

APPENDIX 3

The Report, Comparison of Stengle, Muragin and Barry Trust properties vs. the Petitioned Property which 4 properties are also referenced in the State Office of Planning's ("OP") written testimony to DR21-72, *ref., Exhibit 4, OP written testimony*, **and** variable and conflicting boundary interpretations **and** another Declaratory Order that has been issued by the LUC in the general area of the Property.

Introduction

In **1969** the LUC (variably the "**LUC**" or "**Commission**") completed its first Statewide Land Use District Boundary review (the "**SLUD**" review). The "***State of Hawaii Land Use Districts and Regulations Review***" prepared by ***Eckbo, Dean, Austin & Williams*** (the "**Report**") **formally documented** the Commission's redistricting "**actions**" in **1969**. Page 3 of the Report 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.

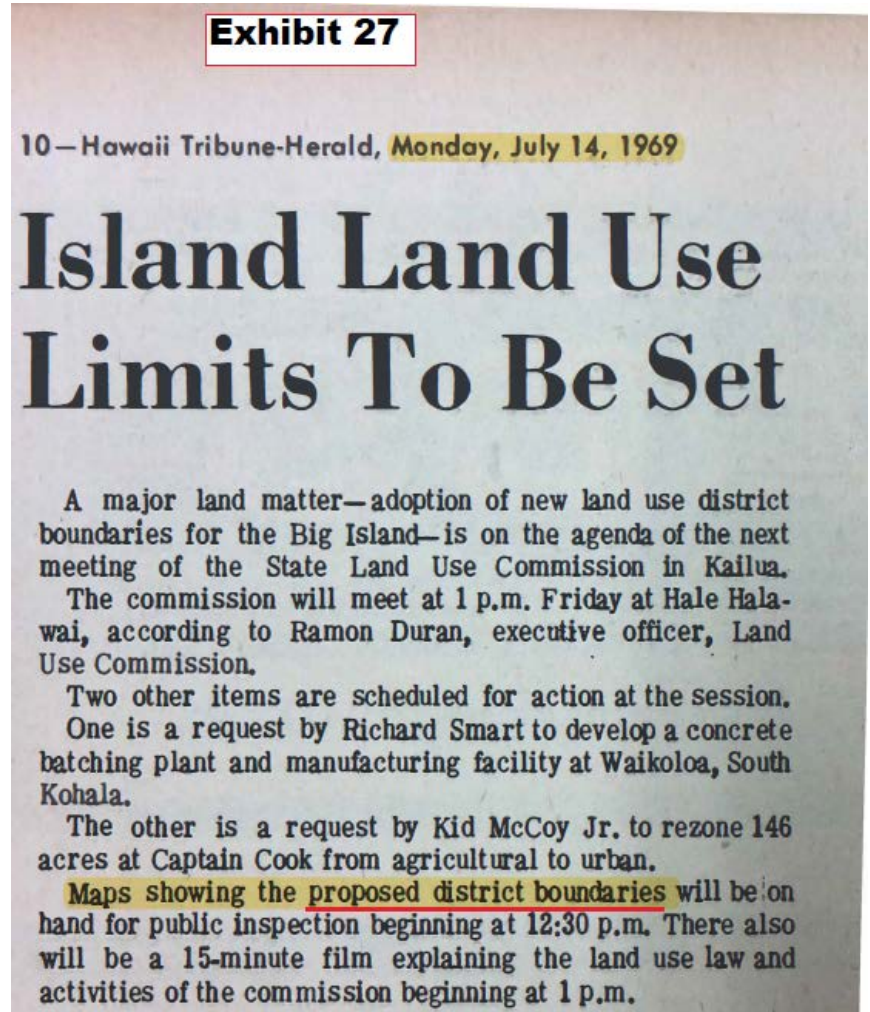
Source, Exhibit 32, Report's page 3, (emphasis added),

see also Appendix 5

Particular attention, in the above picture of a portion of the Report's page 3, is pointed to the words and phases....

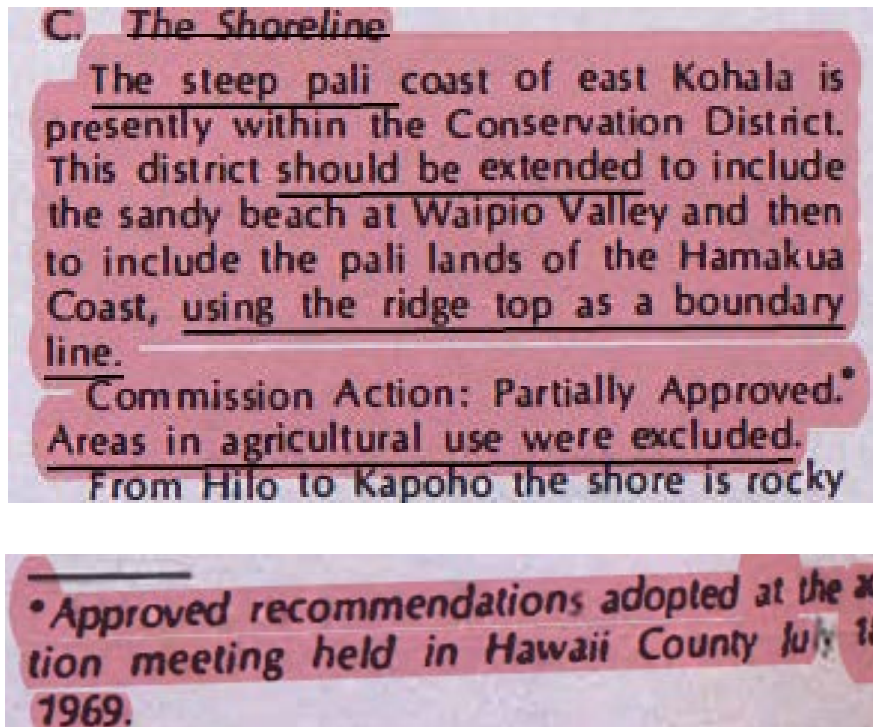
- **recommended** changes
- *we are able to provide the Commission's decisions*
- the **text** becomes not just a report to the Commission but a record of its **actions** as well
- these four chapters are a functional necessity

Effectively the Report's **text** was intended to hold a higher priority than the ***recommended*** changes to district lines that were shown on maps to the LUC's 1969 community hearing attendees.....



Source Tribune-Herald, July 14, **1969** (emphasis added)

The Property lies in a Coastal area on the Big Island of Hawaii that is referenced on the Report's page 36 as the **Hamakua Coast**. The Report describes that the Conservation District was first **recommended** to be extended along the Coastal area between East Kohala, to the north and the City of Hilo, to the south, "**using the ridge top as a boundary line**" which is an area that included intensely farmed Coastal land which land area is known as the Hamakua Coast and comprised "**Prime**" agricultural land Class "C" (see *Exhibit 34 1969 Report soils page and 1969 Report page 42*).



(emphasis added) source *Exhibit 32, The Report, page 36, and Appendix 5*

Particular attention, in the above picture of an area of the Report's page 36, is pointed to the words and phases....

- *steep pali Coast*
- *pali lands of the Hamakua Coast*

- *should be extended*
- *using the ridge top as a boundary line*

The Report describes that these were the Report's **recommendations** (see.... "**should be**") to the **1969** Commission's final Hawaii Community meeting which was held on July 18, **1969**.....

- *Areas in agricultural use were excluded*
- *Approved recommendations*
- *adopted*

The **text record** of the Report makes it clear that it was neither the Commission's, the County's nor the Community's intention to overlay the Conservation District on to lands that were in agricultural use. It would have been against the State's Law to do otherwise.....

The **1969** redistricting would have complied with the State's Law HRS 205-2 (a) (3) **by** not overlaying the Conservation District on to "**lands with a high capacity for intensive cultivation**".
 § 205-2 (a) (3), HRS Retention of district boundaries states.....

*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 State's goal to create a band of land around each of the Islands of Hawaii to be Conservation Districted could and was often accomplished

by only including pali lands makai of the Coastal "**ridge top**" that were not in agricultural use to be redistricted Conservation.

If today's Commission continues to hold that the **undefined reference** District Line on its **1974** SLUD Map H-65 is authoritative over the **text record** of the Report's page 36 then today's Commission makes the **1969** Commission's redistricting actions to have been **illegal**

or

today's Commission, to deny DR21-72 is **illegal**. It seems that one or the other of the Commission's **1969**, or present day Commission's, **actions** has to apply but not both because one or the other puts either the **1969** Commission's or the present Commission's actions in conflict with State Law(s).

The **Hamakua Coastal** land area is generally described in both of the State's ALISH and LSB land classification system as "Prime" Class "C". The Property is shown to be located in the "Prime" Class "C" area (see *also Exhibit 34 soils maps*).

The ALISH definition of Prime Classes A-C 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."*

(emphasis added)

The ALISH definition is in harmony with the State's **Law** HRS 205-2 (a) (3) Agricultural District.....

"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

As far back as **1961** the State documented the Hamakua Coastal area to have *a high capacity for intensive cultivation* (see Exhibit 33 map). The Petitioners ask that the Commission apply an open mind and careful consideration to the above cited State's Laws when the Commission considers this Motion for Reconsideration of Petition DR21-72 (Church-Hildal).

Particularly, therefore, while the extension of the Conservation District, from East Kohala, to the north, and the City of Hilo, to the south, Oceanside "**pali**" land, was identified by the **1969** Commission, on the Report's pages 85 and 86, to be **recommended** for rezoning to the Conservation District as a **high priority**.

The **1969** Commission could easily have met that **high priority** without disregard of the State's Constitution and its Law HRS 205-2 (a) (3) and the Commission's own HAR 15-15-19 (1) **by not** overlaying the

Conservation District inland of the Coastal pali onto lands that had a high capacity for intensive cultivation.

Now also the present Commission should not ignore the precedence of the 1999 Commission DR99-21 (Stengle), *Exhibit 1*, and the Commission's 2007 Boundary Interpretation 07-19 (Muragin), *Exhibit 2*, wherein those two Commissions, spanning a period of 8 years, applied the **text record** of the Report over the **undefined pictorial** district line on the Commission's 1974 SLUD map H-59 **by not** overlaying the Conservation District inland of the Coastal pali onto lands that had a high capacity for intensive cultivation and, in fact, were in agricultural use in 1969. In this way those Commissions were in conformity with the State's Law.

The State's Constitution and its Statute Laws result that State Agencies, such as the LUC, develop and implement Administrative Rules to apply the State's Laws. Effectively the LUC's Rules and "**actions**" become a direct extension of the **text** and **purpose** of the State's Constitution and the State's Laws and **applicable commission records** (ref., HAR 15-15-22 (d)).

The term **greatest possible**, which is found in HRS 205-2 (a) (3) means that when interpreting or 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.

Further in regard to the sugar cane farming practice along the Hamakua Coast the land was generally farmed right up to the top of the Coastal pali, *ref., field map, exhibit 16 and historic picture, Exhibit 15, 1953 picture and Exhibit 22, 1905 field map.*

The **text record** of the Report clearly describes that the Report's **recommendation** that the Conservation District be extended from East Kohala to the City of Hilo was only **partially approved** by the Commission in order that agricultural use areas that lay mauka of the **ridge top** and at least two deep valley bottom lands, that were also in agricultural use, were not to be redistricted into the Conservation District.

The "**partial approval**" is consistent with the State's Law, HRS 205-2 (a) (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 phrase **greatest possible**, which is found in HRS 205-2 (a) (3), means that no other districting priority was to be given a higher priority of **protection** than agriculture, **not even Conservation.**

The Report's pages 85 and 86 describe how the Report's **recommended** redistricting actions were arrived at **for all of the State of Hawaii** for "**shoreline areas**". The Report's Page 86 described 4 different **criteria** for developing the **recommended** Conservation District line. Leading from east Kohala southward, along the Hamakua Coast, to the City of Hilo, Condition #3 generally describes this area.....

"3. in areas where the shoreline is bounded by steep cliffs or a pali, the top the ridge was used."

