Appendix 8 DEFERENCE

When the Commission voted to deny Petition DR21-72 (Church-Hildal) (the "**Petition**") on September 8, **2021** (the "**Hearing**") the Commission's discussions and deliberations focused, in part, on whether, upon an appeal, a State Court would apply ***deference*** to the Commission's decision and uphold the denial.

First the Commission's belief that a State Court would/may apply ***deference*** and overturn the Commission's denial of a petition is not listed anywhere in the Commission's decision making guideline authorities. Therefore it is inappropriate that a Commissioner raised the question with the State Office of Planning Representative Alison Kato ("**Kato**") during the Hearing.

The Petition asked that the Commissioners determine the ***factual situation*** that existed in **1969** and apply it to the Petition. The ***text record*** of the Hearing is Hard Evidence that the Commissioners did not ***examine to discover*** the factual situation that was supported by Hard Evidence that was submitted with the Petition, *ref., Exhibit 5*, transcript. The Commissioners questions and comments during the open part of the Hearing and the closed Deliberations section focused on the current situation which had nothing to do with 1969.

The entire hearing process did not have the appearance of an "***open minded commission***" that was interested in the factual situation that existed in 1969. Cross examination of testimony was not allowed. The Hearing had the appearance of the Petitioners against the Commission with the Commission defending its own incorrect boundary interpretation

and controlling whether Hard Evidence was properly examined evenly in an open way.

The following copy is a small sample, from Exhibit 5, the Petition Hearing transcript pages 72-74 (emphasis added).....

COMMISSIONER OKUDA: Thank you, Mr. Chair. Questions for the Office of Planning, and anyone from the Office of Planning can answer this question. What is the standard of review that would be applied to our decision if we granted the petition or denied the petition? What would be the standard of review on appeal?

MS. KATO: On appeal to the court?

COMMISSIONER OKUDA: Yes. Let's say if somebody, an aggrieved party, decided to appeal the decision that we make today, either granting the petition or denying the petition, what would be the

continued on next page.....

standard of review that the appellant court would apply?

MS. KATO: Offhand, I'm not sure what the standard of review is. I believe, generally, deference is given to the LUC's decision, but I would need to look up the specific standard of review. I've not been involved in an appeal yet.

COMMISSIONER OKUDA: If -- is this a case where it's clear that we would be reversed on appeal if we made a decision one way or the other?

I mean, there are some cases where you look at the factual record and the evidentiary record and the pleadings, and, you know, even though nothing is guaranteed in the legal system, you pretty much can predict, hey, if the decision went this way, odds are the appellant court would reverse.

Is this the type of case where, when you look at the record that's being presented, we are compelled to rule one way or the other based on the penalty of we're going to be reversed?

MS. KATO: Well, as I mentioned in my testimony, the Office of Planning and Sustainable Development does not believe that the answer is clear. We don't think that the 1969 report is clear

as to where this boundary is located.

So I think it is up to the LUC's best determination as to where the boundary of the conservation district was intended to be, based on the information before you. So, no, I don't think it's clear.

COMMISSIONER OKUDA: Okay. And so we have the discretion or deference to make the decision; is that correct?

MS. KATO: I believe that's correct. Yes.

Source, Exhibit 5, the Petition Hearing transcript pages 72-77

Commissioner Okuda then went on to question Kato regarding a matter that also had nothing to do with the ***factual situation*** that existed in **1969**. Commissioner Okuda indirectly suggested and/or speculated that the Petitioners would somehow benefit financially by a favorable Commission decision because Commissioner Okuda suggested and/or speculated that the Property had been purchased at a discount because it was Conservation Districted.....

MS. KATO: I believe that's correct. Yes.

COMMISSIONER OKUDA: Now, the Office of Planning and Sustainability -- you're basically like the community watchdog. And, you know, just to use layperson's description, I mean, is that a fair statement?

MS. KATO: I'm not sure.

COMMISSIONER OKUDA: Oh, okay. Well, let me ask the public policy question, then, just to help inform my decision-making a little bit.

You know, from a statewide public policy issue -- and to some extent this is somewhat a follow-up on Commissioner Cabral's initial line of question -- is it a matter of concern to the Office of Planning that some people -- and I'm not accusing the Churches of this at all, but, you know, from an

Testimony continued on next page.....

overall public policy situation, that there are situations where people buy conservation-designated property because it's cheap or priced lower than urban or rural designated property, and it's the intention that, hey, I'm just going to do urban or rural activity on that property, but I got it on the cheap, and more likely than not, the government -- and many times these are the county entities -- aren't really going to enforce the restrictions?

I mean, isn't it true that's really a public policy concern among many of public policy concerns we have? In other words, people don't really deep down respect the agricultural or -- or conservation designation, that it's not -- it's, like, something that maybe we can get around later on down the road?

MS. KATO: I understand that concern and the discussion that happened on it today. At the same time, I don't think it's my place to comment on policy matters. And I think that the immediate question before the LUC on this declaratory order is a legal one. It's a legal interpretation of where that conservation district boundary should be, and I don't think it's a question of policy.

COMMISSIONER OKUDA: Well, in making a

continued on next page.....

legal determination, is the LUC precluded from taking into account what might be the underlying factual situation?

And the reason why I raise that is, you know, just a while ago, as you're probably aware, we were faced with what I would describe as a somewhat technical argument being made to allow short-term vacation rentals on agriculturally districted land -- you know, very cogent technical argument. But, you know, it -- it, in my view, required looking at what is really the reality of going on.

In making our legal determination, are we supposed to shut our eyes to the reality of what might be going on?

MS. KATO: I'm not too sure how to answer that question.

COMMISSIONER OKUDA: No, no, that's fair.

MS. KATO: I understand that you're just going to consider what you -- what you're aware of and what you hear, but in terms of this legal question, it is really a legal question as opposed to, like, a DBA, which is a policy matter.

COMMISSIONER OKUDA: Well, if we have -- and I'm just speaking for myself. If I were to have a concern that this legal question might have

continued on next page.....

factual implications -- or to put it in plain English, there might be a lot more going on than simply a legal question, would I be erroneous to the point where I get reversed on appeal if we said maybe the record's got to be fleshed out more in detail either by scheduling the matter for a hearing or maybe taking it up on some other matter that's already pending?

I mean, would -- would I be totally crazy to come to that kind of conclusion that, hey, when we're dealing with important lands like conservation or we're dealing with agricultural lands, something that the constitution has, you know, given special protection and recognition, maybe we better to make sure we have a complete factual record so that, you know, there's no question what's really going on?

In other words, maybe you don't flesh the record out. Would I be totally wrong to the point where I get reversed by the Hawai'i Supreme Court?

