

APPENDIX 5 THE 1969 REPORT BOOK

INTRODUCTION

The *factual situation of the Property in 1969*

In **1969** the LUC (variably the "**LUC**" or "**Commission**") completed its first Statewide Land Use District Boundary review (the "**SLUD**" review). Among other things the State mandated that the Commission redistrict a band of land, mauka of the high wash of the waves, around the coast of each of the Hawaii Islands, Conservation and create **maps** with lines that depicted the Coastal boundary. Generally Coastal land owners owned the land area right to the high wash of the waves. Particularly ***unused portions of coastal property*** lots were to be targeted for this redistricting.

The **1969** Commission hired a consulting firm to review existing SLUD boundaries and make recommended boundary changes to the Commission that were acceptable to the County, land owners and the community. The consultant's review period took about one year. First the consultants produced "***proposed***" redistricting maps. Subsequently, after community hearings, final maps were prepared for adoption by the Commission. The consultants were required also to document their review process in written form as a book and submit it also as a record of their work.

The "***State of Hawaii Land Use Districts and Regulations Review***" ***prepared by Eckbo, Dean, Austin & Williams*** (the "**Report**") formally **recorded** the consultants work and the Commission's redistricting "***actions***" in **1969**. For Hawaii Island a ***final*** Commission hearing

occurred on July 18, 1969 where the consultants **final** work was presented to the Commission in the form of 73 new recommended redistricting maps. The final maps that are dated July 18, 1969, for Hawaii Island were adopted by the Commission at that hearing.

Exhibit 32 is a copy of certain pages from the Report that are relevant to the Petition.

Apparently the 1969 Commission passed a motion to adopt the final maps but it did not adopt the Report. None-the-less the Report is an Official Commission Record, *ref.*, HAR 15-15-22 (d), and the Report has been relied on by the Commission in other matters that have been brought before it in as an "**APPLICABLE LEGAL AUTHORITY**", *ref.*, *Exhibit 1, DR99-21*, (Stengle) in order that the Commission may interpret the 1969 Commission's intended district boundaries.

Exhibit 46 is a copy of **proposed** and **final** 1969 Commission adopted redistricting maps for a portion of the area that lies between east Kohala, to the north, and the City of Hilo, to the South. Seven SLUD maps cover this area. The southern 2/3 of this area is generally described in the Report as the "**Hamakua Coast**". Exhibit 46 maps H-59, to the north, and H-65, to the south, cover the final area leading to the City of Hilo. The Petitioned Property lies at the northern end of the final map H-65, 14.5 miles north of the City of Hilo.

Five years following the Commission's first State-wide redistricting the Commission again conducted another State-wide review of districts and boundaries in 1974. The adopted 1969 maps were amended in 1974 to

include additional boundary changes that occurred as a result of the 1974 review and Commission adopted changes. Subsequently the Commission adopted these as foundational reference maps that are described in the Commission's HARules as the Commission's Official 1974 SLUD maps. Particular to the Petition, if an error existed on the 1969 maps it was repeated on the 1974 maps.

During the Commission's September 8, 2021 hearing (the "**Hearing**") for Petition DR21-72 (Church-Hildal) (the "**Petition**") the Commissioners did not recognize the **text record** of the Report to hold a higher authority, regarding the LUC's **undefined pictorial** district line on the LUC's 1974 SLUD map H-65 when interpreting the **defined** boundary location in the area of the Property.

With this Motion for Reconsideration (the "**Motion**") of the Commissions Denial of the Petition, the Petitioners now submit new additional Hard Evidence that was also adopted by the 1969 Commission which **text record** establishes that the **text record** of the Report correctly reflected the Commissions redistricting intended actions in 1969.

Exhibit 43 is the Commission's adopted transcript (the "**Transcript**") of its July 18, 1969 redistricting hearing where the maps were also adopted. Effectively the text record of the Commission's intended redistricting as recorded in both the Report and the Transcript establish that the adopted map H-65 was an administrative error. For confirmation of this assertion by the Petitioners a side-by-side comparison of the **text record** of the Report and the Transcript is found in Appendix 1.

It is a common administrative practice that a **text record** regarding the correct **defined** location of a district boundary holds precedence over **undefined pictorial** district lines on maps. The County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the **text** of the ordinance is to be applied as a **final legal authority** rather than an Official Map or map, *ref., (b) (1)*.....

*"Where a discrepancy exists between a district boundary shown on the adopted zoning **map** and that which is described in the text of an ordinance establishing the boundary, **the text of the ordinance shall be the final legal authority.**"*

source County of Oahu, Sec. 21-3-30 Zoning maps
and interpretations rule

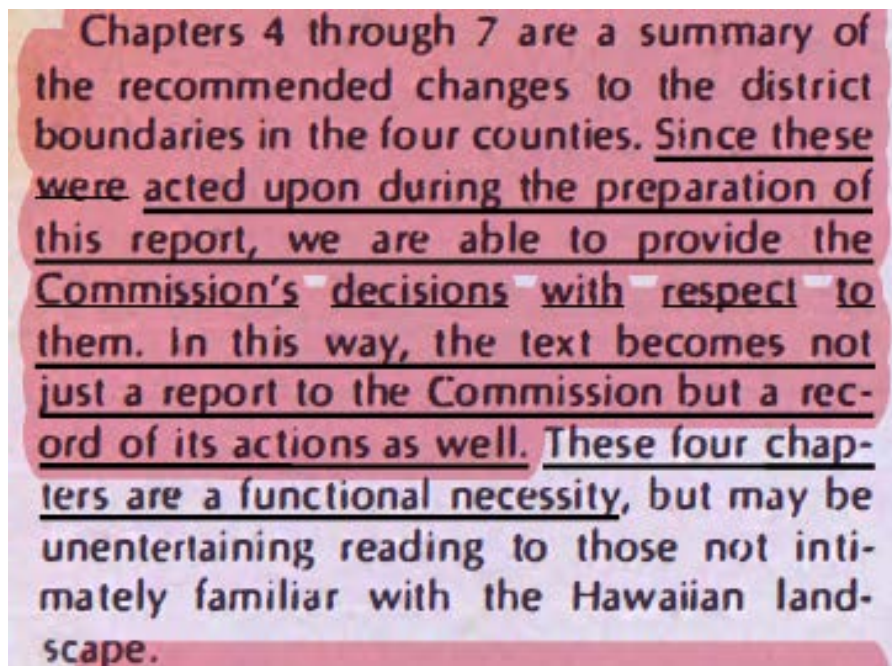
Therefore the location of the **undefined pictorial** Coastal district line, that is depicted on map H-65 mauka of the Coastal "**ridge top**" in the area of the Property is incorrect **or** alternatively, the **undefined pictorial** Coastal district line still **may be used as a reference line** from which a final **defined** boundary is interpreted to be located. If a land owner provides evidence, acceptable to the Commission, that his land was in agricultural use in **1969**, then the makai boundary of that agricultural use would be interpreted to be the **defined** boundary.

The Petitioners and State Office of Planning's Attorney General's representative Alison Kato's ("**Kato**") gave testimony to the Commissioners at the Hearing.

Kato testified that, when comparing, the ***text record*** of the Report vs. the LUC's **1974** SLUD map H-65, resulted that ***uncertainty*** and ***confusion*** existed regarding the **1969** Commission's redistricting intended boundary line that was depicted on the LUC's **1974** SLUD map H-65.

Now with Exhibit 43 Transcript's Hard Evidence, which is further supported by Exhibits 44 and 45 (minutes and transcripts) the Petitioners believe that Kato and the Commissioners may find that ***uncertainty*** no longer exists regarding the intention of the **1969** Commission's ***defined*** district line's location on map H-65.

Turning now to the text record of the Report.....



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 page 3 (emphasis added)

Particular attention, in the above copy of an area of the Report's page 3, the Petitioners highlight the words and phases for subsequent reference...

- **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.**

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 (northerly) and the City of Hilo (southerly) "**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 comprises "**Prime**" agricultural land.

The Report's, Chapter 5, page 36 describes.....

C. The Shoreline

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

Commission Action: Partially Approved.*
Areas in agricultural use were excluded.