The text quote from page 36 of the Report clearly describes that the "**recommendation**" to the **1969** Commission at the Final Hawaii County Community Meeting was that the **ridge top** was recommended **as a boundary line** .

The steep pali Coast of east Kohala ... this district should be extendedand then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line.

emphasis added, Source Exhibit 32, the Report's page 36,
see also Appendix 5

This is not surprising because the quadrangle maps, *ref., Exhibit 46 maps*, that were available for viewing at the Commission's final redistricting hearing in the County of Hawaii, the scale of the maps, 1" = 2000 ft. could not be interpreted by anyone in the detail that would be necessary to interpret the Report's **recommended** boundaries. The area of the Property on the quadrangle map would have looked like.....



Source Exhibit 46 maps, map H-65 (to scale)

Three other criteria were described on the Report's page 86, but again it is important to understand that the Report's page 86 described general criteria for all of Hawaii and not just the ***Hamakua Coast***. The Report describes that the Commission held final Community Hearings in the 4 Counties of Hawaii where the Report's "***recommended***" boundary amendments were considered by the Commission and "***approved***", "***partially approved***" and "***not approved***" the Report's ***recommended*** boundary amendments.

Even then the ***recommended*** line on the maps was an ***undefined pictorial*** representation of a district line. The Commissioners and the Community relied on the ***text record*** transcripts and minutes (*i.e. what they were told by consultants and the Commission's Executive Officer Duran*) during/of the Commission's **1969** redistricting hearings on Hawaii Island than what was represented on maps.....

"The steep pali Coast of east Kohala ... this district should be extendedand then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line."

Source Report page 36, (emphasis added)

The Report, the transcripts and minutes removed any conflict (*ie. uncertainty*) between the district maps and the Commission's ***approval*** of redistricting by adding text stating "***Areas in agricultural use were excluded***" in the records.

Therefore the **text record** of the transcripts, minutes and the Report is essential in *interpreting* the **defined boundary** in the area of the Property according to HAR 15-15-22 (d) and (f).

In the case of the Property the 2021 Commission stated a belief that the 1969 Commission intended that a former railroad, which **bisected a field** in the area, was the 1969 Commission's intended redistricted boundary. The 2021 Commission denied DR21-72 (Church-Hildal), based on the Commission's belief that the Report's page 86, criteria #1 had been approved by the Commission at its July 18, 1969 meeting as applicable to the Property.....

*"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 shoreline, it was used as the boundary between the Agriculture and Conservation Districts."*

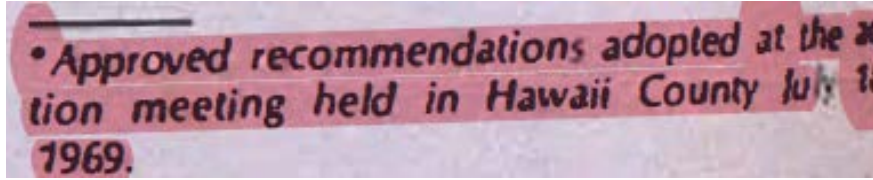
Source, Exhibit 32, the Report's page 86,
see also Appendix 5 (emphasis added)

In the case of the Property the former railroad bisected the existing agricultural use field, *ref., exhibit 16, field map*. The former railroad did not **exists at the edge of the agricultural use**, *ref., exhibit 10, field manager John Cross letter.....*

Specifically the 3 subject TMK parcels had a cultivated area of 3.2 acres that were used for agriculture. Specifically, this area was part of my "seed field" under my management. The balance of their area was a gulch on the Northern end of the field and a narrow uncultivated area along the ocean pali. Ref. attached survey document of BLOCK F31B and aerial photo. The

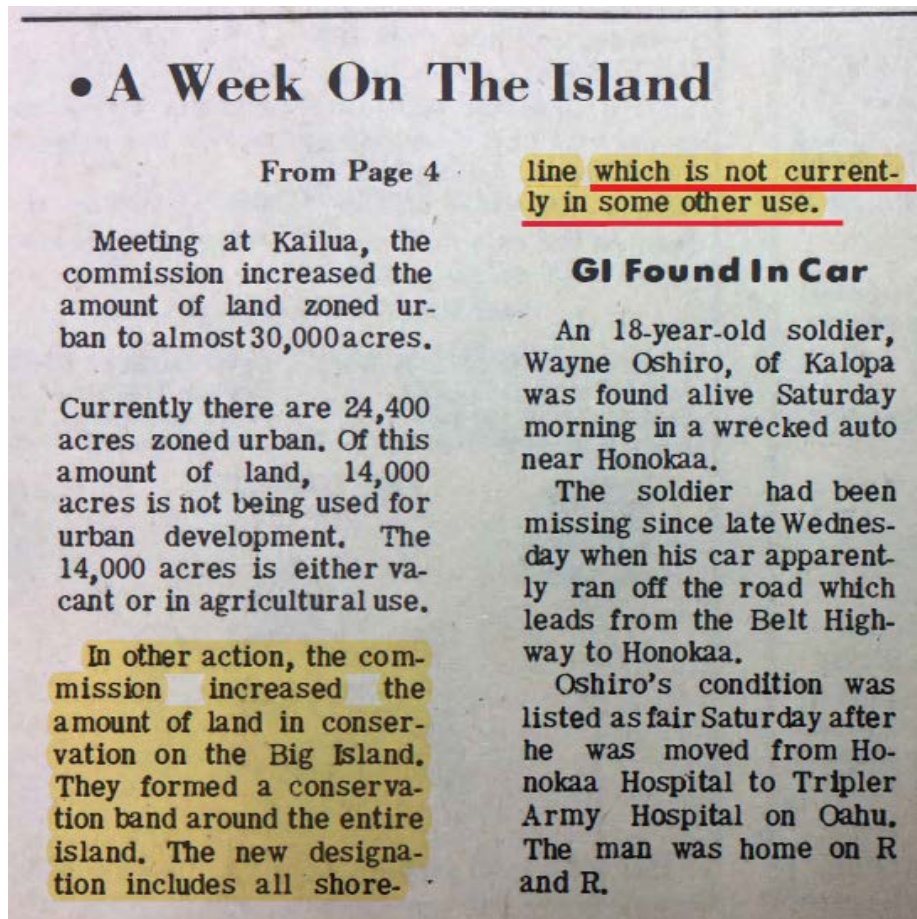
Source, Exhibit 10, John Cross letter (emphasis added)

The * following the word **Approved** (shown on the earlier quoted Report page 36) pointed to a notation box in the bottom right hand corner of the Report's page 36 which identified.....



*source Exhibit 32, Report, page 36, and Appendix 5
(emphasis added)*

The ***undefined pictorial*** district line that is depicted on LUC's **1974** State Land Use District ("**SLUD**") quadrangle map H-65 and the **2021** Commission's denial of DR21-72 (Church-Hildal) is in conflict with the redistricting ***approved*** by the Commission on July 18, **1969** and particularly, in the case of the Property, with the Report's map page 41, *ref., Appendix(s) 5 and 7 and Exhibit 6*, illegal according to the State's Laws HRS 205-2 (a) (3) and HRS 205-4 (h) and the representations made to the Commission and the Community at the Commission's final community Hearing that was held in the County of Hawaii on July 18, **1969**. In the next publication of the Tribune-Herald the outcome of meeting highlights was reported.....



Source Hawaii Tribune-Herald, Exhibit 28, emphasis added

Like everyone else at the meeting, the Tribune-Herald's reporter believed that ***the Commission did not approve*** the redistricting of lands in the County of Hawaii that were "***currently in some other use***". It is obvious that everyone believed that **the maps had/would be redrawn and/or interpreted** to reflect what the Commission ***approved*** at the Commission's Community meeting. The recommended dashed line on the map on the ***recommended*** maps appears to simply have become a solid line on the Maps ***adopted*** by the Commission on July 18, **1969**, *ref., Exhibit 46*. Subsequently those Maps generally were ***redrawn and adopted*** in **1974** by the Commission. Effectively an administrative error

continued or the **text record** of the Report and the transcripts and minutes were intended to be applied with a higher authority.

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.

Source, Report's page 3, emphasis added, see also Appendix 5

HRS 205-2 (a) (3), **the State's Law**, stipulates today what it also did in **1969**.....

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

The above text.... **the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation** does not describe a land use but rather a characteristic of land. The **Law** describes a mandatory instruction to the Commission that maintaining agricultural zoning for land **with a high capacity for intensive cultivation** was to be given **the greatest possible protection**. The term **greatest possible protection** can only mean that no other district have a higher zoning priority than agriculture, **not even conservation**.

The LUC's Rule HAR 15-15-19 (1).....

*"It **shall** include lands with a high capacity for agricultural production;" (emphasis added)*

further emphasizes this as a **mandatory** obligation of the Commissioners.

The word **capacity** , which is found in HRS 205-2 (a) (3) **does not describe a past, present or future land use but rather a physical characteristic of land.**

The Hamakua Coastal area is generally shown on the State's LSB and ALISH maps to be **Prime** agricultural land which is defined by the ALISH system to be.....

"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."

source, ALISH document and Exhibit 35 soils map

Portions of the Report's earlier described text, that are of particular relevance to DR21-72 (Church-Hildal) describe.....

- **"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."** (ref., Report page 3)
(this does not describe the **1974** SLUD maps or any other maps to be a **functional necessity** but rather the **text**),
- **The steep pali Coast** (ref., Report page 36),
- **should be** extended to include (ref., Report page 36),
the pali lands of the Hamakua Coast (ref., Report page 36),

(there exists a **steep pali** at the Property which Property is located on the **Hamakua Coast**) using the **ridge top as a boundary line** (ref., Report page 36), (there exists a **ridge top** along the makai boundary of the Property),

- Approved **recommendations adopted** at the action meeting held in Hawaii County **July 18, 1969**, (ref., Report page 36)
- **"Areas in agricultural use were excluded."** (ref., Report page 36),

(Particularly the **purpose** that the **1969** Commission applied by only **partially approving** the **recommended** redistricting was specifically described to be **"Areas in agricultural use were excluded."**)

The *Report Chapter 5's page 41* shows a map of the Island of Hawaii with shaded areas in various colors and lined areas that denoted **recommended** and **adopted** amendments to SLUD boundaries, ref., *Exhibit 6 map*. The area of the Property, that lies mauka of **the Coastal cliff**, is identified on the map to be an area that was neither **recommended** or **approved** for rezoning in **1969** however the scale of the map can only be applied **interpretively**.

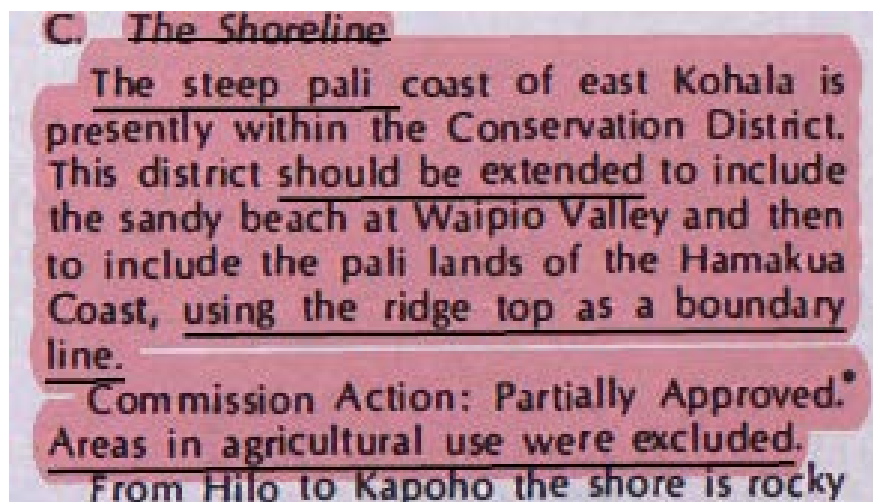
Certainty can be finally **interpreted** when the **purpose** of the **"partially approved" "recommended"** , (ref., Report page 36) redistricting is understood to succinctly be described in the Report..... **"Areas in agricultural use were excluded."** (ref., Report page 36) which is further confirmed in.....

