

APPENDIX 2
Case law, laws, LUC Declaratory Order (Stengle), Boundary Interpretation 07-19 (Muragin), SCOTUS decision ("Etc.")

Case law **Etc.** further supports that the *undefined pictorial* district line on the Commission's **1974** SLUD map H-65 is not authoritative over the **text records** of the transcript of the **1969** Commission's final redistricting hearing, *ref., Exhibit 43, transcript*, and the **1969** District Boundary Amendment ("**DBA**") which is also recorded on page 36 of the Report, *ref., Exhibit 32*, for several reasons.....

- (i) *Exhibit. 13* SCOTUS decision, Discrimination
- (ii) *Exhibit 1* DR99-21, Stengle
- (iii) *Exhibit 2* Boundary Interpretation No. 07-19 Muragin
- (iv) the Report, *Exhibit 32*
- (v) *Exhibit 6*, the Report's page 41 map in detail
- (vi) State Law HRS 205-2 (a) (3)
- (vii) LUC HAR 15-15-19 (1)
- (viii) LUC HAR 15-15-22 (a), (d) and (f)
- (ix) Maps discussion, see *Appendix 7*
- (x) Deference, see *Appendix 8*
- (xi) **1969** newspaper article, *Exhibit 28*
- (xii) *Exhibits 43-45*, transcripts and minutes of the **1969** Commission's redistricting hearings.

(i) Exhibit 13 SCOTUS decision, Discrimination

In this case one property owner was treated differently, *ie. discriminated against*, than others by a City zoning authority. While generally the City required a 15 ft. easement for water and sewer services for several

property owners in another case, for a reasonably similar property the City required a 33 ft. easement for water and sewer services. SCOTUS overruled the required 33 ft easement requirement, citing the 14th amendment of the United States.

Comparatively.....

In the case of Petition DR21-72 (Stengle) and Boundary Interpretation No. 07-19 (Muragin), which land areas the Commission considered for rezoning into the Conservation District in 1969, subsequently the 1999 and 2007 Commissions applied the **text record** of the Commission's Report's page 36 rezoning "**approval**" and effectively held the Report to have a greater authority than the **undefined pictorial** district line that is depicted on the original, ref., Exhibit 46 maps, Commission's 1974 SLUD map. In the case of Stengle and Muragin

- the **top of the coastal pali** was applied by the Commission as the District Boundary,
- Stengle and Muragin's properties were in agricultural production in 1969, and
- Stengle and Muragin's properties lay on the **Hamakua Coast**.

In the case of the Petition DR21-72 (Church-Hildal), which land area was also considered for rezoning to the Conservation District in 1969 and is also described as being the land area that was **recommended** for rezoning **approval** on the Report's page 36, the September 8, 2021 Commission unfairly **discriminated** against Church-Hildal when the Commissioners applied that the District Map had a greater authority than the **text record** of the Report's page 36 even though the **text record** of the Report's page 36 equally applied to all 3 properties (see *Appendix 3*

for a detailed comparison of the characteristics of Stengle, Muragin and Church-Hildal properties and Exhibit 32, the Report).

As stated the Petitioners feel they were **discriminated**, see Appendix 4, against when the Commission denied the Petition DR21-72 on September 8, **2021**. It is a **factual situation** that the Petitioners had recently filed a complaint with Commission Chair Scheuer that the Commission's Executive Officer had wrongfully registered unfounded accusations against the Petitioners. Furthermore the Executive Officer's administration of the Petitioners' matters before the Commission have caused the Petitioners to believe him to not be a neutral party in administering their matters before the Commission, ref., *Exhibit 24 email exchange*.

The Petitioners believe that the Commission's Executive Officer is unfairly set against them. The Commission's Executive Officer controls the flow of information to the Commissioners. It is in this way the Petitioners believe that the Commission's Executive Officer has influenced the Commissioners in an unfair and discriminatory way against the Petitioners.

The Commission's Executive Officer's unfair discrimination against the Petitioners can be seen, in part, when comparing the Petitioners' and Barry Trusts' motions (re., the "**Two Properties**" motions) that the Commission issue a FONSI for the (P)(p)etitioner(s) intended uses for the Two Properties. On June 25, **2020** the Commission held a hearing for both Motions for a Finding Of No Significant Impact ("**FONSI**"). The

Commission made a FONSI for the 2 Properties at the Commission's June 25, **2020** Hearing.