From Hilo to Kapoho the shore is rocky 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.*

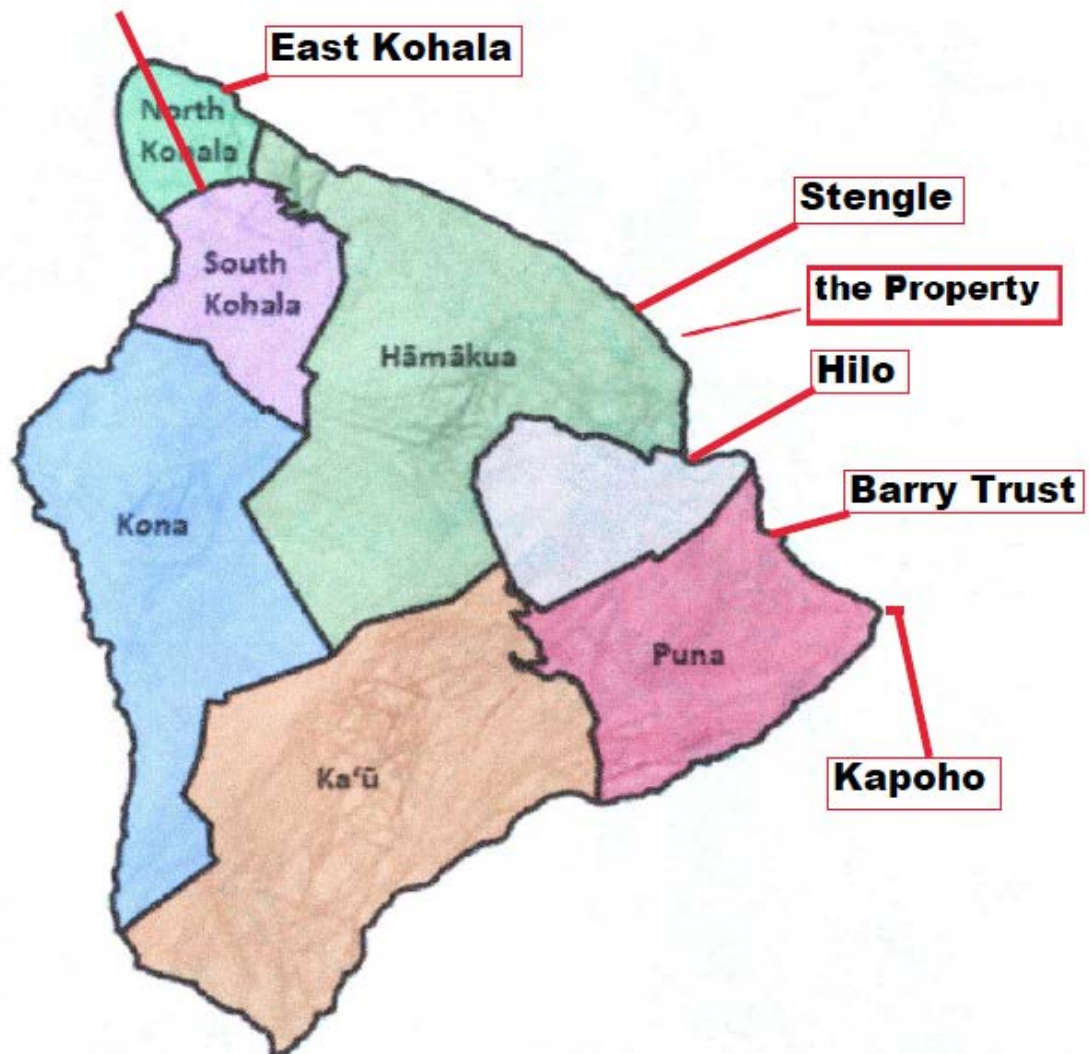
From Kapoho to South Point, most of the

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

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

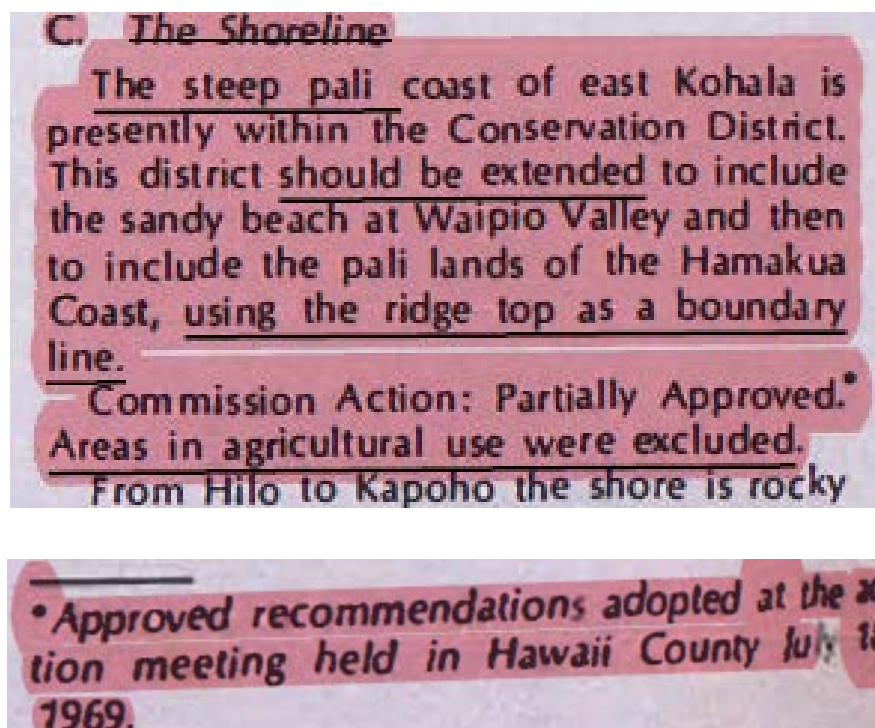
Source, Report page 36 (emphasis added)

The above copied section of the Report's Chapter 4, page 36, also covers two land areas that lay between east Kohala and Kapoho.



Source County maps (text boxes and lines added)

The Report's page 36 describes the 1969 first Coastal Commission's redistricting **actions** to begin at East Kohala and the various Commission's redistricting **actions** are recorded thereafter to go clockwise around the island from East Kohala until arriving back at the western boundary of East Kohala. The first redistricted area was from East Kohala to the City of Hilo, the second redistricted area was from the City of Hilo to Kapoho.



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

Particular attention, in the above copy of an area of the Report's Chapter 4, 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*** (ie. "***should be***") to the Commission's final **1969** Hawaii Community meeting and.....

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

The ***text record*** of the Report and the Transcript makes it clear that it was neither the Commission's intention, nor the Community's understanding that the **1969** Commission's redistricting would overlay the Conservation District on to lands that were in agricultural use. This is further confirmed by a local newspaper article.....

Exhibit 28



Source, Tribune-Herald article (emphasis added)

and

Exhibit 43, transcript describes Commission's Executive Officer Duran explanation to the Commissioners of the **recommended** 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). In 1969 the Petitioned Property was in agricultural use but a steep coastal pali area existed as part of the makai side of the Property that was not in agricultural use. Exhibits 44 and 45, transcript and

minutes further confirm that lands that were in agricultural use in **1969** were not intended to be redistricted Conservation, see *Appendix 1*. Sugar cane was generally farmed right up to the top of the coastal pali "**ridge top**" throughout the **Hamakua Coastal** area, ref., *field map, Exhibit 16 & Exhibit 29, map and historical aerial picture*. In **1969** the Property was part of a large field, TMK (3) 2-9-003: 013 which TMK comprised 13.064 acres and which TMK was owned by C. Brewer & Company Ltd.

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. This was only **partially approved** by the **1969** Commission in order that agricultural use areas that lay mauka of the Coastal "**ridge top**" or in at least 2 valley floors 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)

and State Law HRS 205-4 (h)....

*"No amendment of a land use district boundary shall be **approved** unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, **not violative of section 205-2** and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17. Six affirmative votes of the commission shall be necessary for any boundary amendment under this section."*

and

the Commission's HAR 15-15-19 (1)...