- the above cited ***Tribune-Herald*** article,
- **the text record** of the *Report's page 36, Exhibit 32*,

- the **text record** of the **1969** Commission's redistricting hearing transcripts and minutes, *Exhibits 43-45*, and
- the boundary interpretations of *Stengle* and *Muragin, ref., Exhibits 1 and 2*.

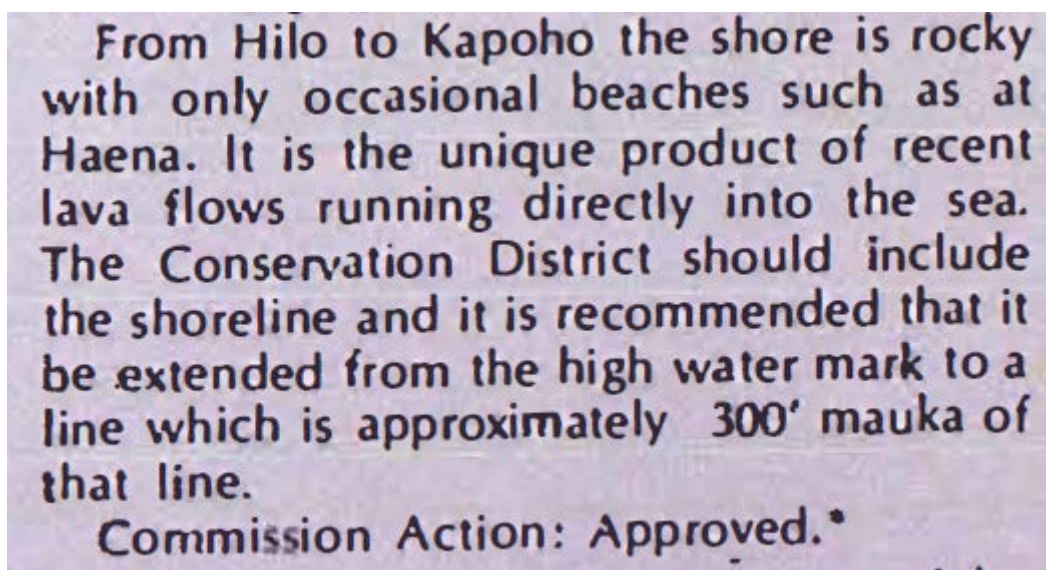
The **1969** Report's Chapter 5 does not refer to any particular USGS map or a LUC quadrangle map but rather the only map shown in the Report's Chapter 5, is shown on the Report's page 41. In **1974** the Commission adopted 5 SLUD quadrangle maps for the Coastal area between East Kohala (northerly) and the City of Hilo (southerly) that are identified as quadrangle maps H- 34, 43, 51, 59 and 65.

The Report's description of the recommended **1969** redistricting of the shoreline areas of the County of Hawaii, that were considered and approved at the **1969** Commission's Community meeting were itemized sequentially in a clockwise order around the Island. The area from East Kohala through the Hamakua Coast to the City of Hilo was dealt with as a block.



(emphasis added) source *Exhibit 32, The Report, page 36, & Appendix 5*

It is noteworthy that the shoreline area leading south from the City of Hilo to Kapoho was "**Approved**" to be redistricted in 1969 into the Conservation District to a line mauka of the shoreline inland 300 ft. There was no notation in the **text record** of the Report's page 36 that excluded areas that were in agricultural use like the area between East Kohala to the City of Hilo, which was **Prime** agricultural land, probably because there was none in the shoreline area south of the City of Hilo.



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.*

Source, Exhibit 32, Report page 36, see Appendix 5

This area was first districted into the Conservation District in 1969, then it was redistricted around 1977 back into the Agricultural District but a few Coastal lots were left in the Conservation District because the owners of those lots could not be found. OP written testimony, *Exhibit 4*, provided 3 comparable properties to the Petitioners' Property that the Commission had considered/redistricted etc. in the County of Hawaii, windward Coastal area. Particularly OP pointed to Barry Trust A18-806.

The Barry(s) identified that they owned a completely undeveloped, **0.51 acre**, shoreline lot in the above identified shoreline area and that their land was one of those lots that had not been zoned back into the Agricultural District in **1977**. The Barry(s) petitioned the Commission to redistrict their shoreline lot back into the agricultural district, *ref., A18-806, Exhibit 8.*

Despite the fact that the Barry(s) **proposed** to develop their **0.51** acre lot property primarily for a residence with an area devoted to agricultural use, *a honey farm - bee hive(s)*, as the property was.....

- very small,
- it had very little soil,
- it was so close to the ocean that salt spray limited the property's agricultural potential,
- it was in a tsunami inundation zone,
- it was in a current lava flow zone,
- the Barry's property development for residential use left very little area available for any form of agriculture,

The Commission redistricted the Barry's lot back into the Agricultural District approving that a few bee hives would be sufficient that the property qualified for Agricultural Districting.

39. The potential range of agricultural uses for the Petition Area is significantly constrained by a number of factors, including the Petition Area's proximity to the ocean (and salt spray), size, and its very poor soils. [Pet. Exs. 12 & 13; 2/24/21 Hr. Trans. at 38:21-24]

*source the Commission's Decision and Order for Barry Trust
A18 806, Exhibit 8*

Even then A18-806, Findings of Fact section, in the Commission's Decision, described that if the bee farming operation did not work out the Barry(s) may try another undescribed agricultural use.

43. In the event that Petitioners' apiary proves unsuited for the Petition Area or unsuccessful for any reason, Petitioners will implement an alternative agricultural use appropriate for the Petition Area in conformance with Chapter 205, HRS, the Commission's Rules found at Chapter 15-15, HAR, and the Hawai'i County Code. [2/24/21 Hr. Trans. at 41:10-21]

*source the Commission's Decision and Order for Barry Trust
A18 806, Exhibit 8*

Comparatively the Petitioners' described in DR21-72 that their 3+ acres of Property (with a land area approximately 7 times bigger than the Barry(s) land.....

- was located on Prime agricultural land,
- the Property **already had** a residence,
- the Property had an ag. use 720 sq. ft. storage and food processing structure,
- the Property had a fully developed orchard of over 60 different species of fruit and nut trees,
- the Property had a large cultivated field area where they had raised pineapples, a plant development nursery etc., and
- most importantly the Petitioners provided a ***preponderance of evidence*** that their Property had never been redistricted into the Conservation District in **1969** , none-the-less the **2021** Commission denied DR21-72 (Church-Hildal).

The Petitioners' Property's location is shown on **1974** SLUD map H-65, *ref., Exhibit 11*. **1969** Redistricted Maps H- 43, 51, 59 and 65 cover the Report's identified **Hamakua Coast** area where the Commission approved ***using the ridge top as a boundary line***. All of these **1969** Maps have **undefined** hand drawn district lines overlaid on them indicating the approximate area of redistricted boundaries, *ref., Exhibit 46 maps*.

When the 5 **1974** maps are highly magnified the district line's apparent location is highly interpretive and uncertain.....



Source, Exhibit 11, current **1974** quadrangle map H-65 (to scale)

the ***undefined pictoral*** Coastal Conservation District boundary line (*not the defined boundary*), that is shown on the five **1974** maps, is generally **in conflict** with the Commissions redistricting "**actions**" that are described in the Report's Chapter 5, page 36. The ***undefined pictoral*** boundary line on the **1974** maps appears to always be shown at variable distances inland of the "***top of the Coastal cliff***".

Finally, again, the scale of map H-65, 1" = 3000 ft. could not possibly show the attendees to the final **1969** Commission Community meeting depicted the **recommended** boundary to be.

Subsequently the LUC has issued boundary interpretations that have **variably interpreted** and in some cases **re-interpreted** district boundaries in the area of the ***Hamakua Coast***. In some cases the LUC has relied on its **1974** SLUD maps and in other cases it has relied on the ***text record*** of the Report. **In this way the LUC's boundary interpretations have become arbitrary and capricious** because the interpretations lack the authority of the ***text record*** of the **1969** Commission's redistricting **actions** which are found in the ***text record*** of the Report and/or **the official text record of the Commission's proceedings** that is Evidenced in the transcript of the Commission's **1969** final redistricting hearing, *ref., Exhibit 43 transcript*.

The Report did not describe the **1969** redistricting Maps nor the Commission's **1974** SLUD maps to be authoritative. Rather the ***text record*** of the Commission's **1969 actions**, that are described in the Report, are described to be the final authority.....

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.

Source, the Report's page 3, (emphasis added)

However we now also have *text record* of the Report and/or the official text record of the Commission's proceedings that is Evidenced in the transcript of the Commission's 1969 final redistricting hearing, *ref., Exhibit 43 transcript*.

In the case of DR99-21 (Stengle) the Commission has applied the *text record* of the Report over any authority of a map or Map. In the case of Stengle the 1999 Commission even cited the Report as an APPLICABLE LEGAL AUTHORITY.....

APPLICABLE LEGAL AUTHORITIES

1. The "State of Hawaii Land Use Districts and Regulations Review" documented the Commission's process to establish the Conservation District boundaries during the 1969 Five-Year Boundary Review. The report recognized four major conditions and provided recommendations based on these conditions for the Conservation District boundaries. Of relevance here is Condition No. 3, which states:

In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used (p. 86).

2. The report further documented the Commission's actions with respect to the establishment of the Conservation District boundaries at the shoreline of the island of Hawai'i by stating:

The steep pali coast of east Kohala is presently within the Conservation District. This district should be extended to include the sandy beach at Waipio Valley and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line (p. 36).

Source, DR99-21 Stengle, (emphasis added)

In the case of Muragin the LUC quoted applicable direct quotations, ie. "**Top of Sea Pali**" from the Report's page 36 in its boundary interpretation.

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.

Source, exhibit 2, Muragin boundary interpretation (emphasis added)

In the case of DR96-19 (Castle Foundation) the Commission applied the *text record* of its **1974** Report **and HRS 205-2**.....

14. In 1974, Commission Boundary Review Docket No. 074-8 proposed the reclassification of approximately 50 acres of land located at Kapa'a, island of O'ahu, from the Urban District to the Conservation District because (i) no urban development was evident on the 50 acres and (ii) portions of the area contained steep slopes which were not suitable for urban development. According to the 1974 Boundary Review Information Meeting and Public Hearing Maps for O'ahu, a portion of the Property was proposed for reclassification to the Conservation District under Docket No. 074-8.

15. By Decision and Order dated June 2, 1975, the Commission reclassified approximately 50 acres of land from the Urban District to the Conservation District in Docket No. 074-8.

The Decision and Order identified the affected lands as TMK 4-2-14: por. 2, which composed the tract of land of which the Property was originally a part and which was undeveloped and in its natural state. The Decision and Order did not include the Property, identified as TMK 4-2-14: 4, in the reclassification to the Conservation District. However, State Land Use District Boundaries Map O-14 (Mokapu), adopted by the Commission following the 1974 Boundary Review, and effective December 20, 1974, delineated the district boundary to include a portion of the Property containing the roadway for egress from the theater and the areas designedly graded for slope ramps within the Conservation District.

Source, DR96-19, exhibit 25 (emphasis added)

Since 1999 DR99-21 (Stengle) the LUC has issued its boundary interpretations for areas that are depicted on the Commission's 1974 SLUD map H-59 to reflect that the Coastal *ridge top* be the boundary.

.....

In the case of n DR96-19 (Castle Foundation) the Commission pointed to HRS 205-2 in its APPLICABLE LEGAL AUTHORITIES.....

APPLICABLE LEGAL AUTHORITIES

1. Section 205-2(1), HRS, provided the standards for determining the boundaries of the Urban District at the time of the reclassification by stating:

In the establishment of boundaries of urban districts those lands that are now in urban use and

a sufficient reserve area for foreseeable urban growth shall be included.