MS. KATO: Commissioner Okuda, I apologize. I don't think that I can necessarily answer that.

Source, Exhibit 5, Hearing transcript, pages 72-75 (emphasis added)

Note line 5 above, "***maybe the record's got to be fleshed out more***" - That is exactly what the Petition asked but the Commissioners did not go

there. Instead the Commissioners questions and comments generally did not "***fleshed out more***" the ***factual situation*** that existed in **1969**. The Commissioners errant questions and comments are too copious to be copied into the text of this Appendix. The Petitioners refer the reader to Exhibit 5, transcript.

Had the Commissioners read the Petition and its Exhibits and refreshed their memory of a former Petitioner filed Petition A18-805 which was cited in the record and ***referenced*** by the Petitioners, the Commissioners would have been very aware of "***whats really going on***" (see Commissioner Okuda comment above).

Next the Petitioners point to Commissioner Chang's reasoning, during Deliberations, where she cited, as one of 4 reasons why she would be voting to deny the Petition she stated.....

```
20 extremely committed, and they've done a lot of work
21 -- but this appears to be essentially a DBA. And if
22 it was a DBA, there would be notice provided to all
23 of other interested parties.
```

Source, Exhibit 5, page 127, Hearing transcript (emphasis added)

Commissioner Chang's reference to a "***DBA***" regarding ***public notice*** requirements, which condition she felt had not been met, is an example of how she was not familiar with the ***record***. The Commissioners had already voted that the Hearing proceed to Deliberations certifying that they were familiar with the ***record***. Commissioner Chang should have been more familiar with the submitted ***record*** which included the record

that she referred to. Just a few months earlier the Commission unanimously voted to approve that the requirements of a DBA had been met regarding a "***notice provided to all of other interested parties***", *ref.,* ***Petition A18-805's EA and FONSI*** *, which the Commissioners approved in June of 2020* and which was for the area of the Property. The ***record*** is that public notice was given and there were no comments from the public what-so-ever. The record of Commissioner Chang's vote to approve the EA and FONSI is.....

Brief Description of the Proposed Action

Applicants have petitioned the LUC to reclassify approximately 3.4 acres of land located at South Hilo, County and State of Hawai'i, from the SLU Conservation District to the SLU Agricultural District. The Applicants are pursing the DBA to allow the for the continuation of existing agricultural uses and structures previously permitted.

Determination

The LUC has determined that the Proposed Action will not likely have significant impacts on the environment and that a FONSI is warranted.

Reasons Supporting Determination

The LUC's analysis and determination of a FONSI is based upon the significance criteria set forth in HAR §11-200.1-13. In summary, the LUC determined that, given the size, nature, and scope of the Proposed Action, as well as the surrounding environment and neighboring land uses, the Proposed Action:

(a) will not impact any threatened or endangered plant or animal species;
(b) will not impact any archaeological or cultural resources, or the exercise of traditional and cultural practices;
(c) will not inhibit public access or impact public views;
(d) will not impact or otherwise degrade the natural environment or any environmental resources, including air and water quality;
(e) will not impact public health, services or facilities, or the socioeconomic welfare of the people of the State and County of Hawai'i; and
(f) will not result in secondary or cumulative impacts.

Source, LUC's FONSI letter to OEQC (emphasis added)...
link: https://luc.hawaii.gov/wp-content/uploads/2020/11/A18-805_Church_OEQC-Transmittal_Ltr_FEA-FONSI_11-12-2020.pdf

Next returning Exhibit 5, the transcript of the Hearing, Commission Chair Scheuer speaking.....

> Commissioners, let me confirm that each of you are fully familiar with the record, you have reviewed the record, and are prepared to deliberate on the subject docket. After I call your name, please signify orally with either an aye or any that you are prepared to deliberate on this matter.

Source, Exhibit 5, September 8, 2021, Hearing transcript, Commission Chair quoted above....page 118

All Commissioners unanimously subsequently voted and approved to move to the Commission's Deliberations section of the Hearing certifying that they were familiar with the Petition, its Exhibits and the record.

In the earlier copied questioning by Commission Okuda, Kato repeatedly tried to direct Okuda back stating her belief that the Petition was to be determined as "***a legal question***" referencing that Petition was to be considered based on the factual situation that existed in **1969**.....

> *"And I think that the immediate question before the LUC on this declaratory order is a legal one. It's a legal interpretation of where that conservation district boundary should be, and I don't think it's a question of policy"*

And in another place she repeated again.....

> "*but in terms of this legal question, it is really a legal question as opposed to, like, a DBA, which is a policy matter.*"

And finally she appeared to give up and Kato stated.....

> "*Commissioner Okuda, I apologize. I don't think that I can necessarily answer that.*"

Like Commissioner Okuda the other Commissioners questions throughout the Hearing, including Deliberations, the Commissioners questions and reasoning focused heavily on the written and verbal testimony that had nothing to do with the ***factual situation*** that existed in **1969**, *see Deliberations section of the Memorandum*. Similarly, throughout the Hearing, Kato repeatedly pointed the Commissioners back to the ***legal*** essence of the Petition, that the ***factual situation*** that existed in **1969** should be what the Commissioners should apply and Kato reminded that the Petition was not a DBA (a DBA is a discretionary order by the Commission).....

> "*but in terms of this legal question, it is really a legal question as opposed to, like, a DBA, which is a policy matter.*"

While the Petitioners also believe, that the Commission was supposed to determine the ***factual situation*** that existed in **1969** it was clear throughout the hearing, among several other questions and noted Deliberations, that the Commissioners believed that the Petitioners had bought ***cheap land*** (which it was not). Several other Commissioner questions and noted Deliberations were supposed to be relevant to the Commissioners HAR 15-15-100 decision making criteria for a Declaratory Order (a "**DR**"). The Commissioners appeared to believe that the Property's Conservation District zoning somehow made it a '***cheap purchase***'. The Commissioners were incorrect.

The Petitioners bought Oceanside land, 4.6 acres, 3 TMK Lots (the "**McCully Land**"), and intended to use it for agriculture believing that its apparent Conservation Districting would not interfere with the agricultural use of the land because, during the period following its apparent Conservation Districting in **1969**, agricultural use of the 4.6 acres had gone on for 23 years without any ***permit*** or ***approval*** from the DLNR being required or applied even though the DLNR HAR 13-5-6 (d) required the DLNR's "*approval*" for such a use.....

