APPENDIX 9
HISTORICAL AND OUR AGRICULTURAL USE OF THE PROPERTY

As a preliminary matter the Petition is only relevant to the ***factual situation*** that existed in **1969**. None-the-less the Commissioners comments and questions during the LUC's Hearing for the Petition DR21-72 (the "**Petition**") strayed into irrelevant topics such as our current use of the Property for agriculture and many other unrelated topics as well.

When the Petitioners ("**We**") purchased the **Property** it was comprised of 3 lots. The vendor's listing was for a block sale of all three lots. We believed that the Property's 4.6 acres would give us a meaningful retirement purpose (farming woody orchard species) which We believed would also add to our retirement income. We recognized that the Property had been in cane production until **1992**. We were aware that the State's Governor was pressing the State's administrative authorities to facilitate expansion of the agricultural industry on the Island so We reasoned that formally allowed agricultural use would be easily achieved.

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 Property in **2014** We encountered an enormous 3 year delay in implementing meaningful agricultural use of the land through the DLNR's administrative processes. During that period We had only been allowed to plant 14 fruit trees. It is difficult to help the Commissioners to understand just how difficult the DLNR's permitting processes are. Here are just two examples.....

- a permit for planting orchard species trees suffered a considerable delay because We had not described in the application what We intended to do with the shovel full of dirt that We removed from the each planting hole,
- another delay was encountered when the DLNR required a second botanical study for the Property - the DLNR rationalized that '*a bird may have flown over the grassy field area and dropped a seed of an endangered plant that may have germinated there*' - We explained that We regularly mowed the grassy field area so it was unlikely that such a plant existed - none-the-less the DLNR insisted a very costly new study be conducted by a licensed professional - no special plants were found.

We also encountered large permit filing fees, significant travel costs to defend our applications to the DLNR in Oahu. We encountered enormous resistance from the DLNR that any land disturbance be allowed, *ie. agricultural uses*, and particularly ***commercial*** agricultural land use.

The DLNR representative directly told us 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** We sold one of the 3 TMK lots, that We purchased from the McCullys because We were not able to secure a firm, formal and legal *approval* from the DLNR that our agricultural use of the land would be/was ***allowed*** and We had become ***time line*** and ***financially*** exhausted by the DLNR's ***approval*** process. We then turned our focus away from developing the agricultural use of the land to developing a residence on the remaining two TMK Lots (this will be described in more detail subsequently herein).

In late **2018** We resumed and expanded our agricultural use of the 2 TMK Lots without securing a Conservation District Use Permit from the DLNR. Instead the DLNR had issued a vague letter to us which described that We were allowed to resume the historical use of the Property for agriculture without any permit being required as an ***allowed*** nonconforming agricultural use. **The DLNR written *approval* included that We were *allowed* to cultivate the soils of the Property right up to the Coastal "*ridge top*".**

We 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*. We have also developed a potted plant nursery and a considerable number of specimen plants from which propagation scion wood is intended to be harvested for propagation use and sale. We did this on the strength of a final letter from the DLNR that

vaguely allowed the resumption of the agricultural use. More recently We have come to believe that the Property was not redistricted from the Agricultural District to the Conservation District in **1969**.

Following our purchase of the Property in **2014** We first applied for permits for ....

- 14 fruit trees in (**2014**)
- an area for 10 fruiting bushes (**2014**)
- a 720 sq. ft. agricultural use storage and processing structure in (**2015**)

We lived off island at the time. Our stay time was limited as We did not have a residence on the Island. We quickly recognized the need for a storage structure for our tractor, tools, fertilizers etc. Washroom and toilet facilities also were needed.

As We have described above these first permits were difficult to achieve. The delays were considerable. The Department of Land and Natural Resources ("**DLNR**") required significant volumes of paperwork and studies and application fees. In one case We even had to fly back to Hawaii to appear at a BLNR meeting in order to defend our application for a storage and processing structure as the Office of Conservation and Coastal Land ("**OCCL**") had resisted and denied that application for over a year. The airline fees, hotel room and meals costs were substantial.

The OCCL resisted that We be allowed a structure on the property in order that We may store our Kubota tractor, roto- tiller and agricultural use tools, a toilet facility, a photo voltaic electrical system and a storage

and processing area for agricultural produce. When We asked how We may appeal the denial We were told, **in writing**, that the denial was final. We could not believe that such a request was forever denied. We did some HARule sleuthing and decided to try to force the matter before the Board of Land and Natural Resources (the "**BLNR**") by appealing directly to the Chair of the BLNR, Suzanne Case. Ms. Case allowed the application to be heard by the BLNR.