(1) It **shall** include lands with **a high capacity for agricultural production**;

(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** and the word "***shall***" is a **mandatory** instruction to the Commission.

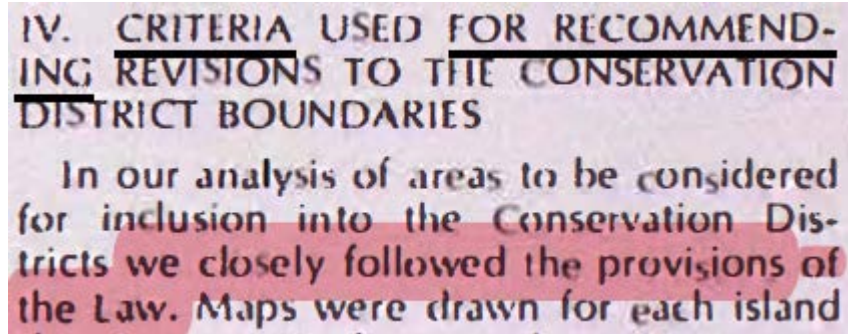
While it may be argued that the Commission still had the authority to redistrict land, perhaps even prime agricultural land, in order to meet a State priority such as the creation of a band of land Conservation around the Hawaii Islands, that goal could have been accomplished, by only redistricting unused Coastal pali land into the Conservation District. This is what was done for all of the other Hamakua Coastal land SLUD maps. It is clear that map H-65 resulted from an administrative error.

There is nothing in the text record of the.....

- Transcript,
- the other transcript and minutes documents, or
- the Report

that even remotely suggested that the **1969** Commission intended that map H-65 land area be treated any differently than other map land areas for the Hamakua Coast. The ***text record*** is Hard Evidence that the **1969** Commission intended that throughout the entire Hamakua Coastal area lands that were in agricultural use were to be excluded from redistricting.

Further evidence is provided where the Report also described that the **1969** Commission's redistricting actions were intended to be in strict compliance with the State's Laws.....



Source, Report page 85, (emphasis added)

Leading up to **1969** the Property was located in the Agricultural District. In order to redistrict any area of the Property into the Conservation District the Commission would have to have made a reasonable attempt to balance the State's goals with its laws.

At the Commission's July 18, **1969** final redistricting Hearing, in the County of Hawaii, the Commission **adopted** redistricting Maps that are dated July 18, **1969** for the **Hamakua Coastal** area, including Map H-65 where the Property is located. Map H-65 showed an **undefined pictorial** district boundary line variably and often 300 ft. inland of the coastal "**ridge top**". In order that the district line that is depicted on such Maps to be legally applied as a district boundary it should also comply with HRS 205-2 (a) (3) and HAR 15-15-19 (1).

or a farm road or a road, vegetation line. In a situation
where ~~xx~~ there is not physical line which can represent these uses
we have indicated a line which is 300 feet mauka of the existing
conservation district. With respect to that it is not our thinking
that this has to be a rigid or firm line. It is flexible in the
same manner as all boundaries are upon application. We feel it is

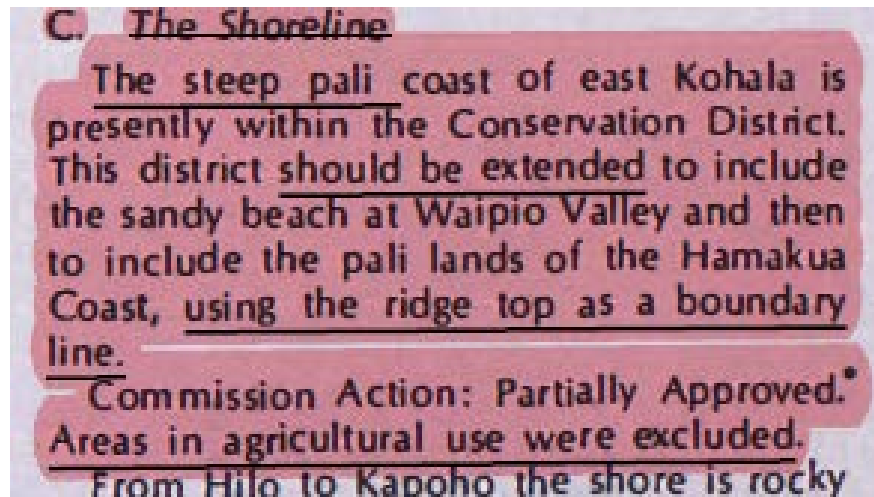
Source, Exhibit 44, 1969 Hilo hearing transcript, page 11,
 testimony of Mr. Degenhardt, consultant, Ekbo.....

Consultant *Degenhardt's* reference "***It is flexible in the same manner as all boundaries are upon application***" is further confirmed to be a standard practice of regulatory authorities, **even Hawaiian authorities**. Lack of clarity and certainty, regarding earlier intended district lines on maps are so common that the County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the **text** of the ordinance is to be applied as a ***final legal authority*** rather than an Official Map or map, *ref., (b) (1)*.....

*"Where a discrepancy exists between a district boundary shown on the adopted zoning **map** and that which is described in the text of an ordinance establishing the boundary, **the text of the ordinance shall be the final legal authority.**"*

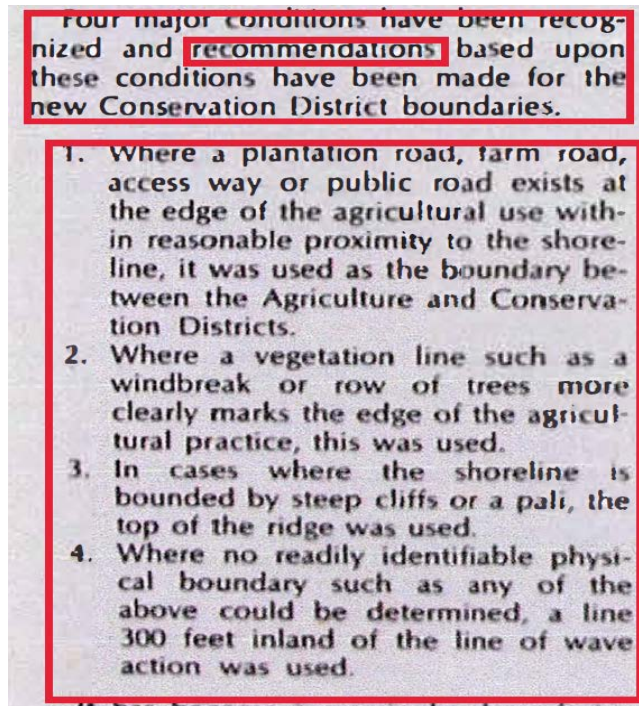
source County of Oahu, Sec. 21-3-30 Zoning maps
 and interpretations rule

It is likely therefore that the 1969 Commission intended that the ***adopted*** district Maps for the ***Hamakua Coast*** be subordinate to the ***text record*** of the 1969 Commission's ***adopted*** Transcript and/or of the Report.....