> *"No land use(s) shall be conducted in the conservation district unless a permit or approval is first obtained from the department or board."*

While the DLNR's Nonconforming use rule, HAR 13-5-7, provided for the continuance of existing uses HAR 13-5-6 (d) clearly required the DLRN's "***approval***" first. In effect such an "***approval***" would be recorded in the DLNR's files, the LUC's files and the State and County Office of Planning files also. What a difference, such a formal and legal recording, would have made to the struggles that the Petitioners suffered through and continue to suffer through to this very day!

The DLNR's HARules for Nonconforming Use are different than the LUC's HARules for Nonconforming Use. The DLNR's HARules also allow the resumption of Nonconfoming Use whereas the LUC's HARules do not if the Nonconforming use is discontinued for a period greater than one year. This was confirmed in the State's Auditor General report to the Governor which can be viewed at the following LUC's link.....

https://luc.hawaii.gov/wp-content/uploads/2019/04/exhibit-6-Auditors-review-of-DLNRs-Nonconforming-use-Rules.pdf

The Hard Evidence of Exhibits and Hearing testimony describe the ***factual situation*** that the Petitioners originally purchased the **McCully Land** in **2014**, intending to develop the **McCully Land** for agricultural production and a residence. Land costs were not discussed during the Commission's Hearing for the Petition (Church-Hildal) nor did a discussion of land costs exist in the Petition or its Exhibits.

The Petitioners have always believed that land cost is irrelevant to the ***factual situation*** that existed in **1969** and that is why the Petitioners did not discuss the cost of the **McCully's Land** in the ***text record***. None-the-less Commissioner Okuda and Cabral both referred to land cost relevant to a State Court subsequently applying ***deference*** favorable to the Commission's denial of the Petition, relevant to ***land cost***. Therefore the Petitioners describe ***land costs*** herein in this Motion for Reconsideration.

It is a ***factual situation*** that the **McCully Land** was not "***cheap***" due to its apparent Conservation District zoning. It actually was more expensive than another comparable Coastal property that the Petitioners considered purchasing at the same time as the **McCully Land**, which comparable land lay 30% in the Conservation District and 70% in the Agricultural District , (the "**Other Land**").

- The **Other** land was TMK (3) 2-8-008: 127.

- The **Other Land** comprised **4.8 acres** (compared to the **McCully Land** which was 4.6 acres).

- The **Other Land** was also on the ***Hamakua Coast***.

- The **Other Land** was closer to the City of Hilo by a distance of approximately 4 miles.

- The **Other Land** had a very large modern residence, a large swimming pool, a large horse stable and a fenced pasture area for the horses food source and the recreational use of the horse by horse riders. The pasture could easily have been converted back to a true agricultural use.

- County taxes on the **Other Land** was almost twice what the **McCully Land** taxes were.

While the Petitioners dithered over the high taxes vs. the potential for offsetting agricultural income, the **Other Land** was sold before the Petitioners could make an offer to purchase. While that property had been developed for recreational, equestrian use, it could have been easily converted to commercial agricultural use. About 30% of that lot's makai side was in the Conservation District and the remaining portion, where the residence, stable and pool were located was in the Agricultural District. The fenced pasture area overlapped both SLUDistricts.

- The **Other Land** was sold for $30,000 more than the **McCully's Land** sale to the Petitioners but again the **Other Land** already was ***fully developed***.

Comparatively the Petitioners purchased the **McCully Land's** 4.6 acres of ***undeveloped land*** that appeared to be entirely in the Conservation District. Any belief that the Commissioners may have had that the Petitioners purchased comparatively ***cheap*** land because of its Conservation Districting is ***factually incorrect***.

Furthermore the Petitioners also considered the purchase of an urban property with a big modern residence on it and coastal frontage with access to a rocky shore. That property was even closer to Hilo. It was too small to develop any agricultural potential. It was also in the same price range. The Petitioners did not closely consider that property because it had no agricultural potential.

The point is that Conservation Districting of land in 2014 did not seem to reduce the value of land. Commissioners Okuda and Cabral were both incorrect.

In **2014** the real estate market was still suffering from the **2008** financial crisis. Very little land had been sold during the period. Prices were soft and sellers were willing to bargain. Both the **Other Land** with a residence and a horse stable **and** the **McCully Land** had been on the market for several years with almost no interest by potential buyers. In the end the Petitioners purchased the **McCully Land** intending to revert the regularly mowed grassy field area to meaningful agricultural use in order give the

Petitioners a meaningful retirement purpose (farming woody orchard species) which the Petitioners believed would also add to their retirement income.

Petitioner Church was very familiar with farm life. He was born on a farm where he supported the work load of the agricultural farming activities until the age of 18. Thereafter Church's entire professional career evolved around agricultural related careers - *2 clerk positions, one in feed sales and another in fertilizer sales, a Co-op farm supply manager, a livestock equipment sales person and finally a livestock equipment manufacturing business*.

After purchasing the **McCully's Land** in **2014** the Petitioners encountered an enormous 3 year delay in implementing meaningful agricultural use of the land through the DLNR's administrative processes. During that period the Petitioners had only been allowed to plant 14 fruit trees. The Petitioners also encountered large permit filing fees, significant travel costs to defend their applications to the DLNR in Oahu, enormous resistance from the DLNR that any land disturbance be allowed, ***ie. agricultural uses***, and particularly ***commercial*** land use. The DLNR representative directly told the Petitioners that any ***commercial*** use of Conservation Districted land would be strongly resisted by the DLNR. The representative advised that ***commercial*** use would even require public hearings as part of the EA and FONSI approval process and even then it would be a ***discretionary approval*** by the Board of the DLNR with highly restricted land uses in the form of a written contract.

Late in **2017** the Petitioners sold one of the 3 TMK lots, that they purchased from the **McCullys** because they were not able to secure a firm, **formal** and legal ***approval*** from the DLNR that their agricultural use of the land would be/was ***allowed*** and the Petitioners had become ***time line*** and ***financially*** exhausted by the DLNR's ***approval*** process. The Petitioners then turned their focus away from developing the agricultural use of the land to developing a residence on the remaining two TMK Lots. In late **2018** the Petitioners resumed and expanded their agricultural use of the 2 TMK Lots and they also applied to the LUC to redistrict the land to the Agricultural District and more recently filed the Petition.

The Petitioners presently have extensive agricultural plantings of over 70 different plant fruiting and plant food species (mainly woody orchard plants) on the Property, *ref., Exhibit 41 plant list*. The Petitioners have also developed a potted plant nursery and a considerable number of specimen plants from which propagation scion wood is intended to be extracted for propagation, use and sale. The Petitioners did this on the strength of a final letter from the DLNR that vaguely allowed agricultural use and a more recent Petitioner belief that the Property was not zoned Conservation in **1969**.

