputing the Conservation district boundary line prior to the filing of this declaratory ruling request.

CONCLUSIONS OF LAW

1. Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

Jurisdiction

2. HRS § 91-8 allows any interested person to petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of an agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.
3. Petitioners are interested persons pursuant to HRS § 91-8 and HAR § 15-15-98(a), and thus have standing to bring this Petition before the Commission.
4. The Commission has jurisdiction to issue this declaratory order. HRS § 91-8, as implemented by the Commission’s administrative rules HAR §§ 15-15-98 through 15-

15-104.1, authorize the Commission to issue a declaratory order “as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation.” The Commission’s statutes, the applicability of which are put at issue in this Petition, are those sections of HRS Chapter 205 that govern the authority to reclassify land.

5. HAR § 15-15-98(c) allows the Commission to issue a declaratory order “...without notice of hearing” to terminate a controversy or to remove uncertainty. The Commission concluded that based on the facts presented at the meeting, the pleadings filed, together with the exhibits, the opportunity of Petitioner to present their views, and the fact that neither Petitioner requested a hearing pursuant to HAR §15-15-103, a hearing is not necessary before issuing a declaratory order in this matter.
6. HAR §15-15-100(a)(1)(D) provides that the Commission can deny the petition where “the petition requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission.”
7. The Commission relied on this authority to determine that the declaratory ruling process was proper. Without limiting the foregoing, the Commission concluded that the declaratory ruling procedure could be invoked by the Petitioner in this matter.

Based on the text and structure of the statute, its legislative history, and relevant caselaw, we agree with Wal-Mart that the declaratory ruling procedure was not intended to be utilized to seek review of agency determinations that have already been made and which have not been timely appealed.

HRS § 91-8, entitled “Declaratory rulings by agencies,” provides that:

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any

rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

HRS § 91–8 (emphasis added).

As both the title (“Declaratory rulings by agencies”) and the pertinent text (“a declaratory order as to the applicability [of a statute, agency rule, or order]”) make clear, the declaratory ruling procedure of HRS § 91–8 is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person. It was not intended to allow review of concrete agency decisions for which other means of review are available. Reading HRS § 91–8 in a common sense fashion, and bearing in mind the plain meaning of the term “applicability,” it cannot seriously be maintained that the procedure was intended to review already-made agency decisions. For such decisions, like the DPP Director's issuance of the CUP to Wal-Mart, the agency has already spoken as to the “applicability” of the relevant law to the factual circumstances at hand—implicitly or explicitly it has found the relevant legal requirements to be met. There is no longer a question of how the relevant laws, in this case the LUO, “apply.”

Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cty. of Honolulu,

114 Haw. 184, 196–97, 159 P.3d 143, 155–56 (Hawaii 2007).

Jurisdiction to Redistrict Land

8. Haw. Rev. Stat. § 205-2(a) provides the State Land Use Commission with the authority to place lands within one of the four major land use districts: Urban, Rural, Agricultural, and Conservation. “The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.”

9. Haw. Rev. Stat. § 205-2(a)(4) further provides standards for the Commission in determining the initial boundaries of each district, including, specifically the Conservation District:

In establishment of the boundaries of conservation districts, the “forest and water reserve zones” provided in Act 234, section 2, Session Laws of Hawaii 1957, are renamed “conservation districts” and, effective July 11, 1961, the boundaries of the forest and water reserve zones, theretofore established pursuant to act 234, section 2, Session Laws of Hawaii 1957, shall constitute the boundaries of the conservation districts; provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission.

10. Haw. Rev. Stat. § 205-2(e) provides standards for the types of lands to be included in the Conservation District:

Conservation Districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept. Conservation districts shall also include areas for geothermal resource exploration and geothermal resources development, as defined under section 182-1.

11. Haw. Rev. Stat. § 205-3.1(a) provides that the State Land Use Commission is the government body to process district boundary amendments involving State Conservation District lands:

District boundary amendments involving lands in the conservation district, land areas greater than fifteen acres, or lands delineated as important agricultural lands shall be processed by the land use commission pursuant to section 205-4.

12. The Commission did not find any compelling evidence that the LUC maps demarcation lines were improperly drawn.
13. Based on the information provided by Petitioner and the presentation and arguments of the Parties during the proceedings, the Commission concluded that:
 - a. The Conservation district line was placed in the correct location on the State Land Use District Boundaries Map H-3, dated 1974 (“1974 LUC map”).
 - b. The boundary interpretation that Commission staff provided to Petitioner on October 19, 2020, was correct.
 - c. There was no error in the map used by the Commission to draw the original State Land Use Conservation district lines and

The Commission Staff accurately determined the location of the Conservation district line in its boundary interpretation.

ORDER DENYING PETITION FOR DECLARATORY ORDE

Having duly considered the Petition and the written and oral arguments presented by Petitioners, the pleadings filed by OPSD, and the County, as well as public comments received, and a motion having been made at the meeting conducted via ZOOM virtual meeting technology on December 23, 2021 from various locations in Hawai‘i, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion, this Commission ORDERS that the Petition be DENIED.

ADOPTION OF DECLARATORY ORDER

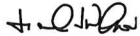
This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, O'ahu, Hawai'i, this 28th, day of February, 2022, per motion on
December 23, 2021.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAI'I



Deputy Attorney General

By 

JONATHAN LIKEKE SCHEUER
Chairperson and Commissioner

Filed and effective on:

2/28/2022

Certified by:



DANIEL ORODENKER
Executive Officer

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Hawaii, State of Hawaii.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that an ORDER DENYING PETITION FOR DECLARATORY ORDER
was served upon the following by either hand delivery or depositing the same in the U.S. Postal
Service by regular or certified mail as noted:

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Dated: Honolulu, Hawai'i, 2/28/2022



DANIEL E. ORODENKER
Executive Officer