Source, DR96-19, exhibit 25

In the case of DR96-19 (Castle Foundation), *ref., exhibit 25, Findings of Fact* items 14 and 15, which are found on *exhibit 25's page 5-6*

.....

14. In 1974, Commission Boundary Review Docket No. 074-8 proposed the reclassification of approximately 50 acres of land located at Kapa'a, island of O'ahu, from the Urban District to the Conservation District because (i) no urban development was evident on the 50 acres and (ii) portions of the area contained steep slopes which were not suitable for urban development. According to the 1974 Boundary Review Information Meeting and Public Hearing Maps for O'ahu, a portion of the Property was proposed for reclassification to the Conservation District under Docket No. 074-8.

15. By Decision and Order dated June 2, 1975, the Commission reclassified approximately 50 acres of land from the Urban District to the Conservation District in Docket No. 074-8.

The Decision and Order identified the affected lands as TMK 4-2-14: por. 2, which composed the tract of land of which the Property was originally a part and which was undeveloped and in its natural state. The Decision and Order did not include the Property, identified as TMK 4-2-14: 4, in the reclassification to the Conservation District. However, State Land Use District Boundaries Map O-14 (Mokapu), adopted by the Commission following the 1974 Boundary Review, and effective December 20, 1974, delineated the district boundary to include a portion of the Property containing the roadway for egress from the theater and the areas designedly graded for slope ramps within the Conservation District.

Source, Exhibit 25, petition DR96-19, exhibit 25 (emphasis added)

Particularly of relevance to DR21-72 (Church-Hildal) the Commission did not apply HRS 205-2 and the very succinct final **purposivist** description that is found in the **text record** of the Report in Petition DR21-72 (Church-Hildal). Rather the Commission applied the text record of the Report in Stengle and Muragin, ie. "**Areas in agricultural use were excluded**", and in DR21-72 the Commission ignored the Report's recorded fact that "**Areas in agricultural use were excluded**" and the State's Law HRS 205-2 (a) (3) and the Commission's HAR 15-15-19 (1).

This **further confirms** the Commission's denial of DR21-72 is **arbitrary** and **capricious**. Nowhere does the Report or the **1969** transcripts and minutes describe that any quadrangle map, Map or even the Report's page 41 map to be authoritative. Rather the Report describes.....

*"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.**"*

Analysis in more detail

The State Office of Planning (the "OP") described in its written testimony, ref., exhibit 4

*"C. Boundary Interpretation No. 07-19 (**Muragin**). The LUC Executive Officer issued a boundary interpretation for Lisa Muragin of Ninole, North Hilo for her Coastal property. The LUC letter dated March 3, 2008 indicates that the State Land Use District Boundary was the **"Top of Sea Pali."** The Conservation District was located seaward of the top of the pali, and the Agricultural District was landward of the top of the pali. As shown on the survey map **this lot also contains a portion of the railroad right-of-way,** similar to the Petition Area. (See OPSP Exhibit 4)" (emphasis added)*

source - exhibit 4 , OP written testimony (emphasis added)

regarding DR99-21 (Stengle)

*"B. Docket No. DR99-21 (**Stengle**), Robert E. & Christine M. Stengle in DR99-21 requested that the **"Top of Pali"** be designated as the correct boundary between the State Conservation District and the Agricultural District. The request indicated that the Boundary Interpretation No. 98-50 which removed the State Agricultural/Conservation District boundary from the **"Top of Pali"** to the area inland, such that approximately 46,699 square feet of land planted in macadamia nuts is within the Conservation District, was incorrect. **The 1969 Boundary Review Report** listed four (4) major conditions to delineating the State Conservation and Agricultural Districts in the **Hamakua area.** The LUC based their approval on Condition No. 3 which said that **"In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used."** The Office of Planning's testimony in this matter on February 24, 1999 indicated no objection to this re-interpretation. (See OPSP Exhibit 3) " (emphasis added)*

(sources - OP written testimony, Exhibit 4 and Exhibit 2, LUC Boundary Interpretation No 07-19 (Muragin))

OP's *Exhibit 4 Muragin No. 07-19* (above) exhibited a copy of the LUC's letter and a survey map of Muragin's property, which were sent by the LUC to Muragin, which letter 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 2 , Boundary Interpretation 07-19 Muragin)

The reference to August 4, 1969 may be incorrect. The Commission did not meet on August 4, 1969. August 4, 1969 was the date the Lt. Governor verified the LUC rules amendments as official. It is clear that the redistricting Maps did not always reflect the Commission's **approved** district boundary amendments but rather after subsequent interpretation, in order to remove **uncertainty**, by applying the **text record** of the Report, the district boundary was defined to be the "**Top of Sea Pali**".

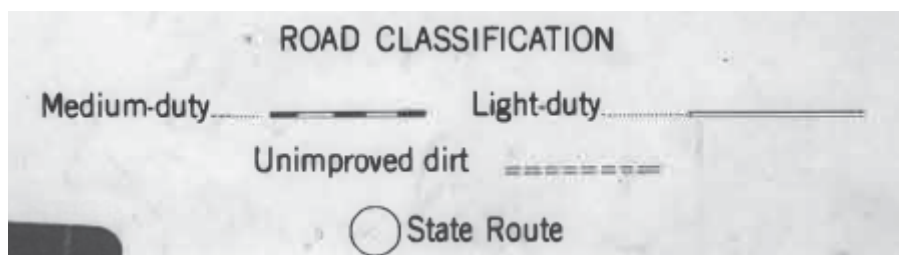
During Petition DR21-72, Commission Chair Scheuer appeared to believe that the **undefined pictorial** district line, that is shown on the Commission's 1974 SLUD map H-65, intended to follow the former railroad and in that way map H-65 was different than the other 4 maps for the area between East Kohala and the City of Hilo. Commission Chair Scheuer described his belief therefore that the present Commission

should interpret the district boundary for 1974 SLUD map H-65 to follow the former railroad.....

7 | But the line on Map H65 does not,
 8 | generally speaking, stick to the cliff top, which you
 9 | can see by the contra lines, but rather as inland,
 10 | apparently running along the railway line for the
 11 | entirety, or nearly the entirety, of this map. So
 12 | I'm not sure in what degree or in what way you're
 13 | saying that H65 is an unclear map.

Source, Exhibit 5, DR21-72 transcript, page 96, (emphasis added)

The evidence, *ref., 1974 SLUD map H-65. is clear*, Commission Chair Scheuer was incorrect, the district line on map H-65 did not run "***along the railway line for the entirety, or nearly the entirety of this map***". In the area of the Property the dashed line did appear to follow the former railroad. The dashed line on the map simply represented ***unimproved dirt roads, a few of which*** reflected the former railroad's location

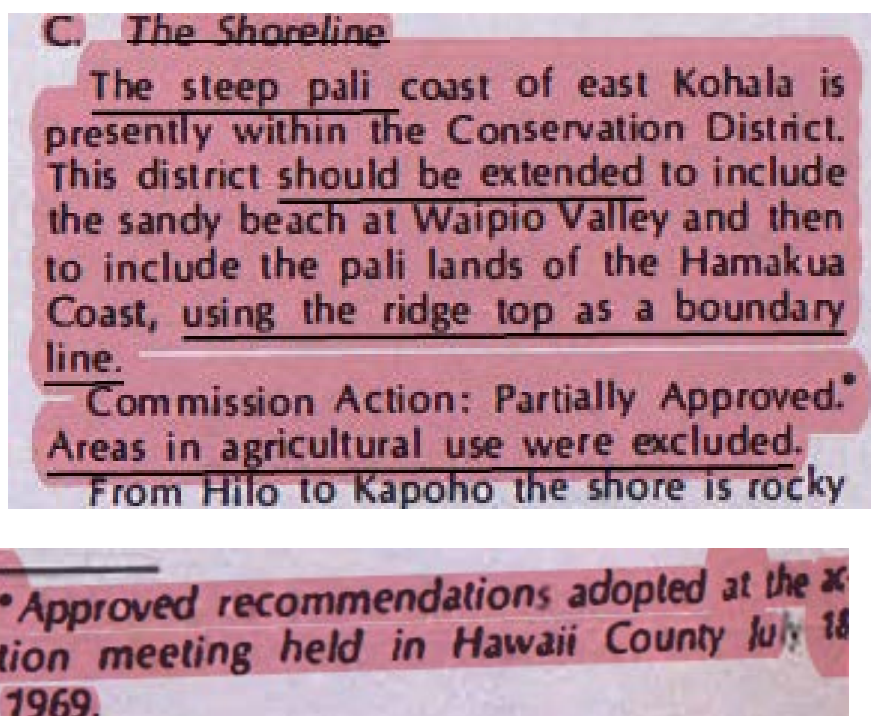


Source, Exhibit 11, 1974 SLUD map H-65 legend box,
also see Exhibit 37 maps

The earlier quoted text from exhibit 2 (Muragin) stated.....

*"Any Coastal lands from the **Top of Sea Pali**" was deemed SLU Conservation District."*

is a reference to the **text record** of the Report's page 36. The text record of the Report's page 36 is.....



Source, the Report's page 36, (emphasis added)

The above Report's text **does not state** that **in the area of redistricting Map H-59** the '***top of the Coastal ridge be the district boundary***' but **rather** the Report **states** that regarding "***the pali land of the Hamakua Coast***", '***the ridge top be the boundary line***' and "***Areas in agricultural use were excluded.***" The text clearly was intended by the

1969 Commission to apply to the areas of the **Hamakua Coast** and was not specific to any particular existing map areas or former railroad lines.

The LUC's DR99-21 (Stengle) **FINDINGS OF FACT**, 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.**" (emphasis added)*

(source - exhibit 1 DR99-21 (Stengle), pages 28-29 (emphasis added))

Again the reference is to the **text record** of the **1969** Report's page 36 and not any particular map. The above copied Commission's Findings Of Fact evidences that **the 1999 Commission found it a fact** that

"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."

The above referenced "**Finding of Fact**" does not refer to...

- a road,
- a railroad,
- a contour line on a map,
- a 300 ft. inset from the Coast,

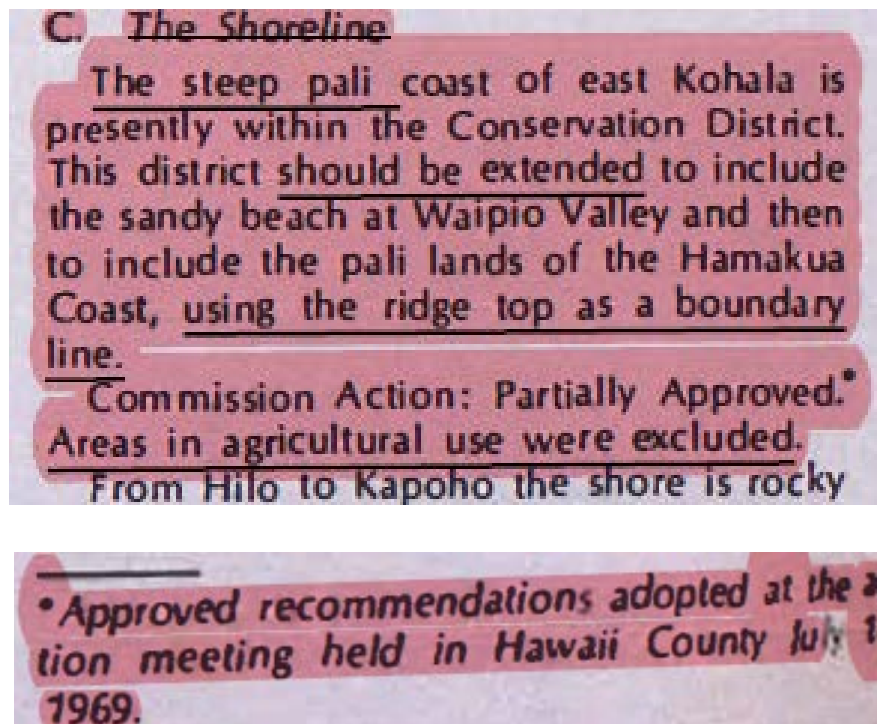
- a former railroad, or
- a map

yet the **present** Commission commonly applies such references.