Mr. Lemmo, the administrator of the OCCL, represented the OCCL's position to the BLNR that the permit be denied describing OCCL's position that '*all We needed was a garden shed typically sold at Home Depot*'. Our Kubota tractor is a large farm tractor. It could not possibly fit in such a structure and anyway We would still lack toilet and washroom facilities, a produce processing area and other storage on the Property.

During the proceedings at that BLNR meeting, where our agricultural use and storage structure was considered and finally approved, the BLNR representative for Hawaii Island commented our Property ***qualified for nonconforming agricultural*** use under the DLNR HARules. He was familiar with the Property. He had a residence and a farm a short distance to the north of the Property.

As We described earlier herein We investigated further and determined that the Property did qualify for the resumption of ***non-conforming agricultural use*** of the Property, according to the DLNR's HAR 13-5-7 Nonconforming use Rule, without a formal permit or fees being required.

> *§13-5-7 Nonconforming uses and structures. (a) This chapter shall not prohibit the continuance, or repair and maintenance, of nonconforming land uses and structures* ***as defined*** *in this chapter.*

(emphasis added)

We wrote a letter to the OCCL inquiring regarding how to secure the DLNR's ***approval.*** An OCCL administrative staff person identified that We would need ***proof*** that the Property had been in agricultural use before its apparent Conservation Districting in **1969**. In an exchange of several letters an OCCL administrative staff person finally specified that pictures and maps were required to be submitted as the specified ***proof*** with an application for the DLNR's ***approval*** of the resumption of the nonconforming agricultural use.

We returned to the Island in the summer of **2015** and sought out such **proof**. After some sleuthing We secured evidenciary documents, a field map **and** a letter from the last sugar cane field manager, that the historical use of the Property was for agriculture, *ref., Exhibits 10, John Cross letter* and *Exhibit 16 field map*, *Exhibit 15,* ***1953*** *picture of cane fields*. The documents evidenced that the agricultural use included the cultivation of the soils of the Property right up to the top of the coastal pali.

We exchanged a number of letters with the DLNR **for a period exceeding 3 years** in order to bring certainty that such a use is an "***Allowed use***" without any formal permit from the DLNR being required. Despite these attempts We were unable to determine with certainty that our use of the Property for agriculture was formally ***allowed*** by the DLNR.

Under the LUC's rules the DLNR manages and enforces its own rules. The State's Auditor General studied this matter and issued a report to the Governor and the State's administrators where he identified that under the DLNR's rules the ***resumption of nonconforming use*** is not time limited to a period ***less than one year*** as it is in the LUC's HARules.... *ref., LUC's on-line file link.....*

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

OCCL's Sam Lemmo also testified to the BLNR that the resumption of a residence and agricultural use of a property is "***Statute allowe***d". The following on-line link is provided of the minutes of that BLNR meeting....

https://luc.hawaii.gov/wp-content/uploads/2019/04/exhibit-17-BLNR-Feb-9-2007-K-1-historical-ag-use-OK-Sam-Lemmo.pdf

A formal DLNR *Conservation District Use Permit* (**"CDUP"**) for agricultural use does not differentiate between the production of crops for resale (commercial use) vs. personal agricultural use however the DLNR's HARules appear to require that if a formal CDUP is requested for ***commercial*** use of Conservation land, it requires a Board ***approval*** which further requires an ***Environmental Impact Study, public hearings and a Finding Of No Significant Impact by the BLNR***.

Alternatively the resumption of "***allowed***" nonconforming agricultural use only appears to require a ***letter of approval*** from the DLNR for the resumption of the nonconforming agricultural use.....

> *HAR 13-5-6 (d) No land use(s) shall be conducted in the conservation district unless a permit or **approval** is first obtained from the department or board.*
>
> (emphasis added)

We recognized the seemed contradiction between the above two cited rules... *HAR 13-5-7's* Nonconforming use Rule and *HAR 13-5-6 (d).* We respect the Law and try to manage our activities formally within the Law.

We determined that a formal "***approval***" of some sort was needed in order that We not be fined later for breaking the DLNR's rules. We unsuccessfully exchanged letters with the DLNR's OCCL over a **3 year period** in order to establish with certainty **and** formally that We may simply develop the agricultural potential of the Property for nonconforming agricultural use which We identified to the DLNR included the sale of agricultural produce.