In the case of the Petitioners' Motion for the Commission's June 25, **2020** FONSI, the Commission's Executive Officer did not transmit the Commission's FONSI to the office of environmental quality control ("OEQC") until November 10, **2020** (22 weeks later). In the case of the Barry Trust's Motion for a FONSI the Commission's Executive Officer transmitted the Commission's FONSI to the OEQC on June 30, **2021** (5 days following the Commission's FONSI). The Commission's HARule 15-15-76 (d) requires that the Commission's Executive Officer issue a letter to the OEQC that the Commission had determined a FONSI within 30 days, *ref., HAR §15-15-74 Decision*

*(d) Notwithstanding subsections (a) and (b), decisions on acceptance or non-acceptance of environmental compliance documents submitted pursuant to chapter 343, HRS, **shall** be made **within thirty days** of receipt of the final statement, provided that the period may be extended -at the request of the applicant for a period not to exceed fifteen days . Notification of a determination of acceptance or non-acceptance will be by letter from the executive officer to the applicant and office of environmental quality control, pursuant to chapter 343, HRS .*

(emphasis added)

During the period between June 25, **2020** and November 10, **2020** the Petitioners raised the delay with LUC staff by telephone and email and two formal letters. The Petitioners reminded LUC staff that it was required in the LUC's administrative rules that it was a "**mandatory**" stipulation that the Commission's FONSI for their Petition, A18-805, was to be transmitted to OEQC within 30 days. The Commission's Executive Officer appeared to ignore the Petitioners repeated requests over the 22

week period. Finally **after** the Petitioners complained to the State Ombudsman Office **and** the Administrator of the State Office of Planning did the LUC's Executive Officer transmit the Commission's FONSI to OEQC for publication.

(ii) Exhibit 1 DR99-21, Stengle

The LUC's DR99-21 (Stengle) **FINDINGS OF FACT, APPLICABLE LEGAL AUTHORITIES** section, item 12 states

"Staff based its determination of the parcels' land use designation on an enlargement of the Commission's State Land Use District Boundaries Map, H-59 (Papaaloa), which represented the Agricultural and Conservation District boundary as following the 200-foot contour line, and upon review of the "State of Hawaii Land Use Districts and Regulations Review" prepared by Eckbo, Dean, Austin & Williams to document the recommendations and actions in the 1969 Five-Year Boundary Review. The report reflected that along the Hamakua Coast of the island of Hawai'i, the Conservation District boundary was to follow the top of the ridge or pali. Areas in agricultural use at that time were excluded."

Source - DR99-21 (Stengle) Exhibit 1), (emphasis added)

DECLARATORY ORDER

FOR GOOD CAUSE APPEARING, the Commission hereby rules that the boundary reclassification under Decision and Order issued on June 2, 1975, in Docket No. 074-8 and Boundary Interpretation No. 92-40 dated September 15, 1992, is clarified and corrected to reflect that the 24.059-acre Property, identified as TMK 4-2-14: 4, and approximately shown on Exhibit "A" attached hereto and incorporated by reference herein, is designated entirely within the State Land Use Urban District.

Accordingly, this Commission determines that State Land Use District Boundaries Map O-14 (Mokapu) be amended to reflect that the 24.059-acre Property is designated entirely within the State Land Use Urban District.

*source the Commissions Decision and Order for
DR99-21 (Stengle), Exhibit 1*

The **1999** Commission's DR99-21 (Stengle) **FINDINGS OF FACT, APPLICABLE LEGAL AUTHORITIES** section clearly describes the "**LEGAL AUTHORITY**" of the Report and the Report's description of what land was redistricted by the **1969** Commission "**that along the Hamakua Coast of the island of Hawai'i, the Conservation District boundary was to follow the top of the ridge or pali. Areas in agricultural use at that time were excluded.**"

This is problematic in the case of the Petition DR21-72 (Church-Hildal). District map H-59 bears a date **1974** but the district line on the present version of District map H-59 does not show the boundary following the 200 ft. contour line. The map has been changed. During the Commission's Hearing for the Petition DR21-72 Commission Chair Scheuer went to considerable length comparing the present version of map H-59 to map H-65 (where the property is located) in what appeared to be an attempt to establish that map H-65 was intended by the **1969** Commission to be treated differently than the other maps for the Hamakua Coast. In order to have a fair comparison the earlier version of the **1969** Commission's Map H-59 would have to have been the

compared Map with H-65, *ref., Exhibit 37* map comparison and the former railroad property line did not particularly follow the ***undefined pictorial*** district line that is shown on Map H-65 anyway.

The **1999** Commission **correctly** applied the ***text record*** of the Report's page 36 to be of a higher authority than any State Land Use District ("SLUD") Map in DR99-21 (Stengle). The Petitioners' Property lies on the "***Hamakua Coast***" and it was in "***agricultural use***" in **1969**.

The **2021** Commission erred in Law by not similarly following the **FINDINGS OF FACT, APPLICABLE LEGAL AUTHORITIES** of the **1999** Commission by denying the **2021** the Petition DR21-72 (Church-Hildal). The Petitioners Petition DR21-72 was supported by 19 exhibits, ie. a *preponderance of evidence*, Stengle's petition was supported by only 2 exhibits, a current photograph and map and it did not exhibit any proof that Stengle's land was in agricultural production in **1969**.