Rather the **text record** of the Report is referenced and applied to the **Hamakua Coast** and not to any particular map, road, former railroad etc.

The above referenced "**Finding of Fact**" further confirms and applies the **purposivist** reasoning, that is described on the Report's page 36, that

"Areas in agricultural use at that time were excluded" when the **1969** Commission only "**partially approved**" the redistricting.....



Source, the Report's page 36 (emphasis added)

In the Commission's Declaratory Order DR99-21 (Stengle) the Commission applied the **1969** Report as an **APPLICABLE LEGAL AUTHORITY**.....

APPLICABLE LEGAL AUTHORITIES

1. The "State of Hawaii Land Use Districts and Regulations Review" documented the Commission's process to establish the Conservation District boundaries during the 1969 Five-Year Boundary Review. The report recognized four major conditions and provided **recommendations** based on these conditions for the Conservation District boundaries. Of relevance here is Condition No. 3, which states:

In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used (p. 86).

2. **The report further documented the Commission's actions with respect to the establishment of the Conservation District boundaries at the shoreline of the island of Hawai'i by stating:**

The steep pali coast of east Kohala is presently within the Conservation District. This district should be extended to include the sandy beach at Waipio Valley and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line (p. 36).

Source, Exhibit 1, DR99-21 Stengle, pages 30 and 31 (emphasis added)

Legal Authority 2. (above) and its referenced page 36 of the Report described the **1969** Commission's **redistricting "action"** - the Commission extended the Conservation District along **"the pali lands of the Hamakua Coastal, using the ridge top as a boundary."**

The above 2 cited Legal Authorities describe that the redistricting applied to the shoreline **pali lands of the Hamakua Coast** and not to any particular map and that the redistricted boundary be **"the ridge top"** and the LUC's Decision and Order stated.....

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, pages 31-32*

Similarly the ***text record*** of the **1969** Commission final redistricting hearing transcript did not differentiate between maps. The *Exhibit 43, transcript* describes **Commission's Executive Officer Duran** explanation to the Commissioners regarding the recommended final 73 redistricting maps that were the final agenda item to be considered and acted upon by the Commissioners. ***Duran*** referred the Commissioners to ***"these maps"***

Mr. Chairman and Commissioners, . . . (inaudible due to echo of microphone) . . . was amended, public hearings were conducted through each town of the State on the rules of the practice and procedures in the Land Use Commission district regulations as well as the district boundaries for each of the (inaudible). Hearings were held in Kauai, April 11, 1969, and in Hawaii, April 25, 1969, and also we had meetings in Hilo on the 26th . . . (inaudible) . . . and Kalapana, 296 acres . . . (inaudible) . . . rural district must change to urban district. And near the town of Pauoa are 290 acres. Another significant proposal of these maps is the designation of the shoreline presently in the agricultural district but not in agricultural use, into the conservation district. The recognition of the shoreline as a natural resource is . . . (inaudible) . . . that both the conservation and this waterfront property should be (inaudible) together. Wide use of this first priority resource can be effected toward the long range public interest in adopting this proposal.

Source, Exhibit 43, July 18, 1969, Commission hearing transcript, page 7, (emphasis added)

Note above:

"Another significant proposal of these maps is the designation of the shoreline presently in the agricultural district but not in agricultural use, into the conservation district." (emphasis added).

The present Commission erred in LAW in DR21-72 (Church-Hildal) in at least two ways.

In the first way, the Commission applied the *undefined pictorial* SULD line, that is shown on the Commission's **1974** SLUD map H-65, as authoritative over the Report's recorded Commission's redistricting **actions** in **1969**. Petition DR21-72 (Church-Hildal) provided a **preponderance of evidence** that...

- a *steep oceanside pali and cliff top* existed at the makai boundary of the Property where the agricultural use of the Property ended,
- the area of the Property mauka of the *steep oceanside pali and cliff top* was in agricultural use in **1969**,
- an unimproved field road bisected the agricultural use field,
- the Property is located in the Report's described area, "***the Hamakua Coast***".

In the case of DR99-21, Stengle provided no direct evidence that his land was in "***agricultural use***" in **1969** and the Commission applied the text record of the Report as authoritative over the Commission's **1974** SLUD map.

In the second way, DR21-72 (Church-Hildal) the Commission ignored *HRS §205-2 (a) (1-3), Districting and classification of lands*.....

'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.**

In **1994** the Commission applied HRS §205-2 in Castle. Since **1999** DR99-21 (Stengle) the LUC has issued its boundary interpretations for areas located on the Commission's **1974** SLUD map H-59 to reflect that the Coastal ***ridge top*** be the boundary.

In the case of DR96-19 (Castle Foundation) the Commission pointed to HRS 205-2 in its APPLICABLE LEGAL AUTHORITIES.....

APPLICABLE LEGAL AUTHORITIES

1. Section 205-2(1), HRS, provided the standards for determining the boundaries of the Urban District at the time of the reclassification by stating:

In the establishment of boundaries of urban districts those lands that are now in urban use and

a sufficient reserve area for foreseeable urban growth shall be included.

Source, DR96-19, exhibit 25

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** vs. the Commission's **1974** SLUD map H-65 the Commission must also interpret, consider and apply the ***mandatory*** guidance of *HRS §205-2 Districting and classification of lands Law* particularly in cases where *uncertainty exists* regarding the intentions and ***purpose*** of the **1969** Commission's redistricting "***actions***" and HRS 205-3 and the present day Commission's actions.

If the Commission ***correctly*** finds that the (i) Report's redistricting 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)*), **and** the earlier described Commission's Duran's representations, that were made to the Commissioners and the Community at the Commission's final Community meeting that was held in the County of Hawaii on July 18, **1969**. This was also confirmed by the local newspaper.....



Source Hearal-Tribune article, Exhibit 29 (emphasis added)

"The new designation includes all shoreline which is not currently in some other use."

Referring back to HRS 205-2 (a) (3) and HAR 15-15-19 (1) the word **capacity**, which is found in HRS 205-2 (a) (3) 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. The Petitioners intend to **resume** selling the produce of their orchard species once the status of the Property's zoning is legally established, *ref., Appendix 9.*

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

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."

In the Petitioner's modest attempt to investigate mapping errors we found another example, other than DR99-21 (Stengle) of a map error that in a way mirrors DR21-72 (Church-Hildal). The LUC's DR96-19 (Castle Foundation) describes that the LUC's Official **1974** SLUD map for that property also showed some 20 acres of land to be in the Conservation District when the **text record** of the Commission's **1974** redistricting report and Order evidenced otherwise.

- DR99-21 (Stengle) pointed to a conflict between the **text record** of the Commission's **1969** first 5 year District Boundary Report vs. the Commission's Official **1974** SLUD map, *ref., exhibit 1*.
- DR96-19 (Castle Foundation) pointed to a conflict between the **text record** of the Commission's **1974** second 5 year District Boundary Report vs. the Commission's Official **1974** SLUD map, *ref., exhibit 25*.

In the case of DR96-19 (Castle Foundation), *ref., Exhibit 25*, **Findings of Fact** items 14 and 15, which are found on *exhibit 25's page 5-6*

.....

14. In 1974, Commission Boundary Review Docket No. 074-8 proposed the reclassification of approximately 50 acres of land located at Kapa'a, island of O'ahu, from the Urban District to the Conservation District because (i) no urban development was evident on the 50 acres and (ii) portions of the area contained steep slopes which were not suitable for urban development. According to the 1974 Boundary Review Information Meeting and Public Hearing Maps for O'ahu, a portion of the Property was proposed for reclassification to the Conservation District under Docket No. 074-8.

15. By Decision and Order dated June 2, 1975, the Commission reclassified approximately 50 acres of land from the Urban District to the Conservation District in Docket No. 074-8.

The Decision and Order identified the affected lands as TMK 4-2-14: por. 2, which composed the tract of land of which the Property was originally a part and which was undeveloped and in its natural state. The Decision and Order did not include the Property, identified as TMK 4-2-14: 4, in the reclassification to the Conservation District. However, State Land Use District Boundaries Map O-14 (Mokapu), adopted by the Commission following the 1974 Boundary Review, and effective December 20, 1974, delineated the district boundary to include a portion of the Property containing the roadway for egress from the theater and the areas designedly graded for slope ramps within the Conservation District.

Source, DR96-19, Exhibit 25 (emphasis added)

and finding of fact 19.....

19. Staff based the delineation of the district boundary on its review of Docket No. 074-8; the July 21, 1976, boundary interpretation; and specifically on the representation of the district boundaries on the Commission's State Land Use District Boundaries Map O-14 (Mokapu). A copy of Boundary Interpretation No. 92-40 was provided to the Department of Land and Natural Resources ("DLNR").

Source, DR96-19, Exhibit 25 (emphasis added)

and in DR96-19 the Commission pointed to its APPLICABLE LEGAL AUTHORITY.....

APPLICABLE LEGAL AUTHORITIES

1. Section 205-2(1), HRS, provided the standards for determining the boundaries of the Urban District at the time of the reclassification by stating:

In the establishment of boundaries of urban districts those lands that are now in urban use and a sufficient reserve area for foreseeable urban growth shall be included.

Source, DR96-19, Exhibit 25

and the Declaratory Order corrected the map

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, DR96-19, Exhibit 25, Castle Foundation, pages 6 and 7,
(emphasis added)

Petition DR21-72 (Church-Hildal) also pointed to the State's Law, HRS 205-2 (a) (3), as an APPLICABLE LEGAL AUTHORITY. In the case of DR96-19 (Castle Foundation) the Commission applied the State's Law HRS 205-2 (1) as an APPLICABLE LEGAL AUTHORITY.

Comparatively the **present** Commission made an error in Law when the Commission did not apply HRS 205-2 (a) (3) as an APPLICABLE LEGAL AUTHORITY in DR21-72 (Church-Hildal). HRS205-2 (3) is just as applicable today as it was in **1969**, **1974** and **1996** and everywhere in between those years and since also.....

(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)

In all 3 cases, DR21-72 (Church-Hildal), DR99-21 (Stengle) and DR96-19 (Castle Foundation) the Commission's Official **1974** SLUD maps are/were in conflict with either the **text record** of the **1969** Report or the **text record** of the **1974** Statewide Boundary Review reports or transcripts of the Commission's hearings.

In the Case of DR99-21 (Stengle) and DR96-19 (Castle Foundation) the petitions were not supported by a preponderance of evidence documents but, none-the-less, the petitions for a DR were Ordered favorably by the Commission. Particularly also no EA or Commission FONSI was required or evidenced.

In the case of DR21-72 (Church-Hildal) the Commission denied the Petition citing that the Petitioners did not meet the evidenciary standard of a "**preponderance of evidence**" despite the fact that DR21-72 was supported by 19 exhibits and it also specifically referred the Commissioners to a number of other Official Commission records (the "Records"). The Records included an EA and Commission FONSI that supported the rezoning of the Property from the Conservation District to the Agricultural District as the Petitioners had previously believed that the Property was located in the Conservation District.

The Muragin Boundary interpretation No 07-19 referred to HAR
15-15-11...