During the early permitting process with the DLNR and believing that agricultural use would be ***allowed*** the Petitioners built a DLNR and County approved 720 sq. ft. agricultural use storage and processing structure that was intended to be accessory to the agricultural use of the Property in **2015**. The structure cost in excess of $70,000.00. The Petitioners have also invested heavily towards their planned agricultural

use of the Property which investments also include a $40,000.00 farm tractor with a front end loader, a back-hoe and a rototiller attachment and miscellaneous tools etc..

The Petitioners formally joined the Hakalau Farmers Market and began selling agricultural produce in **2020** at the local farmers market. The Petitioners suspended sales when they realized that the ***commercial*** agricultural use of the Property may be illegal due the Property's apparent Conservation District zoning.

During the Commission's Hearings for the Petition, Commissioner Okuda asked whether the Petitioners had a ***tax license,*** presumably in order to demonstrate that the Petitioners had previously demonstrated their sincerity in developing their agricultural operation. This question was irrelevant to the factual situation in **1969**, which is what the Petition was about. Anyway a tax license provides that agricultural land use related supplies may be purchased without the payment of State sales tax.

The Petitioners were not aware that such a tax avoidance license existed and more recently the Petitioners have not been so concerned about avoiding the payment of sales tax as most of their major ag. related purchases had already occurred. That situation will likely change once it is clearly established that the Petitioners may ***legally*** use the Property for "***commercial***" agricultural production. The Hard Evidence is that Commissioners are ***factually incorrect*** that the Petitioners may have purchased ***cheap*** land intending to simply enjoy a large Oceanside property for personal residential use and it is irrelevant anyway to the ***factual situation*** that existed in **1969**.

Therefore the Commission erred as a matter of law and the record, in part, because the denial of the Petition was ***prejudicial***, ***arbitrary*** and ***capricious*** and in a ***discriminatory way*** and the Commission did not appear to reasonably consider and apply the ***factual situation*** that existed in **1969** and also apply the State's Law, HRS 205-2 (a) (3), HRS 205-4 (h) and the Commission's HAR 15-15-19 (1) if ***uncertainty*** existed regarding the mind of the **1969** Commissioners' regarding their redistricting "***action***", which is described in detail in the Petition, the Motion, the Memorandum, the Exhibits and the Appendix(s).

For the purposes of a legal ruling regarding whether a Court apply "Deference" supporting the Commission's denial of the Petition the Petitioners point to the following numbered sections.....

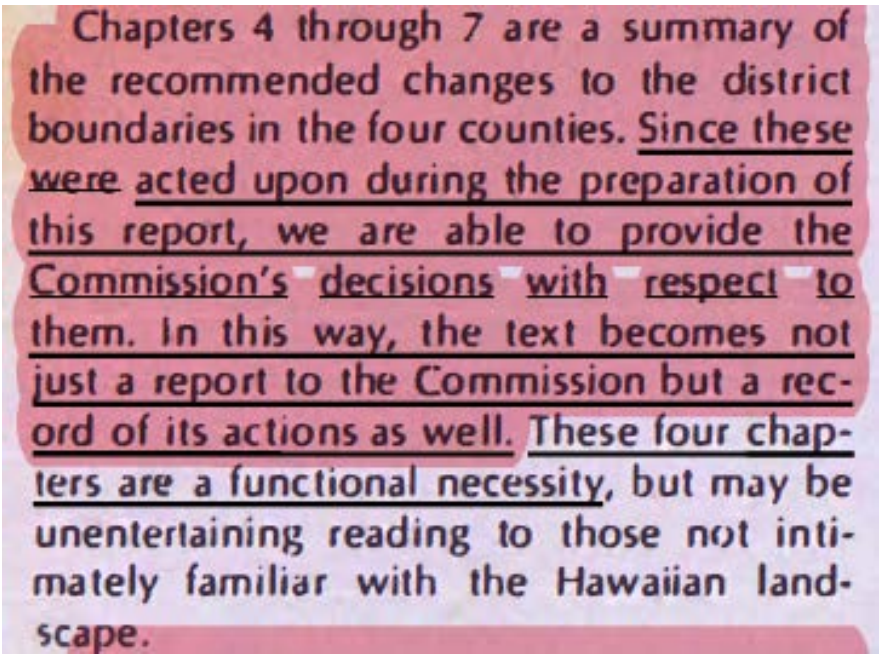
1. Because the State Land Use District (the "**SLUD**") line on the Commission's Official **1974** map H-59 is not a legally ***defined*** line, and the Petitioners have Petitioned that the Commission apply **other commission records** (ref., HAR 15-15-22 (d)).....

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

   in order to interpret the SLUD boundary's ***defined*** location. The Commission has to determine where is the ***text record*** that supports the Commission's adoption of SLUD map H-65. At some point the extension of the Conservation District southward from East Kohala along the Hamakua Coast to Hilo, by redistricting existing Agricultural zoned land to the Conservation District, has to have resulted from a

redistricting "**action by the Commission**" that is recorded in some form of a ***text record*** and ***a map*** which the State's Law and the Commission's rules provided for. The Petitioners Evidence the ***text record*** of the Report and now also the Transcript of the final **1969** Commission redistricting hearing, *ref., Exhibit 32, the Report, and Exhibit 43, transcript.*

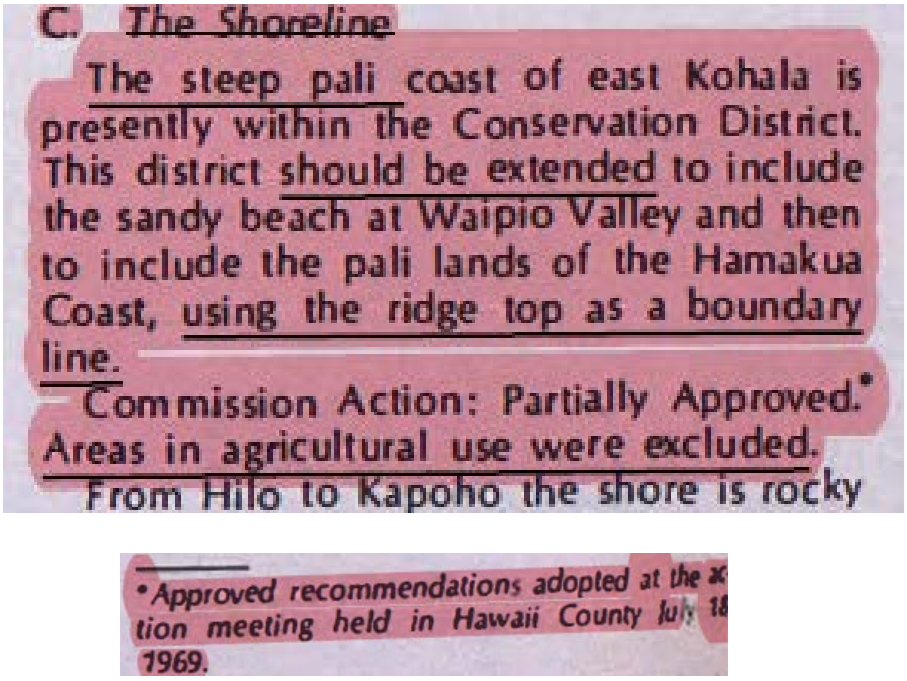
Redistricting legal process requires that the Commission conduct public hearings, deliberations etc. and a final redistricting ***action*** by the Commission. The ***text record*** of the **1969** Commission hearing transcripts, *ref., Exhibits 43-45* and the ***text record*** of the Report are a record of the Commission's ***actions*** and the adopted map H-65 which has an ***undefined reference*** boundary line on it can only be applied as an interpretive Commission adopted ***reference*** document.