The following describes our investments in the agricultural use of the Property.....We built a 720 sq. ft. agricultural use storage and processing structure that is accessory to the agricultural use of the Property late in **2015**. The structure cost in excess of $70,000.00. We have also invested heavily towards our agricultural use of the Property which investments also include a $40,000.00 farm tractor and a roto-tiller attachment and miscellaneous tools etc..

We applied for and formally joined the Hakalau farmers market. We began selling agricultural produce in **2020** but suspended sales when We realized that the commercial agricultural use of the Property may be illegal due the Property's apparent Conservation District zoning and the

DLNR's vague letter that appeared to approve that We may use Property for nonconforming agricultural use.

We also sought SMA approval from the County that the resumption of the agricultural use of the Property also conformed to the County's administrative rules. Within a period of just a few weeks the County issued its SMA approval, *ref., Exhibit 21*. Comparatively the DLNR's approval process took over 3 years and uncertainty remained.

The next several pages contain 3 final letters, or relevant portions thereof, that were exchanged between us and the OCCL in seeking ***approval*** for the resumption of the agricultural use of the Property. A great many more letters, emails and telephone conversations exist. In the end We proceeded and began a substantial agricultural operation on the Property in **2018** believing that the DLNR had, in a sort of way, "***approved***". The expanded agricultural operation included some 70 species and cultivars of orchard plantings and various other crops and cultivated soil areas, *ref., Exhibit 41 plant list*.

Around that time We also filed Petition A18-805 with the LUC to rezone the Property into the Agricultural District due to the frustrations in dealing with the DLNR's OCCL and it seemed a logical outcome as We had established a substantial personal and financial investment in and commitment to the agricultural use of the Property.

After expanding the agricultural use of the Property We began sales of agricultural produce at the market in **2020**. Most of the orchard species

were juvenile and had only recently began substantial production of fruit at that time.

During the early period of the Petitioner's sales of farm produce at the farmers market two local Conservation districted land owners described to us that We really needed to be certain that our nonconforming use was formally ***allowed*** by the DLNR because they had been heavily fined by the DLNR for unpermitted uses of their land.

We went back and re-examined our DLNR correspondence file. We realized that uncertainty remained. We stopped selling our fruit at the local market and abandoned our cultivated area of 300 pineapple plants. Because We did not want to risk heavy fines from the DLNR for commercial agricultural use of our Property. We no longer sold the fruit but any fruit that was surplus to our needs We left it to rot on the ground and/or composted it. We intend to resume sales of produce if the LUC approves our Petition DR21-72.

The following pages contain certain pertinent correspondence from the DLNR that caused us to believe that the DLNR had ***approved*** the agricultural use of the Property.....

STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAI'I 96809

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAG
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCE
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISS
LAND
STATE PARKS

Ref: OCCL:LY

CORR: HA 17-120

Mr. Ken Church
P.O. Box 100014
Hakalau, HI 96710

DEC 27 2016

SUBJECT: Ken Church Properties Located in Wailea, South Hilo, Hawai'i
Tax Map Keys: (3) 2-9-003: 013, 029, 060

Dear Mr. Church:

The Office of Conservation and Coastal Lands (OCCL) is in receipt of your inquiry regarding your non-conforming agricultural use. According to the information you provided, it appears that you have determined that your non-conforming agricultural/horticultural use of 3.2 acres of your property has been accepted by the DLNR as an allowed land use. You are now inquiring

.....

The balance of this letter was dealing with other matters so it is not copied here. Note the date "*December 27, 2016*" **and** also the underlined text is clear. The letter does not describe that the DLNR had determined that our non-conforming agricultural use of our Property had been ***allowed*** but rather that We had made the determination. This resulted that We again wrote to the DLNR which copy, which is dated "*January 27, 2017*" is next found below (over one year had expired since the above letter). At this point We had written several letters asking that the DLNR clearly and specifically issue a letter of ***approval*** that We may legally use our land for agriculture without any formal CDUP being required....

January 4th, 2017
State of Hawaii
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
P.O. Box 621
Honolulu, Hawaii 96809
Dear Mr. Lemmo

Subject: Ongoing correspondence between OCCL and myself regarding non-conforming agricultural use of my property

AND

OCCL - CORR: HA 17-120 dated Dec. 27th, 2016

AND

OCCL – CORR: HA 15-119 letter to Petitioner, dated Jan. 28th, 2015

AND

OCCL - CORR: HA 16-68 dated Oct. 16th, 2015

AND NOW

My request herein that this matter be referred to the BLNR for the requested "determination".