§15-15-111 Land use district boundaries. (a) *The boundaries of land use districts are shown on the land use district maps, entitled "Land Use District Boundaries., dated December 20, 1974," as amended, maintained and under the custody of the commission.*

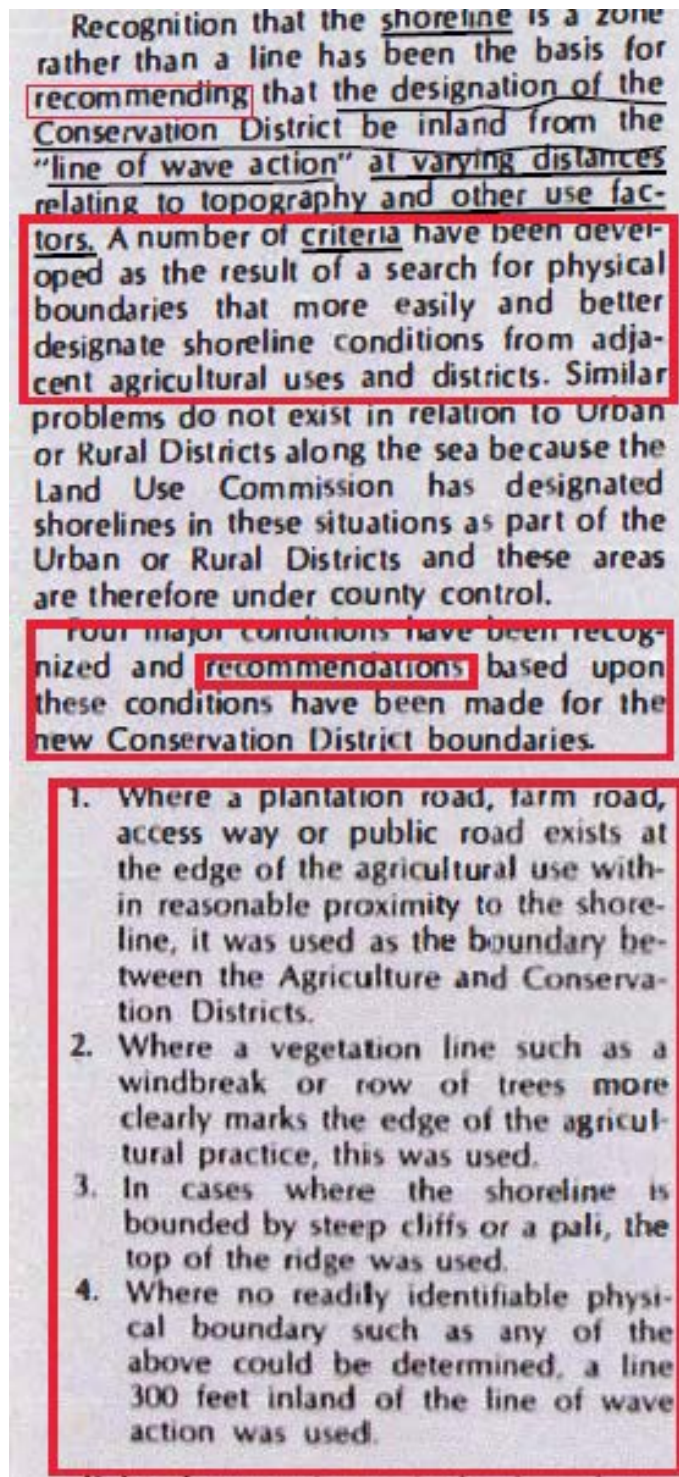
(b) The official maps entitled "Land Use District Boundaries, dated December 20, 1974," as amended, are located in the commission office.

In the case of the Property (Church-Hildal) the ***undefined pictorial*** line on the **1974** SLUDistrict map H-65, **when the map is highly magnified**, appeared to follow the former railroad. In **1969** the Commission and the Community did not have a **highly magnified map** to consider and approve. The area of the Property, which was shown on **1974** SLUD map H-65 appeared like this (1" = 3,000 ft.).....



Source, 1974 Commission LUC **1974** SLUD map H-65, Exhibit 11

Page 86 of the Report described how the Report's authors developed the undescribed ***recommended*** hand drawn lines on all of the maps for Hawaii (*only 4 such maps are shown in the Report, of relevance here is the Report's map page 41, ref., Appendix 5, the Report and Exhibit 6, map page*) as recommended boundaries referencing 4 different possible ***criteria***.....



source Exhibit 32 Report page 86, (emphasis added)

It appears that in the case of Stengle criteria #4 was first applied by the Executive Officer of the LUC in **initial boundary interpretations** but

even then the line was not "**300 ft. inland**" but rather appeared to follow the 200 ft. topographical map contour line. Irrespective of where the **undefined** line appeared to be placed, in the case of Stengle, the LUC's **final boundary interpretation** did not apply the boundary to topographical contour 200 or 300 ft. contour lines inland but rather the **1999** Commission applied criteria #3..... **the top of the Coastal ridge** was **Ordered** by the Commission to be applied.

In the case of the Property (Church-Hildal) the Commission determined that the district line followed the mauka boundary of a former railroad which crossed the Property. The former railroad bisected a field that was in agricultural production in **1969**, *ref., Exhibits 29, 16, 10, 15, 19, 22.*

Specifically the 3 subject TMK parcels had a cultivated area of 3.2 acres that were used for agriculture. Specifically, this area was part of my "seed field" under my management. The balance of their area was a gulch on the Northern end of the field and a narrow uncultivated area along the ocean pali. Ref. attached survey document of BLOCK F31B and aerial photo. The

Source, Exhibit 10, John Cross letter, (emphasis added)

The **present** Commission determined that the railroad line had a special status as a final district line in the case of the Property (Church-Hildal) **even though it did not meet any of the criteria described in the Report's page 86's criteria** of the Report's District line **recommendations** and it conflicted with the **1969** Commissions District Boundary Amendment, which was approved by the Commission at its final Hawaii County community meeting on July 18, **1969**, *ref., Appendix 5, the Report Book's page 36* and it conflicted with the transcript of the Commission's July 18, 1969 final redistricting hearing and it conflicted

with the Tribune-Herald's record of the Community meeting and it conflicted with State Law HRS 205-2 (a) (3) ie.

*"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

Furthermore, in the case of the Property, the Commission ignored the described purpose that the Report's page 36 described as the basis that the Commission only *partially approved* the Report's recommended boundary line. Irrespective of any *confusion* that may be believed to exist regarding the district lines on maps today and what was intended to be applied textually as '*the top of the Coastal cliff or pali*' the purposivist interpretation of the text of both the Report and the final hearing transcript is too clear to be ignored "*Areas in agricultural use were excluded.*"

Neither the Report nor the referenced transcript do not describe an exception where the district line appeared to follow the former railroad or where a particular Commission SLUD map showed otherwise. The *text record* of the referenced transcript and of the Report's page 36 purposively excluded "*Areas in agricultural use*". Furthermore, in the case of the Property (Church-Hildal), the *undefined pictorial* line on the 1974 SLUD map, that appeared to follow the railroad, did not conform to the Report's page 86, criteria #1 anyway. Criteria #1 stated.....

"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."

(emphasis added)

It is a matter of evidence, *ref., Exhibit 16 field map and Exhibit 10 John Cross letter and Exhibit 29 map and picture*, that **the railroad bisected the agricultural use field** leaving a substantial field area mauka and makai of the former railroad.

Specifically the 3 subject TMK parcels had a cultivated area of 3.2 acres that were used for agriculture. Specifically, this area was part of my "seed field" under my management. The balance of their area was a gulch on the Northern end of the field and a narrow uncultivated area along the ocean pali. Ref. attached survey document of BLOCK F31B and aerial photo. The

Source, exhibit 10, John Cross letter, (emphasis added)

In the cases of Stengle and Muragin the Commission pointed to the Report's page 36 and applied it as an authority over the **1974** SLUD maps but in the case of the Property (Church-Hildal) the Commission applied the Commission's **1974** SLUD map to have a higher authority over the Report and now also the referenced transcript. There is nothing in the Report or the referenced transcript that describes that any line on any particular map or Map was to be applied with a higher authority than the ***text record*** of the Report or the recorded transcript proceedings of the July 18, 1969 Commission's final redistricting hearing. Rather the **purpose** of the redistricting was to protect "***the shoreline***" and **not to overlay agricultural use land** into the Conservation District.....

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

source Report page 86 (emphasis added)

The Report's text shown above clearly describes that the intention was that the district line be "*inland from the "line of wave action" at varying distances relating to topography and other use factors. "better designate shoreline conditions from adjacent agricultural uses and districts."*

N.B. "designate shoreline conditions from adjacent agricultural uses and districts"

Confusingly in Petition DR 21-72 (Church-Hildal) the Commission did not apply the **text record** of the Report nor the Report's page 41 map, **ref., exhibit 6**, but rather the Commission applied the **undefined pictorial** line on the Commission's SLUD **1974** Map, H-65 to be authoritative and referred to the Report's page 86, criteria #1. Therefore the Commission's decision to deny DR21-72 (Church-Hildal) is arbitrary and capricious, ie. **unreasonable, unlawful, or erroneous, ref., HAR §15-15-84**

Reconsideration of decision (b) for several reasons that are described in DR21-72 it's Memorandum and Appendix(s)

*"(b) The motion for reconsideration shall state specifically the grounds on which the movant considers the decision or order **unreasonable, unlawful, or erroneous.**"*

(emphasis added)

The official **subsequent 1974** State Land Use District ("**SLUD**") Boundaries map H-59 does not contain the language that is described in the LUC's Boundary Interpretation No. 07-19 (Stengle) which was copied herein earlier. Instead a notation box exists in the bottom right-hand-corner of **1974** SLUD map H-59 which references the LUC's DR99-21 (Stengle) order that the map **had been** changed **in the area of Stengle's land** to reflect the LUC's Decision and Order DR99-21(Stengle), *ref., Exhibit 1, pages 30-31*. It was that order that required that the SLUD line be changed regarding the map to reflect that

A. DECLARATORY ORDER

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.

source - Exhibit 1, Stengle DO, page 31 (emphasis added)

The Report's page 41 does show a map for the County of Hawaii, *ref., Exhibit 6 map*. That map clearly shows the proposed and final Commission approved conservation district area to be much narrower in the area of the Property (Church-Hildal) and much wider in the area of both Stengle and Muragin. This is in conflict with what the Commission ordered on September 8, **2021** for DR21-72 (Church Hildal).

Appendix 7 of this Memorandum describes that it is not unusual that **District maps do not reflect where the District line actually is.**

- There exists LUC DR99-21 (Stengle). In that case the **1974** SLUD map, which showed land to be in the Conservation District was found to be incorrect and the LUC relied on the ***text record*** of its proceedings on July 18, **1969** and ordered....

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 0-14 (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*

Generally all ***Hamakua Coastal*** land is described as "***Prime Agricultural land***" Class C in the State's ALISH and LSB classification systems. This also applies to Stengle, Muragin and Church-Hildal land. Particularly the designation "***Prime***" is defined to be.....

"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."

source, ALISH document

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 because lands with a high capacity for intensive cultivation were to be zoned in the Agricultural District .

HRS §205-2 (a) (1)-(3) Districting and classification of lands **Law applies just as much today as it did in 1969**.

HRS §205-2 (a) (3) 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 Rule 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 (a) (3) Districting and classification of lands Law* and representations that the Commission made to the final Community Meeting in Hawaii County, *ref., earlier copied Tribune -Herald article*.

If the Commission ***correctly*** finds that the Commission's **1974** Official SLUD maps vs. the ***text record*** of the Report and the referenced transcript of the 1969 Commission's final redistricting hearing, are in conflict the Commission must consider and apply HRS 205-2 (a) (3) **law** and HAR 15-15-19 (1) in order to remove ***uncertainty*** (*ref., "uncertainty" HAR 15-15-22(f)*).

The transcript of the **present** 2021 Commission hearing for DR21-72 (Church-Hildal), *ref., Exhibit 5, DR21-72 transcript proceedings (the "Transcript") pages 1-35 and particularly the Commissioner's deliberations pages 120--136*, clearly describe that the Commissioners mistaken belief that the Property's "**capacity**" for agriculture was irrelevant but rather the Property's current use was a determining factor in

its denial of the Petition. This belief appears to be in conflict with the States law, ref., HRS 205-2 (a) (3).....

*(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 above text.... the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation does not describe a land use but rather a characteristic of land and that maintaining agricultural zoning for land was to be given the greatest possible protection by the Commission.

The LUC's Rule HAR 15-15-19 (1).....

"It shall include lands with a high capacity for agricultural production;" (emphasis added)

further emphasizes this as a **mandatory** obligation of the Commissioners.