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, the Report's page 3

continued on next page.....



C. The Shoreline

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

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

From Hilo to Kapoho the shore is rocky

*Approved recommendations adopted at the ac tion meeting held in Hawaii County July 18 1969.

Source, Exhibit 32, the Report's page 36

Further in this regard **if** the ***text record*** of the **1969** Commission hearing transcripts and hearing minutes, ref., Exhibits 43-45 and the ***text record*** of the Report are determined by the Commission to be subordinate to district maps, ***confusing*** **or** visa -versa then the Commission should apply the State's Law HRS 205-2 (a) (3) and HRS 205-4 (h) and the Commission's own HAR 15-15-19 (1) in order to resolve ***uncertainty*** and ***confusion*** if it exists. The State's Laws make it clear that when the Commission considers the districting of land the "***greatest protection***" be given to land that has "***a high capacity for agricultural production***". The word "***greatest***" is succinct, meaning that no other districting priority is to be applied if land has "***a high capacity for agricultural production***" **not even Conservation**. Finally the word "***capacity***" refers to a characteristic of

land and not a past, present or future anticipated land use.

It is difficult to rationalize how the Commission gives ***deference*** to its SLUD maps in one case and the Report in another for very similar land, *ref., DR99-21 Stengle and Muragin boundary interpretation 07-19*. In **1969** the Commission **adopted** new SLUD maps. The ***text record*** of the Transcript of the Commission's final redistricting hearing, Exhibit 43, was/is of a higher authority than a map with an ***undefined reference*** district line on the map.

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

Exhibit 43, transcript for the **1969** Commission's final redistricting hearing evidences ***Commission's Executive Officer Duran*** explanation to the Commissioners regarding 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 Ocean front 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*.

The **present Commission** struggled, during the Hearing in determining whether the LUC's official 1974 SLUD map H-65 held a higher authority than the Report. The Commission applied that and earlier version of the map H-65 had been adopted by the 1969 Commission and the Report was simply a record of the Commission that had not been adopted. Now the Petitioners also present the Hard Evidence of the text record of the Transcript of the Commission's final redistricting hearing in 1969 which Transcript was also adopted by the 1969 Commission.

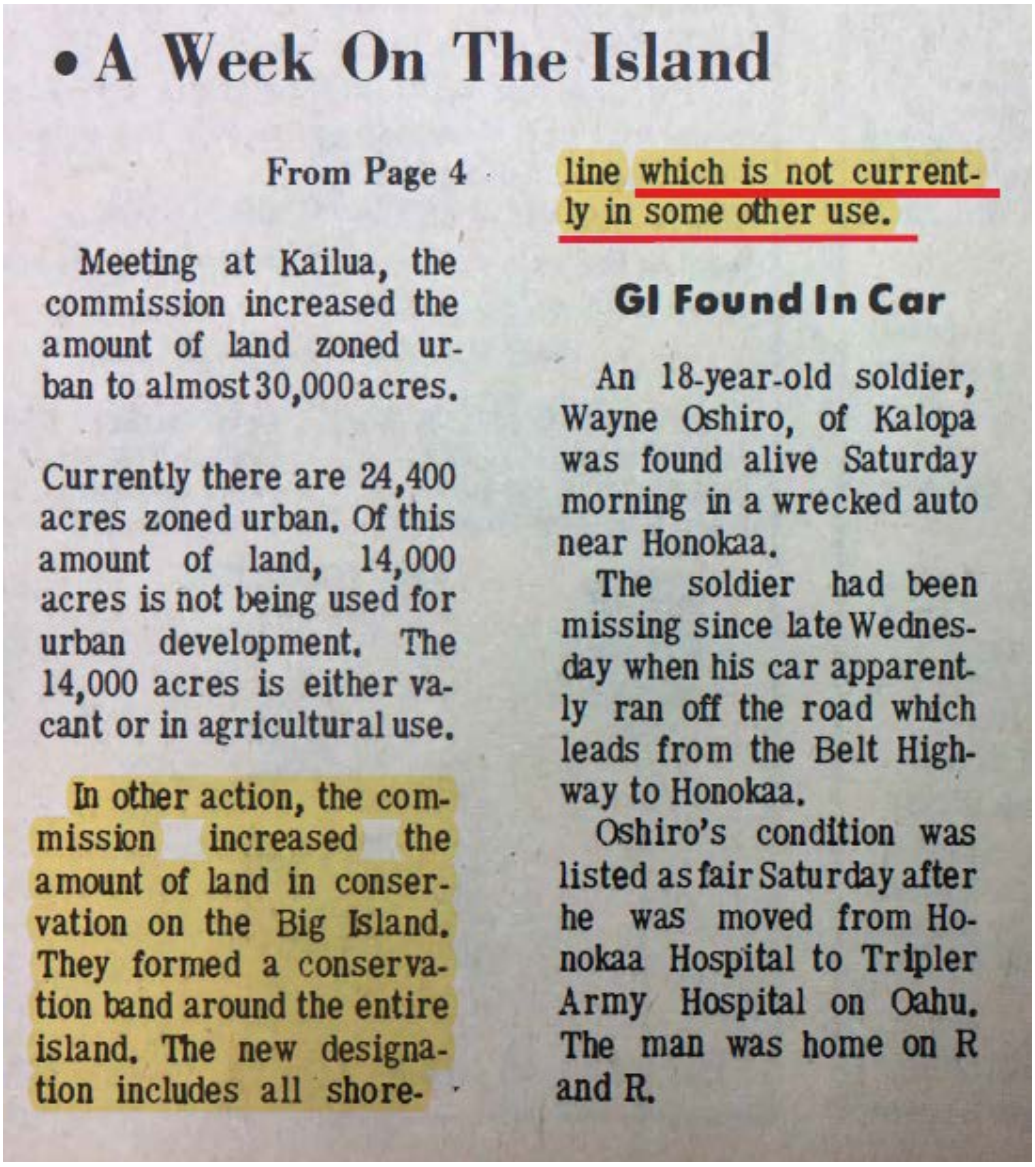
Exhibit 43 Transcript also mirrors the text description of the Commission's redistricting that is described in the Commission's Report, *ref., Exhibit 32 Report*.