I telephoned your office earlier today to discuss the subject matter of this letter, you were not available so I left a request that you telephone me back. as I did not receive a return call I am now forwarding this letter to you by email and hard mail by USPS.

I am appreciative of the OCCL's attempts to respond to my communications and requests regarding my non-conforming agricultural use of my property. However I do not understand why the OCCL has been unable? or unwilling? to bring clarity to my repeated and re-phrased requests in these regards now spanning a period since late 2014 and more specifically since Sept. of 2015? Lack of resolve to this matter is problematic for me and leads to uncertainty of my rightful land use and my planned investments in my property.

To date it is my impression (seemingly confirmed in the below referenced OCCL communications) that clarity has been offered in the following areas……

1. I may grow sugar cane on 3.2 acres of an identified field area on my property, *ref. CORR: HA 16-68 dated Oct. 16, 2015*
2. I may sell produce (agricultural/horticultural) "*on my property or somewhere off site as the historic use of the properties were for the production of sugar cane for commercial use", ref. CORR: HA 17-120, dated Dec. 27th, 2016.*

3. The history of my property has been referred to by the OCCL as being *"the production of sugar cane for commercial use", ref. CORR: HA 17-120, dated Dec. 27th, 2016.*

I particularly draw to your attention SPA HA 16-4, structure accessory to my agricultural use of my property which was considered by the BLNR in the summer of 2015. My SPAA described that there existed on my property non conforming agriculture. I stated the structure was needed, in part, to support my allowed non-conforming agricultural uses of my property as well as permitted agriculture. A Board member stated that *'the maintaining of the property's grassy field area could reasonably be considered as a supporting reasoning for the SPAA.'*

The basis of the OCCL's belief *"production of sugar cane"* is the only form of agriculture historically conducted on the property is not supported by the evidence that I provided to the OCCL, *ref. enclosed letter from John Cross.* Mr. Cross stated that the identified historical field area of 3.2 acres was used for *"agricultural use".*

Finally the OCCL reminded in *CORR: HA 17-120, dated Dec. 27th, 2016* "*we stated that prior to proceeding with the use of your property for non-conforming agricultural use, a management plan, in conformance with Hawaii Administrative Rules (HAR) s/s 13-5, Exhibit 2, Management Plan Requirements, must be prepared and submitted for the Lands within the State, non-conforming uses are still required to be in conformity with the provisions of HAR Chapter 13-5 before proceeding with such a use"* without reference to where in HAR 13-5 that prescribes that a management plan for non-conforming agricultural use is stipulated to be required. Clearly the submission of a "management plan" (if rightfully required which I believe it is not) to the OCCL seemingly would either be approved or not based on the merit of the plan? What is the point of the submission of a "management plan" if it is irrelevant whether the OCCL approves of such a plan? HAR 13-5-7 is clear that….

> *§13-5-7 Nonconforming uses and structures. (a) This chapter shall not prohibit the continuance, or repair and maintenance, of nonconforming land uses and structures as defined in this chapter.*

the chapter HAR 13-5 *"shall not prohibit the continuance"* of nonconforming land use (in my case agricultural use). Confusingly the OCCL seemingly does not recognize my right to use the identified 3.2 acre area of my property for agriculture but rather only the raising of sugar cane yet it has stated in CORR: HA 17-120 that I am required to submit a "management plan" and that I may sell agricultural/horticultural produce either on or off my property.

Aside from the question of whether a "management plan" is properly requested by the OCCL it is apparent that the heart of the uncertainty (or certainty??) that the OCCL is applying to my request flows from the definition section HAR 13-5-2 "Definitions" and HAR 13-5-7…..

HAR 13-5-2 "Nonconforming use" means the lawful use of any building, premises, or land for any trade, industry, residence, or other purposes which is the same as and no greater than that established prior to October 1, 1964, or prior to the inclusion of the building, premises, or land within the conservation district." (underline and bold text added by me)

AND

§13-5-7 Nonconforming uses and structures. (a) This chapter shall not prohibit the continuance, or repair and maintenance, of nonconforming land uses and structures as defined in this chapter. (underline and bold text added by me)

It is my position that *"agriculture"* is the historical *"land use defined in HAR 13-5"* and not specifically *"the raising of sugar cane"*. It appears that the OCCL's position is that *"the raising of sugar cane"* is a land use defined in HAR 13-5.