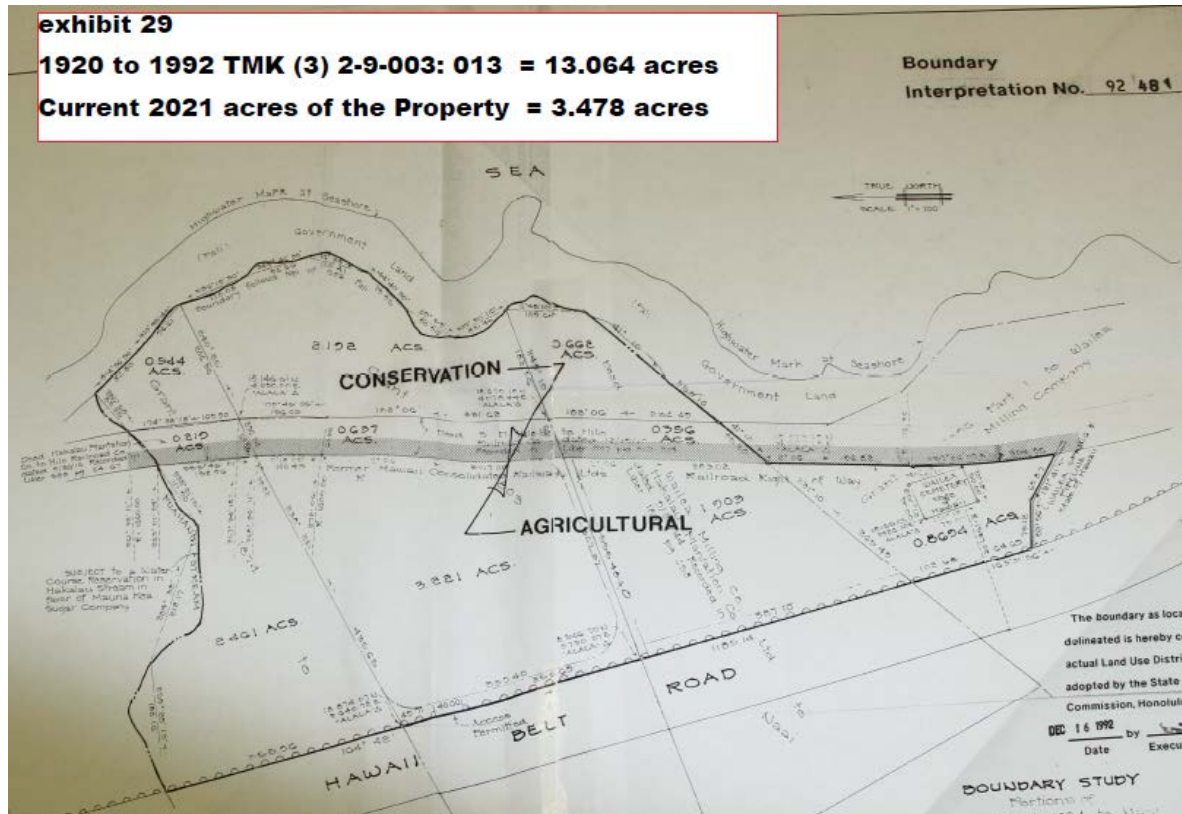
Source, Report page 36, (emphasis added)

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***". Page 86 described 4 different ***criteria*** for developing the ***recommended*** Conservation District line on ***recommended*** maps. Leading from east Kohala southward, along the Hamakua Coast, to the City of Hilo, ***criteria #3*** generally describes this area.....



Source, Report page 86, (emphasis added)

In the case of DR21-72 (Church-Hildal) the **present** Commission applied criteria #1. The Hard Evidence of *Exhibits 16 field map*, and *29 TMK map and historic 1952 aerial picture* is that the railroad bisected the field.....

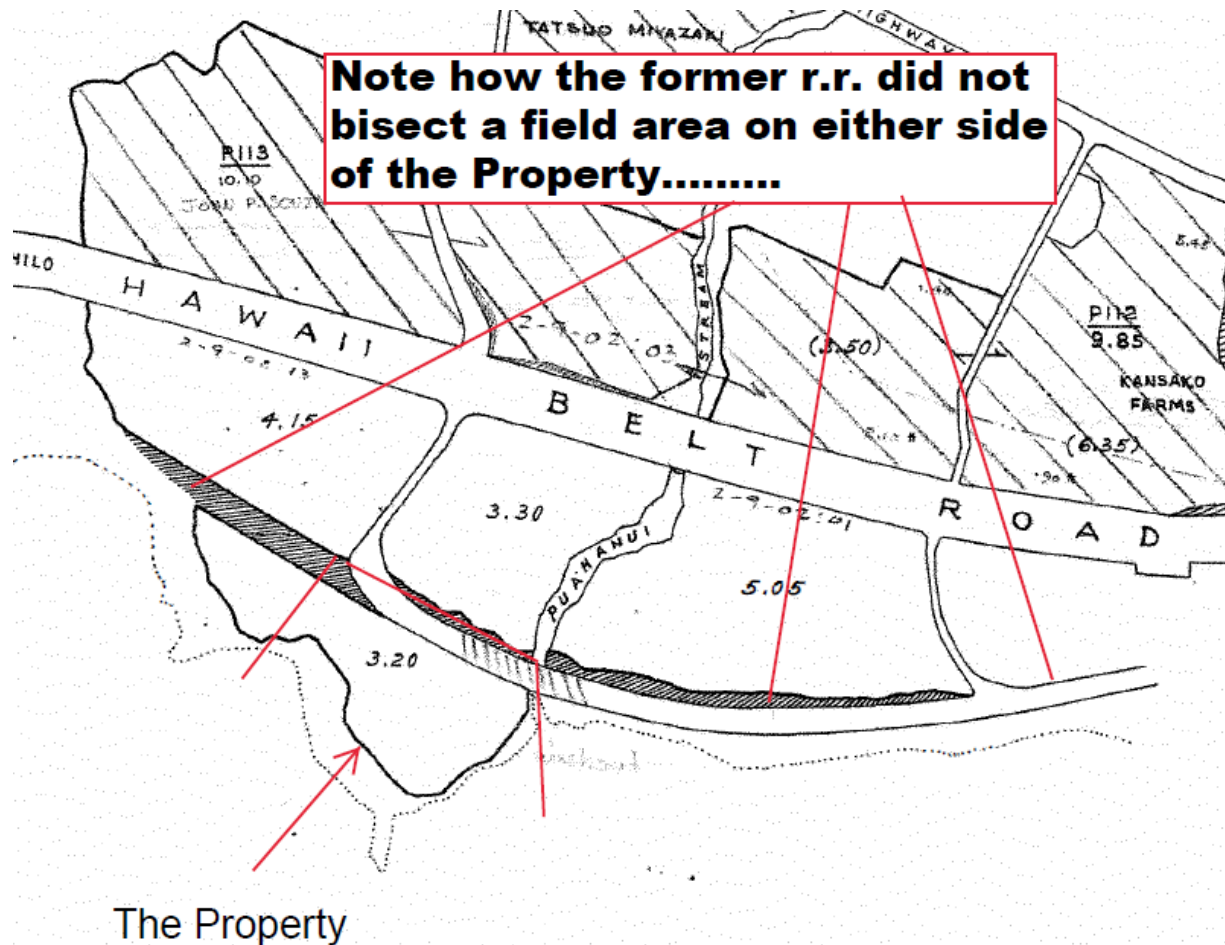


Source, Exhibit 29, photograph of LUC Boundary Interpretation 92-48
 (text box added)

The above survey map is followed with further **Hard Evidence**, in **2015** John Cross, the former field manager for Brewer & Company, wrote to the Petitioners (Church-Hildal) confirming that the area makai of the former railroad was '*part of a larger field area..... BLOCK F31B*'

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)



Source, Exhibit 16, Field map (text and lines added)

note: variable acreages between various maps results from the area of the former railroad not being counted as acreage on some of the maps like the Field map shown above. The described 13.064 acre TMK (3) 2-9-003: 013's field area of 10.65 acres includes 3.2, 3.3 and 4.15 acre areas shown on the above map.

The Report describes that the Commission further removed any conflict (*ie. uncertainty*) between the **1969 approved** redistricting Maps and the **text record** of the Commission's **approval** of redistricting by adding "**Areas in agricultural use were excluded**" in the **text record** of the Report. This is similarly described in the Transcript of the **1969**

Commission's redistricting **action** hearing, *ref., Exhibit 43 (copied below)*. Therefore the **text record** of the Report and the hearing transcript is essential in *interpreting* the **defined boundary** in the area of the Property according to HAR 15-15-22 (d) and (f).

*Exhibit 43, transcript describes Commission's Executive Officer Duran explanation to the Commissioners of the **recommended** 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). In **1969** the Petitioned Property was in agricultural use but a steep coastal pali area existed **as part of** the makai side of the Property that was not in agricultural use.

In the case of the Property the **present** Commission stated a belief that the **1969** Commission intended that a former railroad, which **bisected** a field in the area, was the Commission's intended redistricted boundary. The **present** 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, Report page 86, (emphasis added)

In the case of the Property the former railroad bisected the existing agricultural use field, *ref., exhibit 16, field map and Exhibit 27 TMK map and historic 1952 aerial picture*. 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)

capacity *for intensive cultivation* would have been a violation of State laws HRS 205-2 (a) (3) and the Commission's HAR 15-15-19 (1).