Sugar cane was generally farmed right up to the top of the coastal pali "***ridge top***" throughout the ***Hamakua Coastal*** area, *ref., field map, Exhibit16 & 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 Report and now also the **1969** Commission's final redistricting hearing Transcript, *ref., Exhibit 43,* clearly stated that "***Areas in agricultural use were excluded***" from all redistricted lands between "*east Kohala, to the north and the City of Hilo to the South.* For the **present** Commission to apply the maps and Maps in one case and the Report in another makes the Commission's Boundary interpretations

arbitrary and **capricious** and subject to **prejudicial challenge**.

Further evidence now is provided in Exhibit 28 (newspaper article) that further substantiates the mind of the **1969** Commissioners' where the Report's page 36 described that "***Areas in agricultural use were excluded***." (which is copied above from the Report).....



• A Week On The Island

From Page 4

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

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

In other action, the commission increased the amount of land in conservation on the Big Island. They formed a conservation band around the entire island. The new designation includes all shoreline which is not currently in some other use.

GI Found In Car

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

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

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

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

It is a matter of Evidence that the Property was in agricultural use

leading up to **1969**, and for many years subsequent to**1969**, *ref., exhibits10, 15,16, 20, 23.*

and .....

the above quoted hearing transcript of Commission Executive Officer *Duran* identified to the **1969** Commissioners that the resolution before the Commission, for its consideration and ***adoption*** of district ***maps***, was, in part, to apply to ***coastal lands*** that had existed, since **1964** in the State's Agricultural District, be redistricted Conservation ***but not lands or portions of lands that were in agricultural use***, *ref., above copied Exhibit 43, final* ***July 18,*** **1969** *Commission Hearing transcript.* In the end the Commissioners ***adopted*** the resolution..

COMMISSIONER:

Mr. Chairman, I move that the district boundary maps for the County of Hawaii shown on the maps now before this Commission and dated July 18, 1969, be adopted with the rezoning of lands as shown by the revised district (inaudible) maps to be effective concurrently with and subject to the rules and regulations of this Commission, adopted July 8, 1969.

Source, Exhibit 43, Page 33, hearing transcript (emphasis added)

MR. DURAN:

Motion is carried, Mr. Chairman.

Source, Exhibit 43, Page 33, hearing transcript (emphasis added)

Particular emphasis is pointed to in the above copied transcript that ***adopted 'Maps that were dated July 18, 1969 exist'*** and are

evidence of the Commission's Official Record of what the **1969** Commission's redistricting ***intention*** and ***actions*** were. The **current version** of SLUD map H-59 (ie Stengle and Muragin) does not reflect the district boundary line that was depicted on the **July 18, 1969** Map that was ***"adopted"*** by the **1969** Commission. Also the **July 18, 1969** Map SLUD map H-59 was redrawn first in **1974** and again in **1999**.

2. The "Official" **1974** map H-65, that the **present** Commission applied in the Petition was not the map that the **1969** Commission considered and adopted in **1969**. The Report did refer to at least one relevant map which is shown on its page 41, *ref., Exhibit 6*.
The proposed and adopted district maps and Maps can be found in *Exhibit 46, maps*.

This was further described in an a Commission Declaratory Order DR99-21 (Stengle), *Exhibit 1*, for a very similar neighboring property which the Commission allowed.....

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."

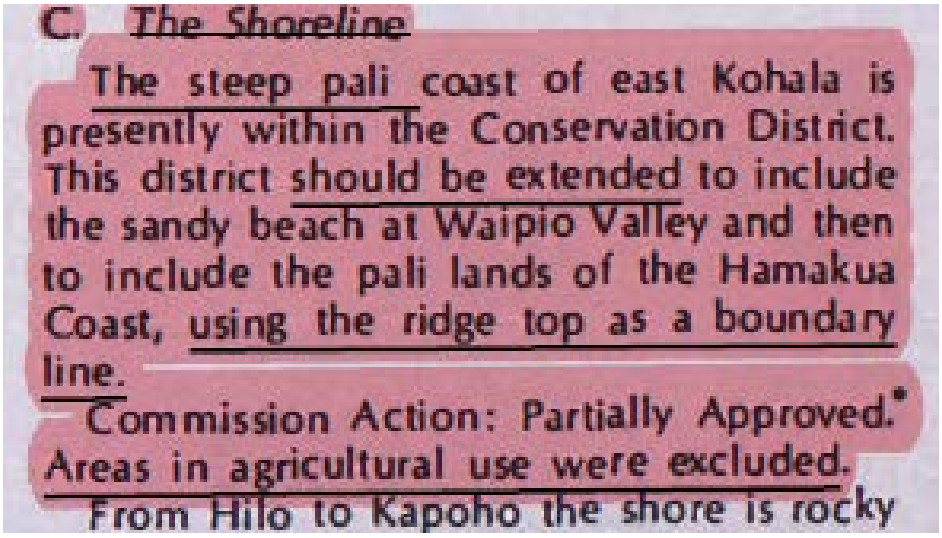
Source DR99-21 (Stengle), (emphasis added)

Note above: "***BASIS FOR AGRICULUTAL / CONSERVATION BOUNDARY DETERMINATION. There are two reference sources used in determining the location of District boundaries.***"

3. The Report and the **1969** Commission hearing transcripts, *ref., Exhibits 43-45*, are the only **other commission records** that directly apply to the ***recommended*** map(s) and ***final adopted*** Map(s) and these Exhibits and the Report provide the only known existing guidance regarding the mind of the **1969** Commission when it redistricted ***Hamakua Coastal*** land from the Agricultural District into the Conservation District.

   The ***text record*** of the **1969** Commission hearing transcripts, *ref., Exhibits 43-45* and the ***text record*** of the Report, *ref., Exhibit 32,* do not identify that only certain coastal agricultural use lands were excluded from redistricting but rather ***all agricultural use lands were excluded***. The ***undefined reference*** district boundary line, that is shown on the Commission's **1974** SLUD map H-65, is overdrawn on areas containing many Coastal properties and, which line, bisected the agricultural use field areas that existed in **1969** in many areas, including the area of the Property.