The Transcript, *exhibit 5*, clearly evidences the Commissioners believed that the current use of the Property, *ie. whether it was for "agricultural use" as defined by the Commission being the commercial production of agricultural crops* was a pivotal consideration of their denial of DR21-72.

The word capacity , which is found in HRS 205-2 (a) (3) **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 that they have planted and raised on the Property. 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.

The **text record** of the Report, the referenced **Official transcript** of the Commission's final redistricting hearing, Exhibit 43, and **HRS 205-2 (a) (3)** and HAR 15-15-19 (1) are of a higher authority, when determining the District Boundary in the area of the Property, than the LUC's **1974** SLUD boundary map H-65.

Case law, the Commission's HARules and the Commission's past actions, where the Commission found its **1974** SLUD maps to not be authoritative over "**applicable commission records**" and particularly over **Official hearing transcripts**, further supports that its SLUD maps are not always to be held authoritative over the other Commission records, *ref., HAR 15-15-22 (a), (a) (1), (d) and (f).....*

§15-15-22 Interpretation of district boundaries.

(a) Except as otherwise provided in this chapter:

(a) (1) A district name or letter appearing on the land use district map applies throughout the whole area bounded by the district boundary lines;

The mandatory instruction "**shall**" is not found in (a) (1) above,

(d) The executive officer may use all applicable commission records in determining district boundaries.

(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.

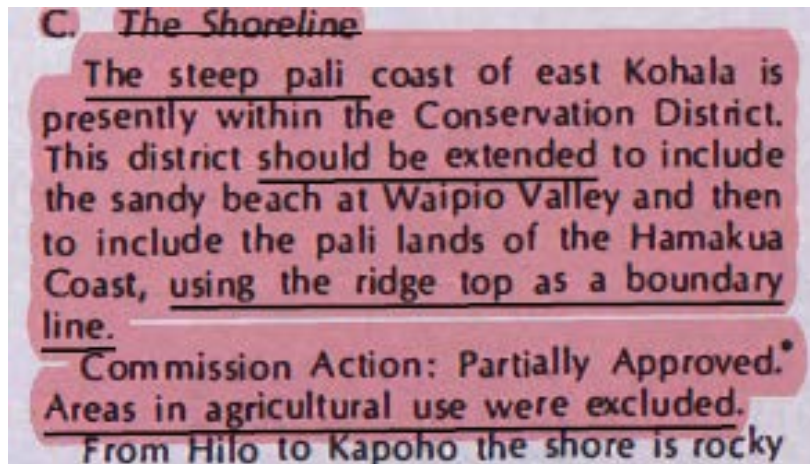
If it was the Commission's intention that its maps or Maps were authoritative it would not be provided in its Rules that the Commission may determine otherwise and there would not exist several examples of such Commission boundary interpretations that appear different than its district maps.

The Petitioners cannot understand how the Commissioners approved Stengle DR99-21 and Muragin boundary interpretation 07-19. The Muragin boundary interpretation specifically reflected the text record of the Report's page 36.

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.

Source Exhibit 2, Muragin boundary interpretation 07-19 (emphasis added)

The Report's page 36 stated.....



Source Exhibit 32 the Report's page 36 (emphasis added)

Furthermore the Petitioners cannot understand how the Commissioners approved Stengle DR99-21 **and** Muragin Boundary Interpretation No. 07-19 (both are located on Prime Agricultural land) **and** approved the Barry Trust rezoning of marginal open lava flow land with very little agricultural potential to the Agricultural District and denied DR21-72 (Church-Hildal) which is also Prime Agricultural land.

Turning now to a discussion comparing the Commission's Decision and Order to redistrict Barry Trust land that lays south of the City of Hilo...

Both Petitions DR21-72 (Church-Hildal) and Petition A18-805 (Barry Trust) were determined by the Commission during the same time period, 2021. Both completed a related EA and FONSI process with no objections registered by the public. OP recommended to the LUC that both be allowed. The Barry Trust land did not have a *high capacity for intensive cultivation, ref., HRS 205-2 (a) (3)*, yet A18-809 (Barry Trust) was approved and DR21-72 (Church-Hildal) was denied.

The Transcript of the Commission's September 8th, **2021** Hearing (Church-Hildal) evidences in several places that the Commissioners did understand that a public notice of Environmental Assessment had already been conducted for the Property's rezoning from Conservation to Agriculture and that no comments had been posted by the general public, *ref., Hearing Transcript (exhibit 5)*. As a matter of fact **the only comment registered** was by the State Office of Planning which supported that the Commission approve Petition A18-805 and rezone the Property from the Conservation District to the Agricultural District.

In the case of Barry Trust A18 806 the Commission issued a Decision and Order that the Barry's oceanfront land be rezoned from the Conservation District into the Agricultural District. Unlike the Petitioners' Property the Barry land was not **Prime Agricultural land** but rather was marginal land. Both the Barry's petition and the Petitioners land that is described in Petition DR21-72 were processed in parallel by the same Commissioners and at the same time and Finding(s) Of No Significant Impact ("FONSI") were issued by the Commission for both.

23. The Hawai'i Department of Agriculture has established three categories of Agricultural Lands of Importance to the State of Hawai'i ("ALISH"): Prime; Unique; and Other. "Unclassified" or soils without an ALISH classification are not considered agriculturally important lands. **The soils within the Petition Area are "unclassified."** [Pet. Ex. 12]

24. **The Land Study Bureau overall master productivity rating system** is used to designate soils within the State as Class A, B, C, D or E, with Class A representing the most productive soils and **Class E representing the least productive soils or "very poor" for agricultural production.** **The soils within the Petition Area are rated Class "E."** [Pet. Ex. 13]

source the Commission's Decision and Order for Barry Trust (highlight added for emphasis) Exhibit 8

and unlike the Property which lies over 100 ft. above sea level the Barry Trust land was in a tsunami inundation zone

26. The Petition Area is within the County’s tsunami inundation zone and subject to tsunami evacuation. [Pet. Ex. 7 at 43]

(source the Commission's Decision and Order for Barry Trust A18 806, Exhibit 8)

and unlike the Property which is not located in a lava hazard zone the Barry's land is in a lava hazard zone.....

27. The Petition Area is within volcanic hazard Zone 3, which indicates that only 1-5% of the area has been covered in lava since 1800, and 15-75% of the area has been covered in lava in the last 750 years. [Pet. Ex. 7 at 11]

source the Commission's Decision and Order for Barry Trust A18 806 Exhibit 8

The Petitioners (Church-Hildal) described that their 3+ acres of Property **already had** a residence, an ag. use 720 sq. ft. storage and food processing structure, a fully developed orchard of over 60 different species of fruit and nut trees, often several cultivars of each, a large cultivated field area where they had raised pineapples, a plant development nursery etc. already over \$100,000.00 investment in agriculture!

The Barry's **proposed** to develop their property primarily for a residence with a very modest area devoted to agricultural use, a honey - bee hive(s), as the property was very small, had it had very little soil and was it was so close to the ocean that salt spray limited the property's agricultural potential.

39. The potential range of agricultural uses for the Petition Area is significantly constrained by a number of factors, including the Petition Area's proximity to the ocean (and salt spray), size, and its very poor soils. [Pet. Exs. 12 & 13; 2/24/21 Hr. Trans. at 38:21-24]

*source the Commission's Decision and Order for Barry Trust
A18 806, Exhibit 8*

Even then the Findings of Fact section described that if the bee farming operation did not work out they may try another undescribed agricultural use.

43. In the event that Petitioners' apiary proves unsuited for the Petition Area or unsuccessful for any reason, Petitioners will implement an alternative agricultural use appropriate for the Petition Area in conformance with Chapter 205, HRS, the Commission's Rules found at Chapter 15-15, HAR, and the Hawai'i County Code. [2/24/21 Hr. Trans. at 41:10-21]

*source the Commission's Decision and Order for Barry Trust
A18 806, Exhibit 8*

Comparatively the Petitioners' described that their 3+ acres of Property **already had** a residence, an ag. use 720 sq. ft. storage and food processing structure, a fully developed orchard of over 60 different

species of fruit and nut trees with often several cultivars of each, a large cultivated field area where they had raised pineapples, a plant development nursery etc.

Unlike the Petitioners' Property, which had a history of intense production of agricultural crops dating back over 100 years, there existed no record of the Barry's land ever have been used for agricultural production.....

90. Petitioners are unaware of the Petition Area ever having been used for agriculture, although the general area of Hawaiian Paradise Park was once used for ranch/grazing land until the late 1950s, when it was subdivided and sold as individual lots. [Pet. Ex. 7 at 31; 2/24/21 Hr. Trans. at 34:17-35:2]

*source the Commission's Decision and Order for Barry Trust
A18 806, Exhibit 8*

None-the-less the Commission denied the Petitioners' Petition DR21-72 and granted the Barry's Petition....

DECISION AND ORDER

IT IS HEREBY ORDERED that the Petition Area, consisting of approximately 0.51 acres of land in the State Land Use Conservation District situate at Kea'au, Puna, Island, County and State of Hawai'i, and further identified as Tax Map Key No: (3) 1-5-059:059, shall be and is hereby reclassified to the State Land Use Agricultural District and the State Land Use district boundaries shall be amended accordingly.

*source the Commission's Decision and Order for Barry Trust
A18 806, Exhibit 8*

The Petitioners believe that the Commission's denial of DR21-72 (Church-Hildal) is **arbitrary** and **capricious**, and **discriminatory, ref.**,

Appendix 4, particularly also when DR21-72 (Church-Hildal) compared to the Commission's approval of A18 806 (Barry Trust) and the referenced Stengle and Muragin boundary interpretations.

Comparison of Stengle, Muragin and Barry Trust properties vs. the Petitioned Property as are also referenced in OP written testimony, *ref., Exhibit 4*.

The Petitioners provide the following comparable characteristics of all 4 properties (Muragin, Stengle, Barry Trust and the Petitioned Property) as follows.....

- 3 properties (Stengle, Muragin and the Petitioners' Property) (the "**Three Properties**") lie in an area which is located between ***East Kohala*** (northerly) and ***Hilo*** (southerly), which southern portion, where all Three Properties are located, is in an area known as the ***Hamakua Coast***,
- the Three Properties comprise lands that ***were in agricultural production*** in **1969** when the Land Use Commission **1969** five year boundary review and Commission approved redistricting was conducted and which area particularly is described on page 36 of the Report as the ***Hamakua Coast*** and as an area comprising a steep '***Coastal cliff***' makai and the area mauka of the '***Coastal cliff***' not having been rezoned into the Conservation District in **1969**,
- the **1969** agricultural farming operation on all Three Properties comprised an ***intense*** farming operation, which field area extended makai, right up to the '***top of the Coastal cliff***' ,

- all Three Properties lie in the ***Hamakua Coast*** area that the "***Land Use Commission's***" **1969** Report described on its page 36,
- the Three Properties consisted of Coastal land, that was in agricultural use, on the ***Hamakua Coast***, which the Report identified that the Commission "***approved***" was to remain in the agricultural district and that the "***top of the Coastal cliff***" was to be the SLUD boundary, *ref., Exhibit 32, Report page 36 and the Report's map page 41,*
- the Report's "***recommended***" boundary line, *ref., page 36 of the Report,* that was shown on the Report's "***recommended***" map, *ref., Exhibit 32, Report's page 41,* which map is described in the Report as having been considered by the Commission and the community at the Commission's ***final*** Hearing on July 18, **1969** in the County of Hawaii (*see also Appendix 5 map and /or Map discussion*) ...
 - (i) a "***recommended***" map, *ref., Report page 41 map, Exhibit 6,* was shown to the Hearing's attendees,
 - (ii) the "***recommended***" map was not generally "***approved***" by the Commission to reflect the SLUD boundary but rather the ***top of the cliff*** was "***approved***" to be the SLUD line, (*ref., Exhibit 32 Report, page 36*),
- the 1974 Commission adopted many quadrangle SLUD maps around **1974** that appear to have been intended to also represent the 1969 Commission's redistricting based on the Report,

- the Commission's **1974** SLUD quadrangle maps show a district boundary line which is in conflict with the Report's map which is shown on its page 41 without explanation for the apparent change in District Boundaries,
- Page 3 of the Report states.....