The LUC's **1974** SLUDmap H-65 and the **present** Commission's denial of Petition 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* , *the State's Law 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** where the Commission's Executive Officer, **Mr. Duran** introduced the final agenda item, the redistricting of Hawaii Island land which was carried, without amendment by a unanimous vote of the Commissioners.

In the next publication of the Tribune-Herald reported the outcome of final hearing highlights.....

Exhibit 28



Source, Exhibit 28, Hawaii Tribune-Herald, (emphasis added)

Like everyone else at the hearing, 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***".

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 all Commissions 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**.

State Law HRS 205-4 (h) states....

*"No amendment of a land use district boundary shall be **approved** unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, **not violative of section 205-2** and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17. Six affirmative votes of the commission shall be necessary for any boundary amendment under this section."*

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 all Commissions.

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

See also Exhibit 35, **1961** and **1969** soils maps and Exhibit 36, historical document.

Various copies of the Report's earlier described ***text record***, 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),
- 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 Hearing held in Hawaii County July 18, **1969**, and
- **"Areas in agricultural use were excluded."** (ref., Report page 36).

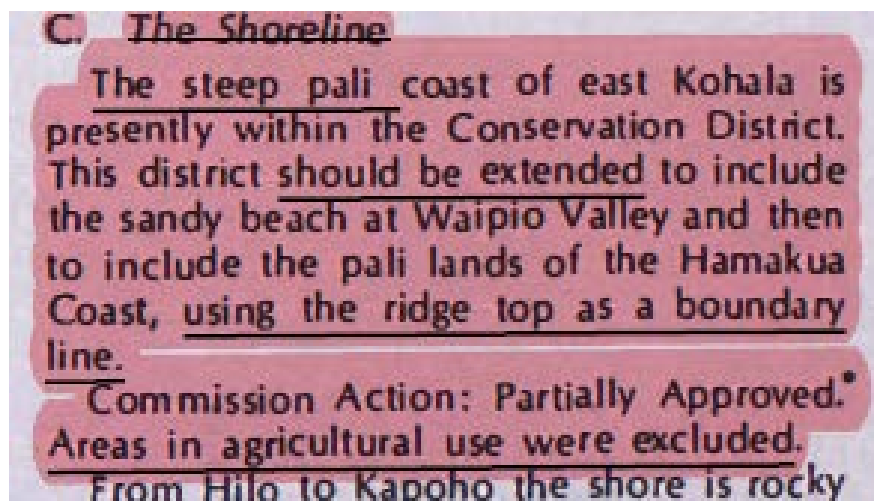
The Report Chapter 5's page 41, ref., Exhibit 6, shows a map of the Island of Hawaii with shaded areas in various colors and lined areas that denoted **recommended** and **adopted** amendments to SLUD boundaries. The area of the Property, that lies mauka of **the coastal cliff**, is identified on the 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 Report's page 36,
- the **1969** Commission final redistricting hearing Transcript, 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. None-the-less the **1969** hearing Transcript does refer that redistricting Maps that are dated July 18, **1969** were **adopted** by the **1969** Commission.

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 district lines that are depicted on map H-65 are located variably inland to the coastal "**ridge top**". Map H-65 is in conflict with the **text record** of the Commission's Report page 36 and the **1969** Commission redistricting hearing Transcript and the **1969** Commission's hearing transcript and hearing minutes *Exhibits 44 & 45*.

As described earlier herein the Report's description of the **recommended 1969** redistricting of the shoreline areas of the County of Hawaii, that were considered and **adopted** at the **1969** Commission's Community Hearing 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 *The Report, page 36, Appendix 5*

The Property's location is shown on LUC **1974** SLUD map H-65, *ref., Exhibit 11 Papaikou map*. LUC **1974** SLUD maps H- 43, 51, 59 and 65

cover the Report's identified ***Hamakua Coast*** area where the Report describes that the **1969** Commission effectively approved ***using the ridge top as a boundary line***. All of ***these maps*** have ***undefined pictorial*** district lines overlaid on them indicating the approximate area of SLUD boundaries.

During the **1969** Commission's redistricting hearings on the Island of Hawaii the generality of district lines on maps was explained to the meeting attendees.....

or a farm road or a road, vegetation line. In a situation where ~~it~~ there is not physical line which can represent these uses we have indicated a line which is 300 feet mauka of the existing conservation district. With respect to that it is not our thinking that this has to be a rigid or firm line. It is flexible in the same manner as all boundaries are upon application. We feel it is

Source, Exhibit 44, April 25, **1969** hearing transcript, page 11, testimony of Mr. Degenhardt, consultant, Ekbo.....

The Petitioners described earlier herein, and now expand upon the variability of interpretation of district lines on maps is so common that the County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the **text** of the ordinance is to be applied as a ***final legal authority*** rather than an Official map, *ref., (b) (1)*.....

*"Where a discrepancy exists between a district boundary shown on the adopted zoning **map** and that which is described in the text of an*

*ordinance establishing the boundary, **the text of the ordinance shall be the final legal authority.***"

source County of Oahu, Sec. 21-3-30 Zoning maps
and interpretations rule

In the case of DR21-72 (Church-Hildal) we **do not** have "**the text of the ordinance**". What we do have are the following **Hard Evidence** Exhibits which are Exhibited to this Motion for Reconsideration of DR21-72 that record **facts**.....

- the **text record** of the **1969** Commission hearing's minutes, and transcripts, *ref., Exhibits 43-45*, which describe...
 - (i) that the **1969** Commission adopted redistricting Maps on **May 18, 1969**,
 - (ii) that the **1969** Commission and the community were told, by the Commission's representative consultants, that the district lines on the maps and Maps were intended to represent the general extension of the extension of the Conservation District along the Hawaii Island coast..... "**It is flexible in the same manner as all boundaries are upon application.**", *ref., Exhibit 44, Hilo hearing transcript, page 11*,
 - (iii) that the **1969** Commission and the Hawaii Island Community, and particularly affected **land owners**, were repeatedly assured by the Commission's representative consultants, that.... '**areas in agricultural use in 1969 would not be redistricted,**' see *Appendix 1*,

- (iv) that **adopted** Transcript of the final hearing evidences that the Commission's Executive Officer introduced final maps to the Commissioners for adoption assuring that the maps do not overlay the Conservation District on lands that were in agricultural use, *ref., Exhibit 43, July 18, 1969, Commission, City of Kona, final hearing transcript, page 7,*
- the **text record of the Commission's Report's** pages 3 and 36, which further confirmed that the 1969 Commission's redistricting of land in the area of the **Hamakua Coast**, the Coastal "**ridge top**" was intended to be the **defined** district boundary, *ref., Exhibit 32,*
- the **text record** of the Tribune-Herald newspaper article, which is copied herein, "**The new designation includes all shoreline which is not currently in some other use.**", *ref., Exhibit 28,*
- the **text record** of the Commission's 1999 DR99-21 (*Stengle*), page 7, *ref., Exhibit 1,* where the Commission recognized the authority of the **text record** of the Report's description that the 1969 Commission intended that the extension of the Conservation district from east Kohala "**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.**" over the Commission's 1974 SLUD map H-59, *ref., Exhibit 1,*
- the Commission's **recommend** maps that led up to the final **adopted** Maps by the 1969 Commission, *ref., Exhibits 37-39 and Exhibit 46 maps,*

- the **text record** of the LUC's boundary interpretation No. 07-10 (Muragin) which confirmed in a similar way to DR99-21 (Stengle) that **"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"**, ref., Exhibit 2,
- the **text record** of the present Commission DR21-72, Exhibit 5, Hearing transcript, page 107, where Commission Chair Scheuer and Kato **agreed** that the district line on the Commission's **1974** SLUD map H-65 was supposed to have been drawn '**based on the Report**'.

This is further exhibited here in testimony, by **Laura Thielen**, who was then the **Director of the State Office of Planning**, to McCully LUC redistricting petition A05 757 for a land area that included the Property.....