(iii) Exhibit 2 Boundary Interpretation No. 07-19 Muragin

LUC Boundary Interpretation No. 07-19 letter to Muragin stated, in part, ...

*For your information, the designation of the subject parcels **was established on August 4, 1969**, and in accordance to Hawaii Administrative Rules Subchapter 16, 15-15-111. as depicted on the official State Land Use (SLU) District Boundaries Map H-59. Papaaloa Quadrangle, the landward portion of the subject parcels was designated SLU Agricultural. any coastal lands from the "**Top of Sea Pali**" was deemed SLU Conservation District. For a more precise determination, the top of pali shall be located - in metes and bounds relative to subject parcels and with the additional locations of the SLU Agricultural / Conservation District as depicted on your attached boundary interpretation survey map. (emphasis added)*

source exhibit 4

The above copied Boundary Interpretation clearly describes the **text record** of the Report to be of a higher authority than the **undefined pictorial** district line that is shown on LUC's SLUD Map H-59.

Also Kato testified that the **1969** Commission "**approved**" the district Maps on **August 4, 1969**. It appears that this is an **error in evidence**. LUC staff recently advised the Petitioners that the Maps were not approved by the Commission on **August 4, 1969** but rather were **approved** on July 18, **1969**. The August 4th date was related to a formal map filing with the State by a higher authority.

(iv) Exhibit 32 the Report

The **text record** of the Report's page 3 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. These four chapters are a functional necessity, but may be unentertaining reading to those not intimately familiar with the Hawaiian landscape.

Note: "the **text** becomes not just a report to the Commission but a **record** of its **actions** as well. **These four chapters are a functional necessity**"

The word "**actions**" directly point to the word "**actions**" quoted on the Report's page 36 and 85.

Source the **1969** Report's page 3

II. CONSERVATION DISTRICTS

A. General

Hawaii is the most recently formed of all the islands, and the evidence of volcanic activity dominates the landscape. Above the 7,000 foot elevation on the peaks of Mauna Kea and Mauna Loa, the land is generally dry and barren. Also, the recent lava flows, particularly in the dry areas of the island, are barren and unproductive. Seemingly the highest and best use would be as wilderness areas. These areas have been recognized and are for the most part within the existing Conservation District. Certain areas should be added to the Conservation District owing to their scenic qualities, wilderness or wildlife resources, steep topography and general conservation values.

C. The Shoreline

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.

Commission Action: Partially Approved.*
Areas in agricultural use were excluded.
From Hilo to Kapoho the shore is rocky

*Approved recommendations adopted at the action meeting held in Hawaii County July 18, 1969.

The text boxes on the left is a "*pdf snapshot*" taken from **Chapter 5, page 36** of the Report.

Paragraph C "*The Shoreline*" describes the Report's '*recommendation*', ie. "*should be*", to the Commission's *final* Community meeting in Hawaii County. The '*recommendation*' appears to have been supported by a '*recommended map*'.

The "*criteria*" for developing the district lines that defined "*the shoreline*" on the '*recommended map*' was described at the "*final*" Hawaii County Community meeting to be according to the "*criteria*" that we have just described on the previous page. The "*shoreline*" was "*recommended*" to be rezoned into the Conservation District.

The Commission "*partially approved*" the "*recommended*" district boundary amendment. The extension of the Conservation District was "*approved*" with the "*ridge top as a boundary line*", ref., *criteria #3, Report page 86*, and not the "*recommended*" district line that was shown on the maps for the area extending southward from East Kohala to the City of Hilo, which is an area which included the Hamakua Coast where the Property is located.

Source Exhibit 32, the 1969 Report, page 36, (emphasis added)

(for more detail see Appendix 5)

(v) Exhibit 6, the Report's page 41 map in detail

The "*proposed*" and "*adopted*" Conservation District is shown on the Report's map page 41 to be much wider at Stengle and Muragin's land than at the Property (Church-Hildal)

See Exhibit 6, Report page 41 map with added text and lines.

(vi) HRS 205-2 (a) (3) and (vii) HAR 15-15-19 (1)

HRS §205-2 (a) (1-3), Districting and classification of lands, states.....

'HRS §205-2 Districting and classification of lands. (a) 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:(1)

.....urban districts;

(2).....rural districts.....;

(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;' (emphasis added)

The term **greatest possible** means that when determining the location of a State Land Use District Boundary **no other district boundary, not even Conservation be applied** without compelling consideration and reasoning,

HRS §205-2 Districting and classification of lands **Law applies just as much today as it did in 1969.**

HRS §205-2 is reflected in the LUC's Rule HAR 15-15-19 (1).....