I refer to OCCL - CORR: HA 16-68 dated Oct. 16th, 2015.....

"According to the information you have provided, record surveys dated 1905 and 1953 show that the subject parcels were used for cane production. In addition, the letter and map provided by Mr. Cross, custodian of records for C. Brewer & Co. Ltd., provides further evidence that the parcels were used by sugar companies for agricultural production for over 100 years. The letter from Mr. Cross states that a total of 3.2 acres were used for agriculture, while the remaining balance of the properties consisted of a gulch on the northern end of the field and a narrow uncultivated area along the ocean pali. The OCCL notes that the project area is located within the Conservation District Resource subzone. Based on the evidence provided, it would appear that the properties were used for sugar cane production as early as1905. Hawai'i Revised Statutes §183C-5 specifically states that "Neither this chapter nor any rules adopted hereunder shall prohibit the continuance of the lawful use of any building, premises, or land for any trade, industrial, residential, or other purpose for which the building premises, or land was used on October 1, 1964, or at the time any rule adopted under authority of this part takes effect. All such existing uses shall be nonconforming uses." Therefore, if your properties were being cultivated for sugar on October 1, 1964, that use is grandfathered." (underline and bold face text added by me)

I next refer to a previous letter - OCCL's CORR: HA 15-119 to me, dated Jan. 28th, 2015 wherein I inquired about non-conforming agricultural use of my property (not particularly the raising of sugar cane) I was instructed….

> *"Based on the information you have provided, you are inquiring whether or not the current crops found on your properties could be considered a nonconforming use as the area was once cultivated for sugar cane."* ……
>
> *"To characterize the lands as a nonconforming agricultural use, you as the landowner, would need to submit proof that such lands were indeed* ***used for agriculture production****. (HAR) 1 3-5-7 (f), The burden of proof to establish that the land use or structure is legally nonconforming shall be on the applicant. Proof may include historic photos or records showing that the specific area in question was used for agriculture."* (bold face text and underline added by me).

While I fully complied with the direction from the OCCL quoted above in OCCL CORR: HA 15-119, dated Jan. 28th, 2015 the OCCL appears to have taken the position that the production of sugar cane is an identified land use according to HAR 13-5. It is obvious to me that my subsequent approach of asking these questions of the OCCL will not result in bringing further clarity to my seeming right provided for in HAR 13-5 to conduct non-conforming agricultural use of my property which I believe is an allowed use according to HAR 13-5-7 particularly supported by the evidence which I provided and which the OCCL specified that I must provide in order that such a use be "allowed".

I respect the law and I want to conduct my land use in conformance with the law. Bringing resolve to this matter is very important to me and my continuing investments in my property. Particularly I do not want to conduct land uses unlawfully.

In order that we may sort this matter out with better definition I request that you refer this matter to the BLNR for its consideration and I request their "determination" (seemingly provided for in HAR 13-5-30) to the questions that I ask below.

For the BLNR's consideration I describe that the area of my property (the identified 3.2 acres) is currently a maintained open grassy field area currently comprising grasses, fruit trees and the like but also includes limited cultivated areas and garden areas. Such uses are dynamic and subject to change as agriculture is reasonably understood as a dynamic use not easily defined in high detail particularly where the cultivation of the soil is involved. Seemingly the grasses were planted as a cover crop to prevent soil erosion of the sloping field area.

Enclosed with this letter is a historical field map showing that 3.2 acres of the 4.6 acre of my property was used for agriculture. A letter from the former field manager, John Cross confirming that use and a picture of the field area for the BLNR's consideration. Whether accepted for consideration or not I reserve my right to refer this matter to a court of competent jurisdiction.

To be clear the sort of questions that I am trying to have answered are as follows…..

1. Is the evidence that I submitted, the field map, the letter from John Cross and the picture of the property's field area, sufficient evidence according to HAR 13-5-7 of past "**agricultural**" use of my property to support its continuing use for non-conforming agriculture?
2. What, if any, provision is there in HAR 13-5 that I provide a management plan for my agricultural use of my property (specifically with reference to which HAR 13-5 clause which stipulates such)?
3. Does HAR 13-5 provide that my non-conforming use be restricted to sugar cane cropping or is agricultural/horticultural use allowed including…
    - Cultivation of the soil in the former 3.2 acre field area which includes generally an area extending generally to the top of the pali?
    - Planting various agricultural crops?
    - If non-conforming agriculture is an allowed use does that include personal and commercial?
    - Removal and stacking of field stone?
    - Irrigation, if required during dry spells, of my agricultural crops?
    - Disposal/disposition of waste plant material?
    - Livestock?
    - Specimen plantings of ornamentals in order to provide seed, scion wood, cuttings for rooting (essentially plant propagation materials)?
    - Placing of landscape fabrics and potted plants in the field areas?
    - Etc. (answers to questions undoubtedly will lead to new questions so a format of resolving such questions needs to be identified and defined?