6 But until that happens the reality is we're dealing
 7 with many areas of classification where there was not an
 8 independent analysis saying that this land belongs in this
 9 classification because of the attributes of this physical
 10 property.

(emphasis added)

Finally, again, the scale of map H-65, 1" = 2000 ft. could not possibly show the attendees to the final **1969** Commission Community Hearing where the maps and Maps, ie. depicted the **recommended** or final **approved** boundary to be.....



Source, Exhibit 11 LUC map H-65

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.

The LUC's various explanations of the correct location of the ***undefined pictorial*** boundary lines on maps go something like this.....

- Scheuer to Kato..... "***followed the railroad***"
- Scheuer and Kato agree..... the "***maps were based on the Report***"
- DR99-21 (Stengle) the LUC's first boundary interpretation stated..... the "***boundary as following the 200 ft. contour line***",
- In the end in DR99-21 (Stengle) determined that the correct location of the District Line was to be the Coastal pali "***ridge top***",
- In DR21-73 (*Honoipu Hideaway*) the LUC applied the line where it believed a ***former road*** was located,
- In DR21-73 when (*Honoipu Hideaway*) asked that the LUC's first boundary be reconsidered based on the fact that the later dated map's road was inconsistent with the correct map the LUC decided to not

apply it to the road and instead applied it to a line **300 ft. inland of the Coast.**

In this way the LUC's boundary interpretations and rationalized descriptions of why the lines are where they are have become **arbitrary and capricious** because the interpretations do not always line up with the authority of a text record of the redistricting action when the districting occurred. It is when the district lines on maps and/or the LUC's interpretation of district boundaries are made which do not line up with the Hard Evidence of a ***text record*** or ***historical map*** or ***factual situation*** where conflict and uncertainty arise from. It is the Commission's job to be **open minded** and to always apply **the law** and **text records**, when its decisions and orders go outside the law and records that conflicts and the potential for liability arise.

The Report did not describe SLUD Maps to be authoritative but rather the ***text record*** of the Commission's **1969 actions** that are described in the Report to be the final authority, *ref., the earlier quotes from pages 3 and 36 of the Commission's Report.*

In the case of Petition DR21-72 (Church-Hildal), the Commission has applied its **1974** SLUD map H-65 as authoritative. In the case of DR99-21 (Stengle) and Boundary Interpretation No. 07-19 (Muragin) the Commission has applied the ***text record*** of the Report over any authority of a map. In the case of DR96-19 (Castle Foundation) the Commission applied the ***text record*** of its **1974** Report **and** HRS 205-2. Since **1999** DR99-21 (Stengle) the LUC has issued its boundary interpretations

for areas that are located on SLUD map H-59 similarly to reflect that the Coastal ***"ridge top"*** to be the boundary.

Particularly of relevance to Petition DR21-72 (Church-Hildal) the Commission did not apply HRS 205-2 (a) (3) and HRS 205-4 (f) nor the ***text record*** of the Report.

This **further confirms** the Commission's denial of DR21-72 is **arbitrary** and **capricious**. Nowhere does the Report and now also the Exhibit 43 Transcript and Exhibits 44 and 45 transcripts and minutes describe that any quadrangle map or 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."

Appendix 1 provides hard evidence discussion that the text record of the Report and the text record of the **1969** transcripts and minutes effectively refer the same regarding the **1969** Commission's intended redistricting actions.

DISCUSSION, The Report, IN MORE DETAIL

The State Office of Planning ("OP") provided written testimony to DR21-72 (Church-Hildal) which gave OP's considered analysis of the Report as applied to DR21-72 with 4 supporting exhibits. OP's written testimony, *ref., Exhibit 4*, describes that OP concluded that the Report and other 'Official Commission Records' supported DR21-72.

CONCLUSION

There is a lack of clarity in the Boundary Review Report and in the subsequent establishment of the boundary line between the Conservation and Agricultural Districts for the Petition Area as to where the boundary line was intended to be drawn. However, as shown in the various dockets and boundary interpretations sharing similar circumstances and brought before the LUC at different times since the 1969 Boundary Review Report established the State Land Use District along the East Hawaii coastal areas, the Conservation District boundary has been determined in some cases to be the “top of the sea pali.” Accordingly, OPSD would have no objection to the LUC’s granting of Petitioners’ requested Boundary Interpretation.

Source OP testimony, page 8, exhibit 4

Subsequently, during the Commission's September 8, **2021** hearing for DR 21-72 (Church-Hildal), AG representative Kato ("Kato") admitted her opinion that the Report is **confusing** (see above transcript quote).

The Petitioners ask that the OP representative Kato further consider

- the text record of the Exhibit 43, **1969** Commission July 18, **1969**, hearing transcript, page 7, Duran's opening comment when he introduced the Commission's final redistricting agenda item for the approval of the redistricting maps where he stated that **'areas in agricultural use in 1969 would not be redistricted,'** ref., Exhibit 43, July 18, **1969**, Commission, City of Kona, final hearing transcript, page 7,
- the text **record** of the Exhibit 44, April 25, 1969, page 43 hearing transcript, testimony exchange between land owner Ken and

consultant Williams regarding the apparent 300 ft. setback line that appeared on the Coastal maps for the Island of Hawaii,

- all of the discussion in the side-by-side comparison between the Report and the **1969** Commission's hearing transcripts and minutes that are shown in Appendix 1,
- County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule,
- *Laura Thielen*, who was then the Director of the State Office of Planning, testimony to McCully LUC redistricting petition A05 757,

6 But until that happens the reality is we're dealing
 7 with many areas of classification where there was not an
 8 independent analysis saying that this land belongs in this
 9 classification because of the attributes of this physical
 10 property.

Source page 120, August 11, 2005 petition transcript testimony by Laura Thielen, the Director of the State Office of Planning to McCully LUC petition A05 757

- that the **1969** Commission and the Hawaii Island Community, and particularly affected **land owners**, were repeatedly assured by the Commission's representative consultants and finally by the Commission's Executive Officer, that.... **'areas in agricultural use in 1969 would not be redistricted,'** ref., *Exhibit 43, July 18, 1969, Commission, City of Kona, final hearing transcript, page 7,*

- *Exhibit 44, Hilo 1969 Commission hearing transcript, page 11, "It is flexible in the same manner as all boundaries are upon application."*,
- the **text record** of the Tribune-Hearal newspaper article, which is copied later herein, "**The new designation includes all shoreline which is not currently in some other use.**", ref., Exhibit 28,
- this Motion for Reconsideration, particularly Exhibit 29, picture and map and again Exhibit 16 field map and Exhibit 10 John Cross letter.

When the Report is considered in a **textual** and **purposivist** way the **text record** of the Report, in all of the chapters of the Report, removes the potential for **confusion** by using key words like "**recommended**" vs. "**approved**". None-the-less it does take a very considered read of the Report, in both a **textual** and **purposivist** way, to remove **uncertainty** regarding **what the mind of the 1969 Commission was** when it redistricted land in 1969. Any remaining uncertainty should be eliminated when Appendix 1 is considered also.

The Report's page 3 appears to have been intended by the Commission to remove **uncertainty** and **confusion**. Page 3 has language that describes how the Report's subsequent chapters are to be interpreted and applied. The Report's page 3 describes that chapters 4-7 describe the Commission's redistricting **actions**. Chapter 8 described how the consultants developed **recommended** district boundaries on maps.

Each of the Report's **chapters 4-7** cover one of the 4 Counties of Hawaii. where the 1969 Commission's redistricting actions are described.

Chapter 5 is in regard to the County of Hawaii where the Petitioned Property is located.

Unfortunately the scale of the maps that were available, to the Hearing attendees, **including the Commissioners**, were not sufficient that anyone could reasonably interpret where the recommended district boundary was actually located, *ref., DR99-21 (Stengle)*.....

II. BASIS FOR AGRICULTURAL / CONSERVATION BOUNDARY DETERMINATION.

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

These are the 1969 State Of Hawaii Land Use Districts and Regulations Review document and the accompanying U. S. Geographical Survey ("USGS") maps. The document details boundary changes made by the Land Use Commission for Hawaii County during the 1969 review. The USGS maps, having a scale of 1 inch = 2,000 feet, were used as a foundation for charting the changes stated in the document and are known as the "Official Maps."