*"It **shall** include lands with a high capacity for agricultural production;"*

(emphasis added)

The word "**shall**" is a mandatory instruction to the Commission and the instruction and the law was the same in **1969** just as much as it is today.

If any *uncertainty* exists regarding the Report's ***text record*** of the Commission's ***actions*** regarding redistricting of land in **1969** the

Commission must also interpret, consider and apply the **mandatory** guidance of *HRS §205-2 Districting and classification of lands Law*,

If the Commission **correctly** finds that the (i) Report's maps and the (ii) LUC's **1974** SLUD maps vs. the **text record** of the Report are in conflict the Commission must consider and apply HRS 205-2 (a) (3) and HAR 15-15-19 (1) in order to remove **uncertainty** (*ref., "uncertainty" HAR 15-15-22(f)*),

The word **capacity**, which is found in HRS 205-2 (a) (3) and HAR 15-15-19 (1), does not describe a past, present or future land use but rather **a physical characteristic of land**. Therefore it is irrelevant to the Commission's decision whether the Property is presently in agricultural production. None-the-less the Petitioners have over 60 different orchard plant species and/or species cultivars on the Property, *ref., Exhibit 41, plant list*. The Petitioners already have a farm tractor and a 720 sq. ft. agricultural use storage and processing structure on the Property. The Petitioners \$ investments directly in the form to support the agricultural use of the Property exceed \$100,000. The Petitioners intend to begin selling the produce of their orchard species once the status of the Property's zoning is legally established.

The Property is shown on both of the LUC's ALISH and LSB maps as **Prime** Agricultural land Class C.

The ALISH definition of Prime Agricultural land is.....

"Land which has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed according to modern farming methods."

(viii) HAR 15-15-22 (a), (d) and (f)

§15-15-22 Interpretation of district boundaries.

- (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)...(3)....(4)....
- (b)(c)
- (d) The executive officer may use all applicable commission records in determining district boundaries.
- (e)
- (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.

Clearly HARule 22 provides.....

- that the chapter may provide otherwise,
- applicable commission records may be applied,
- a land owner may file an application to the Commission that if uncertainty remains it will determinethe location of the district boundary.

§15-15-22 Interpretation of district boundaries.

- (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)...(3)....(4)....
- (b)(c)
- (d) The executive officer may use all applicable commission records in determining district boundaries.
- (e)
- (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.

If it was the Commission's intention that the *undefined pictorial* boundary lines, that are shown on the Commissions 1974 SLUD maps, were highly authoritative it would not be provided in the Commission's Rules that the Commission may determine otherwise and there would not exist several examples of such Commission "*defined*" boundary interpretations that appear to be different than the Commission's SLUD maps.

(ix) Maps discussion, see Appendix 7

(x) Deference, see Appendix 8

(xi) Newspaper article further evidences the mind of the Commission in 1969, which is described on the Report's page 36, ref., Exhibits 27 & 28,

continued on next page.....

• A Week On The Island

From Page 4

Meeting at Kailua, the commission increased the amount of land zoned urban to almost 30,000 acres.

Currently there are 24,400 acres zoned urban. Of this amount of land, 14,000 acres is not being used for urban development. The 14,000 acres is either vacant or in agricultural use.

In other action, the commission increased the amount of land in conservation on the Big Island. They formed a conservation band around the entire island. The new designation includes all shore-

line which is not currently in some other use.

GI Found In Car

An 18-year-old soldier, Wayne Oshiro, of Kalopa was found alive Saturday morning in a wrecked auto near Honokaa.

The soldier had been missing since late Wednesday when his car apparently ran off the road which leads from the Belt Highway to Honokaa.

Oshiro's condition was listed as fair Saturday after he was moved from Honokaa Hospital to Tripler Army Hospital on Oahu. The man was home on R and R.

Source, Tribune-Herald article, exhibit 28, (emphasis added)

(xii) 1969 transcripts and minutes of the Commission's redistricting hearing.

The transcripts and minutes clearly describe that the 1969 Commission did not intend to overlay the Conservation District on to existing agricultural use land, *ref., Exhibits 43-45.*

In conclusion there exists a **preponderance of evidence** that the Property was not rezoned into the Conservation District in 1969.....

- case law, SCOTUS decision Exhibit 13, Jenkins, Exhibit 23,
- the State of Hawaii's laws,

- the Commission's Rules,
- the minutes and transcripts of the 1969 Commission's redistricting hearings, *Exhibits 43-45*,
- the newspaper articles *Exhibits 27-28*, and
- past Commission rulings ie DR99-21 (Stengle) *Exhibit 1*, Boundary interpretation No. 07-19 (Muragin) *Exhibit 2*, Boundary interpretation DR96-19 (Castle Foundtion) *Exhibit 25*, and Barry Trust DBA 18-806 *Exhibit 8*.

The above all support that the Commission allows the requested Petition DR21-72 (Church-Hildal).