Final resolution of these questions will serve both of our interests. It is unfair that my use and investments in my property are placed in this continuing uncertainty. **Please advise when this matter will be heard by the BLNR at a scheduled meeting?**

Supplementary to this question which seemingly has been difficult to officially respond to my satisfaction I propose that I (that is to say I and the DLNR) may consider another possibility that may resolve this matter as follows….

In exchange for a supporting letter from the DLNR that supports a successful petition by me to the Land Use Commission to re-zone the remaining area outside of an identified portion of my property (a 40 ft. wide buffer zone along the pali) from the State Conservation District to the State Agricultural District I describe as follows……..

That a 40 ft. buffer zone strip (identified in straight lines) along the top of the pali be described on a survey document to remain in the State Conservation District with the remaining portion of my property be re-zoned into the State Agricultural District. A deed restriction would be offered by me to be properly registered on that strip that would forego any rights that I may have provided for in HAR 13-5 to use the identified "buffer zone" for non-conforming agricultural use based on its historical use for such. Any use of the proposed buffer zone would only be permitted by the DLNR according to the provisions of HAR 13-5. The specific language of such a deed restriction could be worked out between myself and the DLNR if the petition is successful.

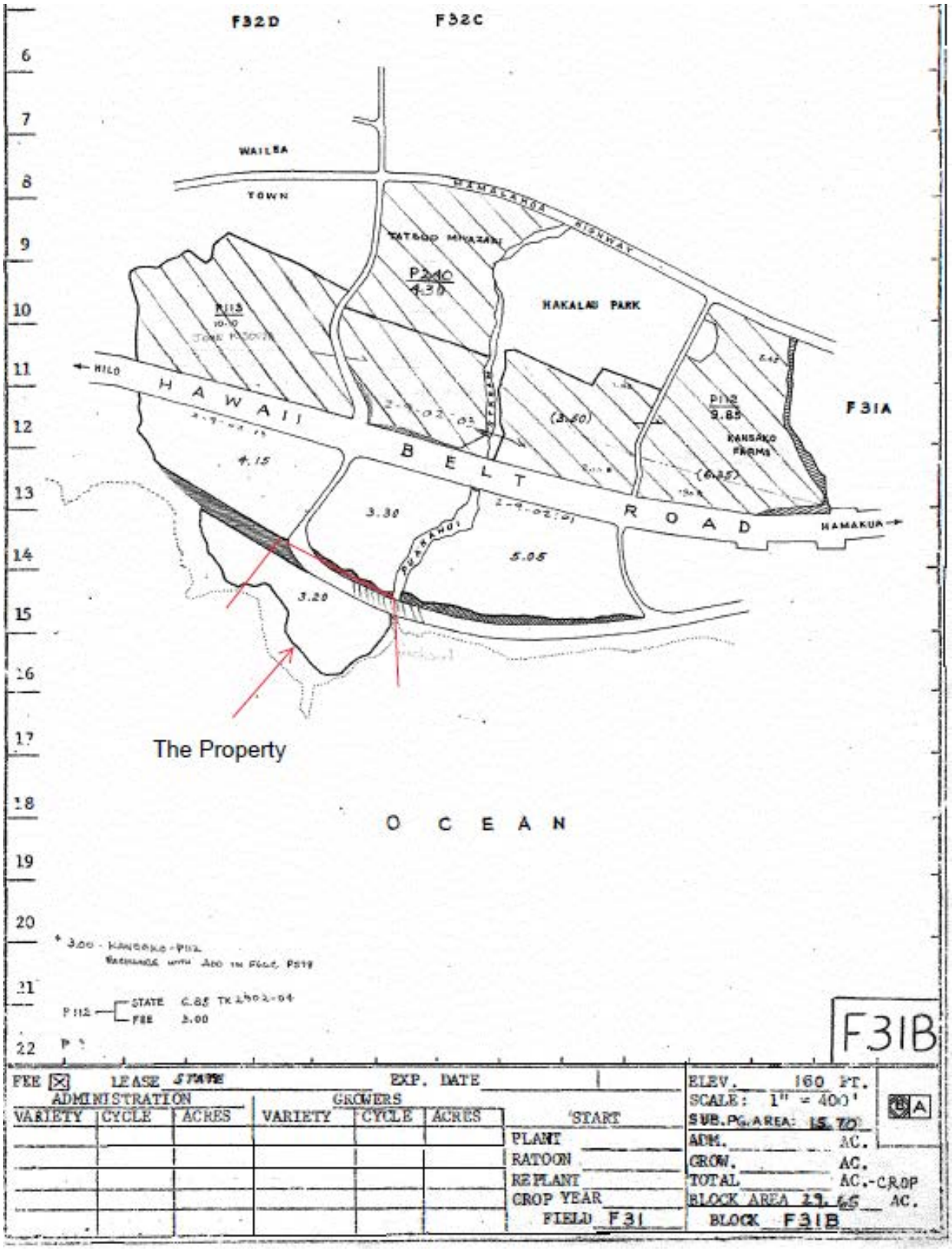
If such can be arranged/negotiated I may determine to abandon further resolve to the determination requested in this letter. Please advise?