Source DR99-21 (Stengle), exhibit 1
(highlight and emphasis added)

The next picture shows the area of the map that was available for inspection by the 1969 redistricting hearing attendees. In the area of the Property. It is generally represented at the scale of 1" = 2000 feet.



Source, LUC SLUD map H-65, exhibit 11

In the earlier described DR99-21 the Commission agreed and it issued a new boundary interpretation for Stengle that defined "***the ridge top as a boundary***".

In summary of the above it is clear that the Commissioners and the public believed that Hamakua Coastal "***Areas in agricultural use were excluded.***" from rezoning in **1969** in both a ***textual*** and ***purposivist*** way irrespective of what the ***adopted*** Maps showed. The text records are clear. Map H-65 is an administrative error.

It is a matter of record that the Commission.....

- in **1992** applied the **1974** LUC SLUD map as authoritative in the Boundary Interpretation No. 92-48 (McCully), *ref., Exhibit 3*,
- in **1999** the Commission **first applied** the **1974** LUC SLUD map as authoritative in the boundary interpretation of Stengle and then on appeal, when the Commission was reminded of the ***text record*** of the Report and the 1" = 2000f ft. scale of the map, the Commission determined that the **1974** LUC SLUD map was incorrect and the Commission applied the ***text record*** of the Report as authoritative, *ref., Exhibit 1*.
- in **2007** the Commission appeared to have sorted the ***confusion*** out and it applied the ***text record*** of the Report as authoritative over **1974** LUC SLUD map in the case of Boundary Interpretation No. 07-19 (Muragin), *ref., Exhibit 2*,

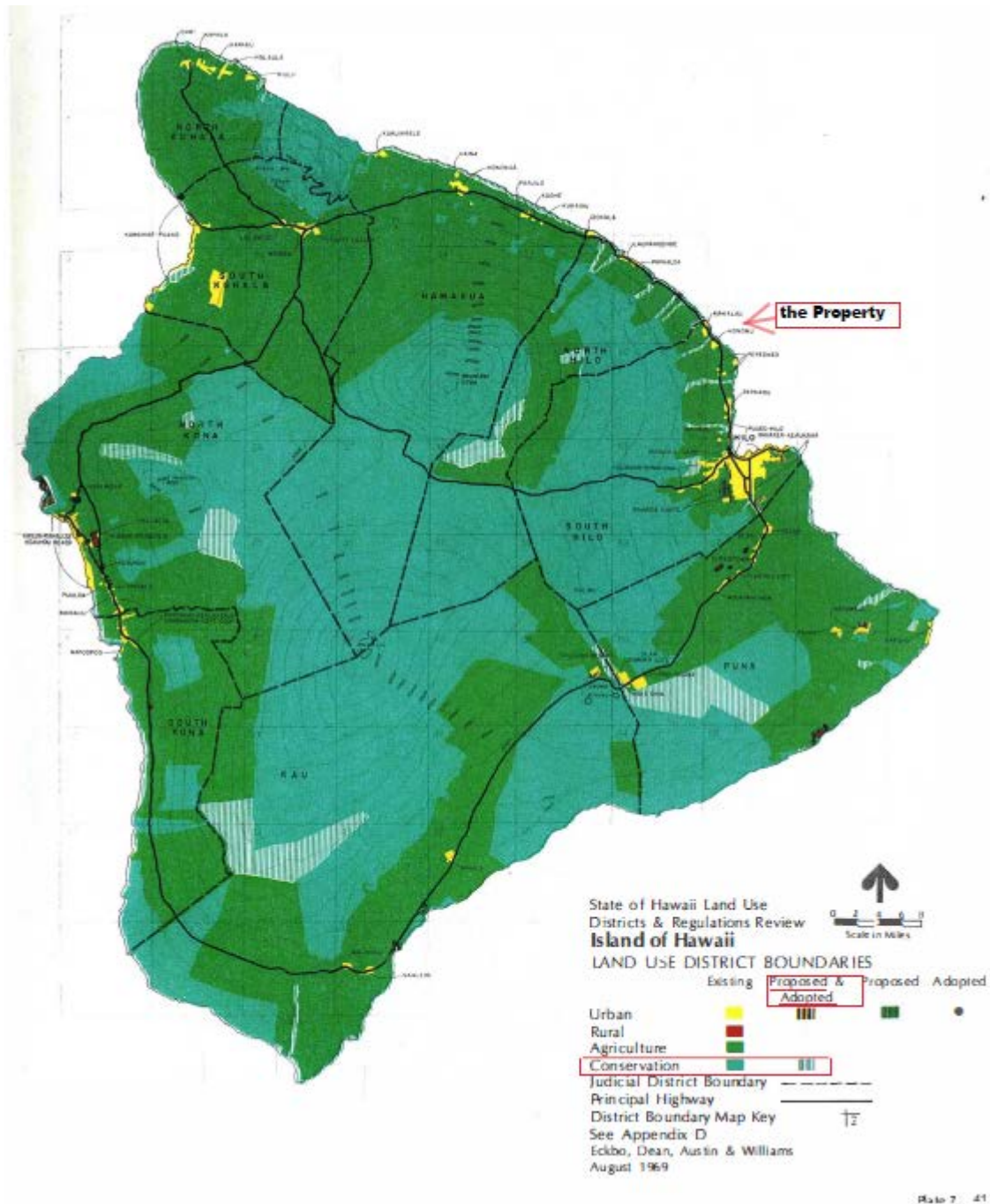
- in **2021** the Commission returned to the **1974** LUC SLUD map as authoritative over the **text record** of the Report, *ref., Exhibit 5, transcript for DR21-72 (Church-Hildal)* .

The Commission has effected that now **confusion** and **uncertainty** continues.

The factual situation has always remained the same since **1969**, ***just the LUC's interpretation of its maps has become variable and confusing.***

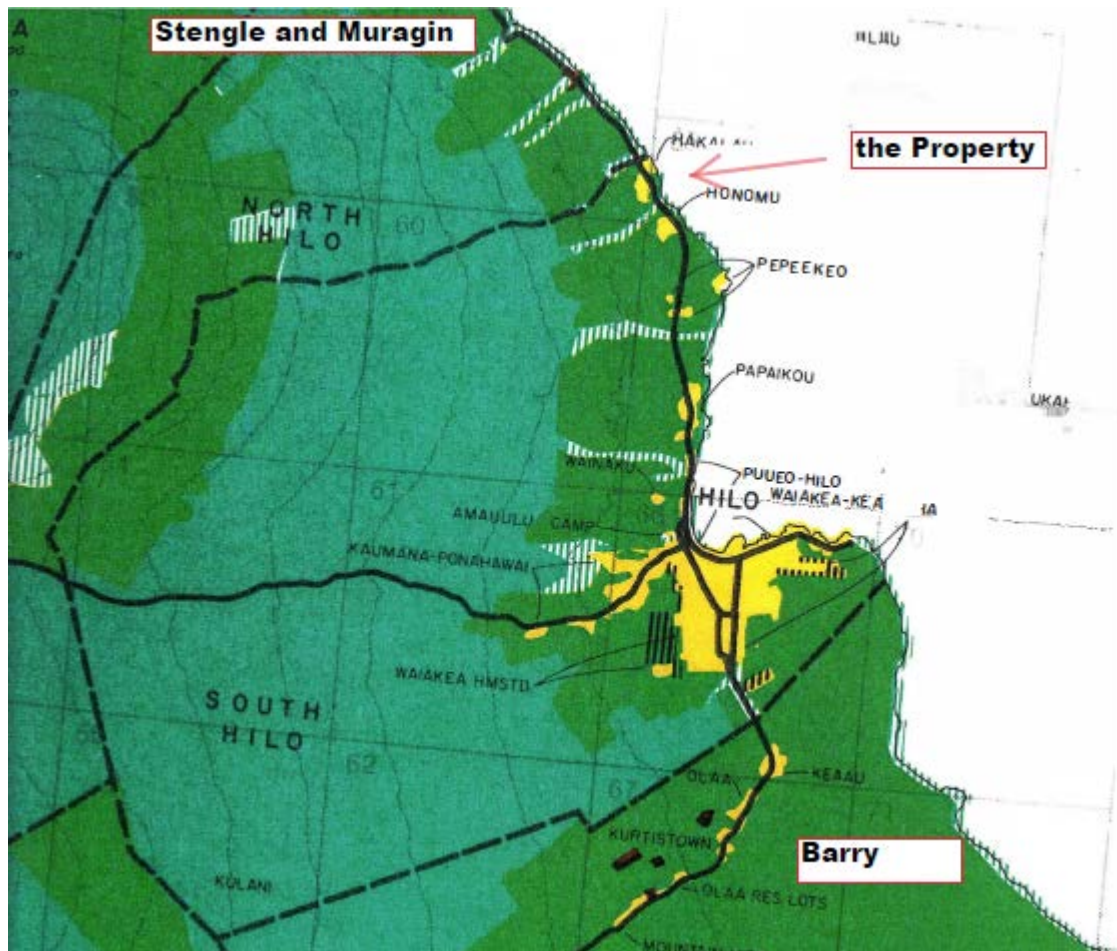
Furthermore HRS 205-2 (a) (3) and the Commission's HAR 15-15-19 (1) applied just as much in **1969** as it does today ie. *that the Commission apply the 'greatest protection' to lands with a high capacity for agriculture be zoned in the Agricultural District'* and HRS 205-4 (h) also applies today if the **present** Commission believes that **uncertainty** exists. The word "**greatest**" means that no other district is to be applied with a higher authority than the Agriculture District. The word "**capacity**" is not related to a past, current or future land use. This is discussed in more detail throughout the Motion for Reconsideration and its Appendix(s).