*"Since these (recommendations) 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.**"*

emphasis added and the additional word (recommendations) also added) - source The Report, Appendix 5

- in regards to the 3 Properties, generally all of **1974** SLUD maps that overlay on the Hamakua Coast, the district line on the LUC's Official **subsequent 1974** SLUD maps bisected **1969** agricultural use fields resulting that intense agricultural use existed on both sides of the SLUD boundary line and which agricultural use extended generally makai to the '**top of the Coastal cliff**' ,
- following the State of Hawaii LUC's **1969** boundary review and amendment the Three Properties appeared on the LUC's **subsequent 1974** Official SLUD maps, in whole or in part, to lie in the Conservation District,
- during a period between **1992** and **2021** the owners of the three Properties applied to the LUC's Executive Officer that a boundary

interpretation be issued regarding the Three Property's zoning according to HAR 15-15-22 and HAR 15-15-19 (1),

- in the case of Barry Trust, Stengle and McCully the LUC's Executive Officer first issued a boundary interpretation that defined that a portion or all of the 3 properties land area lie in the Conservation District,
- the area of the Three Properties (Hamakua) included a field area where a railroad, ending in **1947 (22 years earlier)**, bisected the fields, leaving field areas on either side of the former railroad and the ***undefined pictorial*** District Lines that are shown on the **1974** Official LUC SLUD maps,
- in the case of the Three Properties the land area of the former railroad became the property of the adjacent land owner and also part of the agricultural field operations up to around **1992**,
- the Three Properties comprise land that is classified in the State's LSB and ALISH land classification as ***"prime"*** agricultural land.

During the final Commission - discussion, questioning, determining in DR21-72 (Church-Hildal) - the Commission referred that the Petitioners did not meet the standard of ***"preponderance of evidence"*** in order that the Commission may issue a favorable Decision and Order regarding DR21-72 (Church-Hildal).

Comparatively, in the case of Stengle DR 99-21 (Stengle), very little ***"preponderance of evidence"*** was submitted.....

- only quoted page 36 of the Report, *ref., Exhibit 1, page 9*.....

The 1969 report State Of Hawaii land Use Districts and Regulations Review, page 36, discusses Urban, Agriculture and Conservation District boundary changes for Hawaii County. Section II., Conservation Districts; Subsection C., The Shoreline, states “The steep pali coast east of Kohala is presently within the Conservation District. This District should be extended to include the sandy beach at Waipio and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line”. This interpretation was adopted and then drawn on USGS maps. USGS Map H-59 titled “Papaalooa, Hawaii” pertains to the Property and was used in Boundary Interpretations 98-36 and 98-50.

Source DR99-21 (Stengle), Exhibit 1, page 9 (highlights added)

- Stengle did not offer evidence that his property was in agricultural use in 1969, *ref., Exhibit 1, Finding of fact item 10, page 28*.....

10. The Property was historically cultivated in sugarcane. There is no evidence in the record indicating the specific areas within the Property that were cultivated in sugarcane. The Property was converted to a macadamia nut orchard in 1982.

Source DR99-21 (Stengle), Exhibit 1, page 9 (highlights added)

Stengle did not intend to continue farming his land but rather intended to sell his property, *ref., Exhibit 1, Finding of fact item 16, page 29*.....

16. 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 O'ahu.

Source DR99-21 (Stengle), Exhibit 1, page 29 (highlights added)

- Stengle did not offer any proof that his land was "Prime agricultural land".
- Stengle did not directly refer the Commissioners to HRS 205-2 (a) (3)

.....

*(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)*

- Stengle's petition was only supported by two evidenciary documents, an aerial photo and a locator map,
- Stengle's petition was not supported by an EA and FONSI did not include a list of precedence,
- Stengle described an intention to sell the property,
- Stengle did not offer case law,
- Stengle did not describe the ALISH or LSB rating for the property.

In the case of DR21-72 (Church-Hildal) Petitioners.....

- extensively directly evidenced relevant sections of the Report, *ref., Appendix 5 and Exhibit 6 (page 41 map)*,
- *offered proof that the Property was in agricultural use before, during and after **1969** in the form of (i) field maps, (ii) a letter from the former field manager (iii) historical field maps and photographs*
- referred the Commissioners to the mandatory provision of HRS 205-2 (a) (3)

*(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)*

- supported their Petition with over 20 evidenciary exhibits,
- stated their intention to continue and expand their agricultural uses of the Property,
- described that the Property was "Prime Agricultural Land",
- described supporting case law and precedence,
- Petition was also supported by a previous EA and FONSI that the land be redistricted into the Agricultural District,
- already had a residence and a 720 sq. ft. storage and processing structure on the Property,

Comparatively, in the case of Muragin they simply applied for a boundary interpretation. No "**preponderance of evidence**" was submitted.....

- there was no proof of historical agricultural use, frankly no mention of it!,
- subsequent to the cessation of sugar cane cropping the property was maintained as unfenced grassland,
- no description of the property's agricultural resource classification was given,
- no plan to develop the agricultural resources was given,
- no EA or FONSI existed,
- the property's area was a very narrow band of Coastal land between 1 and 2 acres in size.

It appears that Stengle was so desperate to have a successful petition, **in order that he may sell his land for a good price**, he even offered to give the State areas of the gulch, stream and waterfall on his property, if the Commission would just correct the boundary area of his field.....

5. Petitioners state that using the ridge top as the basis for the location of the Agricultural and Conservation District boundary would place approximately 46,699 square feet currently designated within the Conservation District and containing a macadamia nut orchard into the Agricultural District and place approximately 22,888 square feet currently designated within the Agricultural District and containing stream beds and a waterfall into the Conservation District.

Source Exhibit 1, Stengle DR99-21, Page 27, Findings of Fact

to which the Commission responded in its Declaratory Order.....

4. Petitioners' request to place the approximately 22,888 square feet currently in the Agricultural District and containing stream beds and a waterfall into the Conservation District is not supported by the recommendations or actions documented in the report and is a matter more appropriately addressed through the district boundary amendment process, pursuant to Chapter 205, HRS.

Source, Exhibit 1, page 31,

Declaratory Order item 4 (colored emphasis added)

The Stengles did not have a lawyer and the Muragin's application would not normally require a lawyer and it did not. Comparatively the Petitioners have constantly been told to get a lawyer by the Commission's Executive Officer, LUC staff, the Director of OP and County of Hawaii's Planning Office staff. The Petitioners have already paid close to \$10,000

in filing fees and the like (both DLNR and LUC fees) in order to correct an error that the Commission has made.

A lawyer that represents to the Commission regularly estimated a minimum fee to present the Petition to the Commission at \$30,000. **It seems outrageous to the Petitioners** that such a straight forward Petition, supported by ***a preponderance of evidence*** and precedence, **in order to correct an error of the Commission** would necessitate that the Petitioners pay such additional fees with an uncertain outcome.

Turning to the **2021** Commission's rezoning of the Barry Trust land from Conservation to Agriculture, ***ref., map, Exhibit 6,***

- the Barry Trust land was around 1/2 acre in size,
- it was in a tsunami zone,
- it comprised a very narrow band of Coastal land,
- it had very little top soil but was rather bare lava flow rock,
- typical agricultural use was thought to not be possible due to the poor soil conditions and the effect of salt spay,
- the petition was amended to provide for a very modest bee farm due to the lack of agricultural values of the land,
- a substantial area of the land would be overlaid by a residence,

the Commission provided that if the bee farm did not work out the Barry's may try something else.....

43. In the event that Petitioners' apiary proves unsuited for the Petition Area or unsuccessful for any reason, Petitioners will implement an alternative agricultural use appropriate for the Petition Area in conformance with Chapter 205, HRS, the Commission's Rules found at Chapter 15-15, HAR, and the Hawai'i County Code. [2/24/21 Hr. Trans. at 41:10-21]

Source, Exhibit 8, Barry Trust, Commission approved redistricting, page 9

Of equal significance is a comparison of zoning for the Coastal areas south of the City of Hilo - Hawaii Paradise Park ("HPP"), where the Barry Trust land is located and an area which lies to the south of HPP, and the area of the Hamakua Coast, which lies to the north of the City of Hilo.

The following comparison offers descriptions of overwhelming LUC zoning contradiction of lands. It is worth first looking again at the State's Law HRS 205-2 (a) (3) regarding the Commission's obligations when considering zoning.....

HRS 205-2 (a).....

*(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 above **LAW** text.... **the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation** does not describe a land use but rather a characteristic of land and that maintaining **agricultural zoning for land was to be given the greatest possible protection** by the Commission.

The LUC's Rule HAR 15-15-19 (1).....

*"It **shall** include lands with a high capacity for agricultural production;" (emphasis added)*

further emphasizes this as a mandatory obligation of the Commissioners.

The Transcript of the Commission's September 8, **2021** Hearing (Church-Hildal), *ref., exhibit 5*, clearly evidences the Commissioners believed that the current use of the Property, *ie. whether it was for "agricultural use" as defined by the Commission being the commercial production of agricultural crops* was a pivotal consideration of their denial of DR21-72.

The word **capacity** , which is found in HRS 205-2 (a) (3) **does not describe a past, present or future land use but rather a physical characteristic of land.**

- HPP **Coastal lots** and **Coastal lots** immediately to the south of HPP, *ie. Leilani Estates*, and large areas mauka of both areas are zoned in the Agricultural District ("These Lots"),
- These Lots do not conform to HRS 205-2 (a) (3) nor HAR 15-15-19 (1),
- The Coastal lots are very small, often as small as 1/2 acre in size,
- The Coastal lots are low lying, generally only 10-15 ft. above the high wash of the waves and therefore lie in a tsunami inundation zone,
- These Lots are generally all located on repeated lava flows, *ie. recent eruption of fisher eight which destroyed hundreds of homes immediately to the south of HPP in the Leilani*,
- These Lots are generally composed of basalt lava flow with very little, if any, top soil,

- These Lots are not suitable for the *intense production of agricultural crops* due to the poor soil conditions and the effect of salt spay on the Coastal lots,
- very little agricultural use exists on the Coastal lots as their small size is further compromised by large residences, paved driveways, accessory structures etc.,
- due to the high population density of the Coastal lots shoreline access is provided in many locations including areas for long Coastal walks in several locations,
- These Lots have very little area or soil conditions suitable for sewage leaching,
- These Lots have had a variable zoning history having been first in the Agricultural District, then the Conservation District and finally back in the Agricultural District.

Comparatively Hamakua Coastal Land leading north from the City of Hilo, which is shown on 1974 SLUD Map H-65, where the Property is located.....

- Hamakua Coastal Land **appears on District Map H-65** to generally be the Conservation District ("**The Hamakua Lots**"),
- The Hamakua Lot lands generally conform to HRS 205-2 (a) (3) and HAR 15-15-19 (1),
- The Hamakua Lots generally range from 1 acre to 20 acres in size,
- The Hamakua Lots are generally makai of high Coastal cliffs ranging to over 200 ft and therefore do not lie in a tsunami inundation zone,
- The Hamakua Lots have no history of recent lava flows,
- The Hamakua Lots are located on Prime Agricultural land,

- The Hamakua Lots have deep, rich soils,
- The Hamakua Lots are not particularly susceptible to the effect of salt spay,
- The Hamakua Lots have a history of intense agricultural use, however more recent use has been severely compromised due to their apparent Conservation District zoning,
- The Hamakua Lots agricultural potential is not severely compromised by residences, accessory structures, roadways and the like due to the lots larger size,
- in the area of The Hamakua Lots shoreline access is neither generally available nor is it desirable due to the steep, high cliff and lack of access to the wave washed boulder fields at the high wash of the waves,
- These Lots have a zoning history having been first in the Agricultural District, then the Conservation District appears on the LUC's **1974** SLUD maps to have been overlaid on them,
- The Hamakua Lots have large areas and soil conditions suitable for sewage leaching,