Respectfully submitted by,

Ken Church
c.c. Chair BLNR, County of Hawaii Planning Dept. LUC, OP State of Hawaii

(emphasis added)

The following attachment, a field map, was sent with that letter.....



The relevant portion of the DLNR response follows next below. Please note item 5 on the letter's page 2 and that all of my questions remained unanswered as had usually been the case for almost 3 years.....

STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAI'I 96809

Ref: OCCL:LY

CORR: HA 17-128

JAN 27 2017

Mr. Ken Church
P.O. Box 100014
Hakalau, HI 96710

SUBJECT: Ken Church Properties Located in Wailea, South Hilo, Hawai'i
Tax Map Keys: (3) 2-9-003: 013, 029, and 060

Dear Mr. Church:

.....

I want to bring to your attention that our office has received approximately 130 emails and letters from you, comprised of hundreds of pages of text. Throughout this process, this office has been responsive and has made reasonable efforts to address your questions and concerns despite the volume and frequency of your inquiries. Moreover, we have cooperated with you to make reasonable use of your land. All of your requests to make use of your land have been approved either by the Department or the Board of Land and Natural Resources (Board). For example:

1. Approval of landscaping (planting of trees and a garden);
2. Approval of consolidation and re-subdivision of your properties;

Mr. Ken Church CORR: HA 17-128

3. Approval of construction of a 700 square foot storage shed;
4. Approval of construction of a 4,649 square foot single family residence (SFR); and
5. Agreement over the continuance of non-conforming agriculture uses.

With respect to the non-conforming agricultural use, we have asked that you submit a management plan to our Office for the Department's review prior to initiating work. The reason for this is that in addition to recognizing your right to continue an agricultural use, the Department must continue to ensure that the use is actually what you say it is, and is, furthermore, conducted in a judicious manner, and in a way that adheres to appropriate best management practices to reduce or prevent environmental damages. Since you would like to continue an agricultural use which would involve land disturbance and potential on-site and off-site impacts (e.g., water pollution), ***we have indicated that you may do so***. However, we want you to demonstrate that the work will be conducted in an appropriate and safe manner and is in conformance with governing laws (e.g., Chapter 183C, HRS). Our December letter stated that a Management Plan must be prepared and submitted for the Department's ***review and approval***. We wish to clarify that statement by stating that if the work proposed in your agricultural management plan is consistent with non-conforming agricultural use of the property, we would use the plan for informational purposes only.

With respect to your request to go before the Board, this does not appear to be required or necessary at this time since you have no discretionary matters pending before the Department or Board.

You have also suggested that in lieu of a discussion with the Board, the Department may issue a supporting letter for your petition to the Land Use Commission for a boundary amendment to take your properties out of the Conservation District and put them in the Agricultural District. We are unable to accommodate this request as this would be inappropriate. However, if the Land Use Commission wished to seek our input on this matter, we would be happy to respond to an inquiry from them.

We also remind you that any work that you conduct on your land may be subject to other Federal, State or County laws, rules, and ordinances with which you may be required to comply.

Should you have any questions regarding this correspondence, you may contact me at (808) 587-0377.

Sincerely,

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

c: Chairperson

Following this letter, from Mr. Lemmo, We did not seek further clarification from the DLNR. It was very obvious that such an effort would be futile. The letter effectively described that the DLNR had **previously** "***approved***"

1. our agricultural use of the Property,

2. the cultivation of the Property's soils right up to the coastal cliff.