see next page, Report page 41 map.....

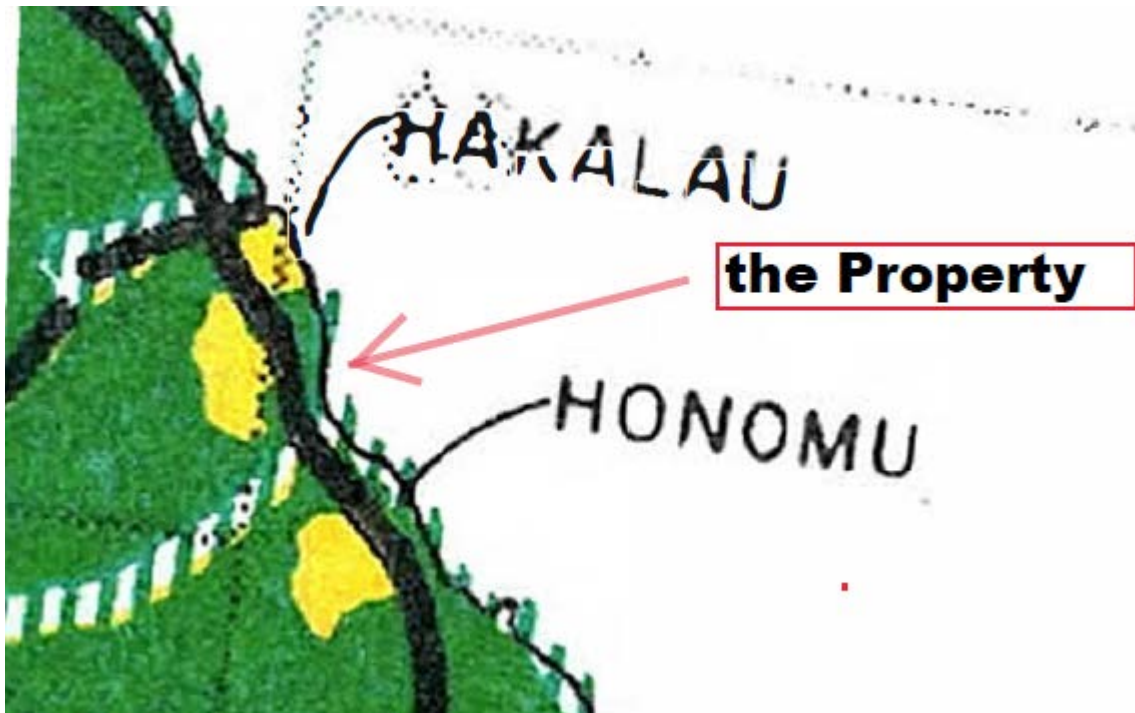


The next magnification of the map shows the location on the map of various properties that the State Office of Planning's written testimony to DR21-72 described to the Commission as "*OTHER SIMILAR LUC ACTIONS IN THE AREA*", (i) the petitioned Property (**Church-Hildal**), (ii) the **Stengle** property (ref., Petition DR21-72, OP written testimony), (iii) the **Muragin** property (ref., Petition DR21-72, OP written testimony),

and (iv) the **Barry Property** (ref., Barry Property ref., Petition DR21-72, OP written testimony Exhibit 5)



The next image of the map shows a further magnification of the area where the Property is located.....



The above magnifications of the Report's page 41 map were done on the Hilo Public Library's high resolution scanner. Other than the obvious text boxes and red lines these maps have not been doctored in any other way.

The 1969 Report's page 41 map enlargements show that the area North of Hakalau and south of the Property, which northern area is also shown on the LUC's 1974 map H-59 and southern area is shown on the LUC's 1974 map H-65, depicted a wide band of land that was "*proposed*" for rezoning to the Conservation District (*dashed green line area*).

The area where the Property is located, however, was depicted in solid green color (*which the legend showed the Property to be in the Agricultural District in 1969 and the Property was neither proposed nor adopted to be rezoned in 1969 according to the text record of the Report*

and the page 41 map). A very narrow band was shown as a single green line along the Oceanside *pali* in the area of the Property.

All that can be determined from the Report's page 41 map is that a **very narrow band of pali land** in the area of the Property was "**approved**" to be rezoned Conservation in **1969** and that a **much wider band** of coastal land to the north and south was also "**approved**" by the Commission to be rezoned. The Report's map page 41 also appears to be in conflict with the district line that is shown on the LUC's **1974** State Land Use District maps H-59 and H-65. The Report's page 41 map shows the areas to the south and north, that were rezoned to the Conservation District, **to be wider** than the area at the Property. No other maps of this character are shown in the Report.

Lex Jotwell, in the Harvard Law Review describes **The Multiple Faces of Textualism - Lex**

lex.jotwell.com/the-multiple-faces-of-textualism/

It is a lengthy document so it is only included by reference herein. It describes how legal interpretations may be either **textual** or **purposivist**.

The Commission must consider the 1969 Commission's **adopted** maps and the **text record** of its **adopted** hearing Transcript and the Commission's 1969 Report. The Commission must apply the textual and purposivist records with an **open mind** and apply that to this Motion.

If **uncertainty** still **remains**, ref., *HAR 15-15-22(f)*, regarding the correct State Land Use District boundary in the area of the Property, the

Commission must also consider and apply *the State's Laws, HRS §205-2 (3) and HRS 205-4 (h)* which requires that Agricultural District zoning receive a higher priority than Conservation District zoning *ie "the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation;"*

The **purpose** of The State's Constitution's section 11.3 Agricultural lands and the Statute *HRS §205-2 (a) (3)* describes is clear.....

(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 apparent redistricting the Property to Conservation did not give the required "**protection**" to the Property's agricultural use. It took over 3 years, hundreds of pages of submitted documents, studies and the like before the DLNR issued a vague letter that appeared to allow that the Petitioners may use the Property for agriculture. The apparent redistricting cannot be described to have given "*the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation*".

Without question the **textual interpretation** of *HRS §205-2 (a) (3)* and its **purposivist interpretation** can only be the same, both in **1969** and today. When the LUC ***approved*** redistricting of land, agriculturally suitable land was to be given **the greatest possible protection**, even **greater than applying Conservation zoning.**

The Property has always had.....

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

and the Property was utilized in the ***intense cultivation*** of ***agricultural crops*** before, during and after **1969** and **it is also a fact** that it *yielded high production of crops economically* just as much as other lands (*ie. Stengle and Muragin*) along the Hamakua Coast.