The Report's page 36 evidences that the 1969 Commission ***approved*** that the district line, in the area of the Hamakua Coast, was to be the ***ridge top***. .....



C. The Shoreline

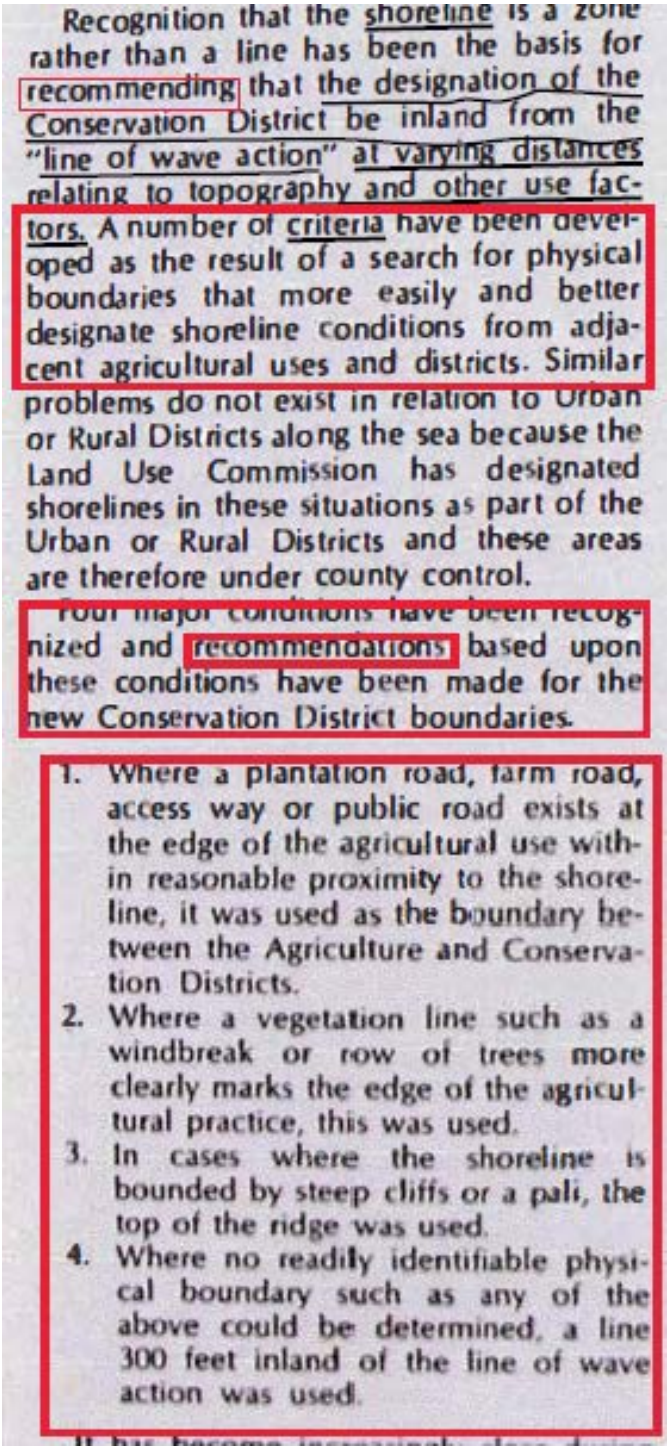
The steep pali coast of east Kohala is presently within the Conservation District. This district should be extended to include the sandy beach at Waipio Valley and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line.

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

From Hilo to Kapoho the shore is rocky

Source, Report page 36, (emphasis added)

4. The Report's page 86 described how the consultants developed ***recommended*** redistricting maps. The Report's page 36 described that the 1969 Commission only "***Partially Approved***" the maps for the Hamakua Coastal area. The Report's page 86, criteria #3 described that when a steep coastal pali or ridge existed, the ***ridge top*** be applied as the district boundary.....



Recognition that the shoreline is a zone rather than a line has been the basis for recommending that the designation of the Conservation District be inland from the "line of wave action" at varying distances relating to topography and other use factors. A number of criteria have been developed as the result of a search for physical boundaries that more easily and better designate shoreline conditions from adjacent agricultural uses and districts. Similar problems do not exist in relation to Urban or Rural Districts along the sea because the Land Use Commission has designated shorelines in these situations as part of the Urban or Rural Districts and these areas are therefore under county control.

Four major conditions have been recognized and recommendations based upon these conditions have been made for the new Conservation District boundaries.

1. Where a plantation road, farm road, access way or public road exists at the edge of the agricultural use within reasonable proximity to the shoreline, it was used as the boundary between the Agriculture and Conservation Districts.
2. Where a vegetation line such as a windbreak or row of trees more clearly marks the edge of the agricultural practice, this was used.
3. In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used.
4. Where no readily identifiable physical boundary such as any of the above could be determined, a line 300 feet inland of the line of wave action was used.

Source, Report page 86, (emphasis added)

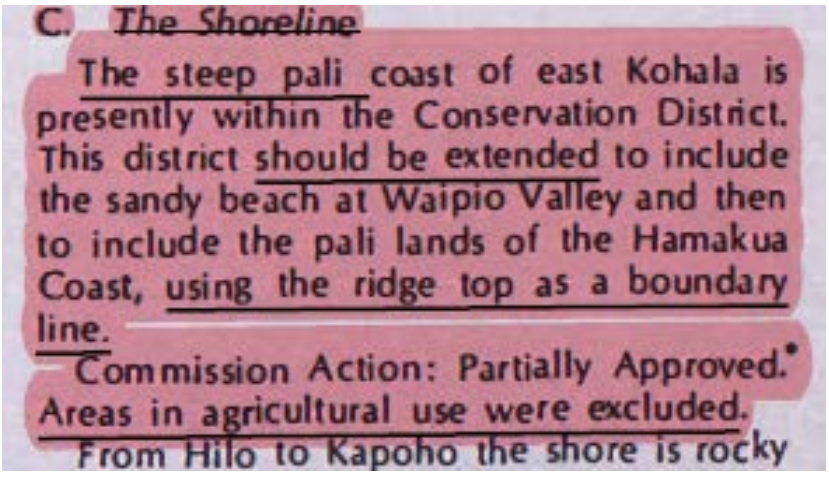
Also LUC Boundary Interpretation No. 07-19 (Muragin) described that the "***Top of Sea Pali***" was to be applied in the case of a property

located a short distance to the north of the Property that is shown on SLUD map H-59.....