The only previous formal approval from the DLNR was that We may grow sugar cane. Many of the questions that We had asked in our January 4, **2017** letter (copied above) remained unanswered or vaguely replied to. We were even more suspicious because the letter was only copied to the "*Chairperson*" and not to the State or County of Hawaii Planning Department. Normally past correspondence from the DLNR to us regarding nonconforming agricultural use was widely circulated by the DLNR including to the County of Hawaii Planning Department and to the BLNR's County of Hawaii representative.

Our suspicions grew deeper later when We delivered a copy of this letter to the County Planning Department where We asked that it be inserted into our file. On another visit to the County We observed the letter in our Property file. Several weeks later We visited the County Planning Department where We again asked to see our property file for other reasons. Mysteriously the letter was no longer in the file. We subsequently returned with another copy of the letter and asked that it be inserted into the file. We do not know whether the letter was inserted into the Property file.

We first applied to the LUC to rezone the Property from the Conservation District to the Agricultural District in **2018**. Then, in **2021**, We discovered that the Property was never zoned into the Conservation District in **1969**. When We first applied to rezone it We filed an EA with that application. There was not a single community letter posted by anyone that stated any concern, **in fact the only letter was from the State Office of Planning**

that recommended that the Commission approve the redistricting. Thereafter the Commission issued a FONSI late in **2020**. The Commission's FONSI can be found in the on-line link.....

https://luc.hawaii.gov/wp-content/uploads/2020/11/A18-805_Church_OEQC-Transmittal_Ltr_FEA-FONSI_11-12-2020.pdf

Among other things during the LUC's September 8, **2021** Hearing for the Petition several Commissioners suggested that.....

- We knew the Property was zoned Conservation when We purchased it
  - *in fact We knew that it appeared to be Conservation zoned*

- why not proceed with our Petition DR18-805 instead of DR21-72
  - *it would be irrelevant if the Property was never zoned Conservation in the first place*,

- that it would have been relevant to the Commission's considerations if We had a sales tax license,
  - *We did not realize that a sales tax avoidance provision existed, by the time that We realized this our major investments were behind us, therefore if DR21-72 is allowed by the Commission We will seek such a license*.

Thereafter the Commissioners questions often vacillated into areas that would be particular to a petition for a District Boundary Ammendment rather than an examination of the ***factual situation*** that existed in **1969** regarding the Declatory Order that was applied for.

New evidence is also provided in this Motion for Reconsideration that the Property was in agricultual use in **1969**. The Petition already had a number of Exhibits which provide Hard Evidence that the Property had a long history of agricultural use.....

Exhibit 10, a 2015 letter from the former field manager, John Cross,

Exhibit 16, an undated field map,

Exhibit 22, 1905 field map,

Exhibit 29, 1992 field map and 1952 photograph of the Property's cane field.

The new evidence is found in a **professional consultant's** study and report regarding the Property. The Consultant's study and reporet are already a LUC file which can be found at this link.....

https://luc.hawaii.gov/wp-content/uploads/2019/04/exhibit-2-2005-06-23-HA-FEA-CONSERVATION-LANDS.to_.ag_.pdf

see next pages for text copies of relevant sections of the consultants report.....

RC-0247

Archaeological Inventory Survey and Limited Cultural Assessment of TMKs: 3-2-9-03:13, 29, and 60

Wailea Ahupua'a
South Hilo District
Island of Hawai'i

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ARCHAEOLOGICAL, CULTURAL, AND HISTORICAL STUDIES

Source LUC Petition A18-805, its exhibit 2's Appendix C cover page, (empasis added)

and next from page 13 of LUC Petition A18-805, exhibit 2's Appendix C

PROJECT EXPECTATIONS

Based on the background information summarized above, a set of archaeological expectations for the project area can be formulated. Historical data indicate that the general area was part of the heavily exploited traditional Hawaiian *kula* lands. For the last 100 years, however, the area has been utilized for sugar cane cultivation

Emphasis added

The Consultant's report is dated **2004**. The above text further evidences that Robert Reichtman, Ph. D. described

> "***For the last 100 years, however, the area has been utilized for sugar cane cultivation***".

That 100 year period would have included **1969** when the Commission redistricted lands '***that were not in agricultural use into the Conservation District***'. The portion of the Property that extended makai from the top of the Coastal cliff i.e. the "***ridge top***" was the area of the Property that was not in agricultural use in **1969**.