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, Boundary Interpretation No. 07-19, (Muragin)
exhibit 2 (emphasis added)

Of relevance here is the above copied excerpt from the Boundary Interpretation letter directly refers to *the Report which was adopted by the Commission on August 4, **1969*** and which Report's page 36 does not refer to the Commission's Map H-59 but rather the Report refers to the area of the ***Hamakua Coast*** having been redistricted without reference to certain map areas of the ***Hamakua Coast***.....



C. The Shoreline

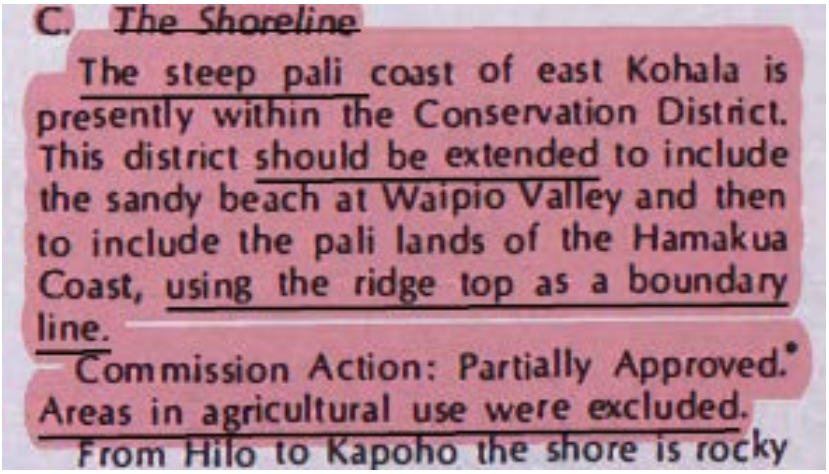
The steep pali coast of east Kohala is presently within the Conservation District. This district should be extended to include the sandy beach at Waipio Valley and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line.

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

From Hilo to Kapoho the shore is rocky

Source, Report page 36, (emphasis added)

5. Nowhere does the **1969** Commission hearing transcripts, *ref., Exhibits 43-45* and the ***text record*** of the Report describe that any particular district map be authoritative over either of the ***text records.*** Page 3 of the Report defines that interpretation and deference be applied to ***the text record*** of the Commission's "***actions***" at final Community meetings, *ref., Report page 36*.



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

Source, Report page 36, (emphasis added)

6. The ***text record*** of the Report's ***Chapter 5***'s page 36 evidences the mind of the **1969** Commission when it ***approved*** the redistricting of Hamakua Coast land .....

   "*the **pali lands** of the **Hamakua Coast**, using the **ridge top** as a boundary line*" (emphasis added)

7. The ***text record*** of the Report, chapter 5's, page 36 ***further evidences*** the **purposivist** mind of the **1969** Commission when it described its ***approval*** of the redistricting of Hamakua Coast land..... "***Areas in agricultural use were excluded***".

8. As is copied above the Report's page 3 evidences the mind of the **1969** Commission where it is recorded that ***the text record*** of the Report was to be applied as the final authority when interpreting district lines.

> "***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."*
>
> (emphasis added)

9. HRS 205-2 (a) (3) described to the **1969** Commission the will of the Government in its **law** and that law also applies to the Commission today.

> *'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 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 the Commission **correctly** finds that the (i) Report's maps and the (ii) LUC's **1974** SLUD Maps vs. the ***text record*** of the **1969** Commission hearing transcripts, *ref., Exhibits 43-45* and the Report are in conflict the Commission must consider and apply HRS 205-2 (a) (3) and HAR 15-15-19 (1) in order to remove ***uncertainty*** (*ref., "uncertainty" HAR 15-15-22(f)*),

The word *capacity* , which is found in HRS 205-2 (a) **(3) 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 70 different orchard plant species and/or species cultivars 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 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."

10. The Commission applied the Report in DR99-21 Stengle citing it as a 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) exhibit 1, (emphasis added)

11. The Commission applied the Report in its Boundary Interpretation (Muragin).....

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, Boundary Interpretation No. 07-19, (Muragin)
exhibit 2 (emphasis added)

12. In the LUC's boundary interpretation No. 07-19 (Muragin) the LUC applied the legal authority of the text record of the Report which evidenced that Hamakua Coastal land, particularly land that was in agricultural use, mauka of ***the coastal ridge top*** was in the Agricultural District.

13. Appendix 3 describes comparable Commission boundary interpretations, Declaratory Orders etc.. Therefore the Commission's denial of the Petition (Church-Hildal) is arbitrary and capricious, discriminatory and it conflicts with the Commission's redistricting actions in 1969 and finally it conflicts with the State's Law HRS 205-2 (a) (3).

14. The **present** Commission expressed a belief that map H-65 was different than map H-59 because on map H-65 the SLUD ***reference*** line on the map appeared to follow the railroad '***for all or nearly all of the map***' vs. map H-59 which appeared different, *ref., Exhibit 5, hearing transcript, page 96, line 11*. The **present** Commission was

incorrect. The SLUD ***reference*** line on map H-59 also was overlaid on the former coastal railway just like it was on map H-65, *ref., Exhibit 1, Stengle map, Exhibit 2, Muragin map and Exhibit 3 the Property map*.

It is irrelevant whether the SLUD ***reference*** line appeared to follow the Coastal "***ridge top***" **or** was 300 ft. inland **or** appeared to variably follow the railroad. The ***text record*** of both the Report's page 36 and the **1969** Commission's July 18, **1969** hearing transcript both describe that in Coastal areas, lands or portions of lands that were in agricultural use in **1969** were not to be redistricted into the Conservation District.

The lines on the maps were SLUD ***reference*** lines that were intended to be interpreted against ***text records*** in order that the Commission establish a ***defined*** boundary when/if applied for by a land owner. In the case of the Property, the mauka portion of the Property inland of the Coastal "***ridge top***" was in agricultural use in **1969**, *ref., Exhibit 10, John Cross letter, Exhibit 16, field map, Exhibit 22, **1905** field map, Exhibit 29, **1992** TMK map and **1952** and **1965** pictures.* Therefore the current boundary interpretation 92-48 is incorrect.

15. And now the ***text record*** of the **1969** Commission's redistricting hearing transcripts and hearing minutes, *ref., Exhibits 43-45*, also describe that Coastal lands that were in agricultural use in **1969** were not to be redistricted. This is also described in detail in Appendix 1.

The Petitioners believe that it is grossly unfair to force them through the very time consuming and expensive Court system for a decision that is so plainly obvious and that is supported by a ***preponderance of*** **Hard Evidence** **in order that the Commission's work load not likely increase regarding other similar situations**. It is unlikely that a Court would rule against the Petitioners. It is likely that forcing the Petitioners through the Court system will increase the Commission's work load and not decrease it.