

Petition Motion (the "**Motion**") for Reconsideration Memorandum

Chapter 1 B

Regarding FINDINGS OF FACT DECLARATORY ORDER for LUC DR21-72 (Church-Hildal), (the "**Petition**") which DO is dated March 15, 2021 and which DO references the LUC's Hearing for the Petition which Hearing was held on September 8, 2021 (the "**Hearing**") which DO can be found on-line at the LUC's link.....

https://luc.hawaii.gov/wp-content/uploads/2022/03/DR21-72_Church_DO_and_COS_3-15-2022_Final-signed.pdf

First the Commission's DO did not deal with the issue raised in the Petition that it would have been illegal for the Commission to redistrict the Prime Agricultural land portion area of the Property, located mauka of the Coastal ridge top in 1969 according to HRS 205-2 (A) 3 or, in effect in 1992 through Boundary Interpretation No. 92-48 or in effect in 2022 through the Declaratory Order (the "**DO**"), ref., Exhibit 47 SCOH.

(Note: the numbered italicized facts below are copied from the DO followed by the Petitioners response.)

1. *On June 17, 2021, Petitioners filed a Petition for a Declaratory Order, Memorandum, Verification, Exhibit List, and Exhibits 1 - 19.*
2. *On September 1, 2021, the Commission mailed an agenda and hearing notice for a Hearing on September 8-9, 2019 to the Petitioner; and, the Statewide, email, and Hawai'i County and Maui County mailing lists.*

Petitioners admit 1., 2. (above), however during the Hearing proceedings it became confusing whether the Hearing had become a Contested Case Hearing, at the discretion of the Commission, or some other form of

Hearing. The Commission and the DO did apply/reference Statutory Law HRS 91-10 (5) to the Hearing and the DO, which Hearing procedure, does not appear to be clearly described in HAR 15-15, ref., HRS 91-8.....

"§91-8 Declaratory rulings by agencies. Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders." (emphasis added)

3. *On September 1, 2021, OP filed a Position Statement and Exhibits 1-4.*
4. *On September 1, 2021, Hawai'i County filed a statement of no position via email.*
5. *On September 7, 2021, Petitioners filed Opening Remarks, and Statement for the Record on Report and Maps.*
6. *On September 8, 2021, the Commission met in Honolulu, Hawai'i, via Zoom interactive conference technology, to consider the Petition pursuant to HAR §15-15-100. Kenneth Church and Joan Hildal appeared on behalf of Petitioners. Commissioners were present at each site in Hilo, Kahului, Lfhu'e, and Honolulu, Hawai' i, to consider the Petition pursuant to HAR § 15-15-100.*

Petitioners **admit** 3. - 6. (above)

7. *Alison Kato, Esq., Rodney Funakoshi, Lorene Maki, Aaron Setogawa, and Mary Alice Evans appeared on behalf of OP.*

Petitioners **admit** 7. (above) with the condition that the OP staff mentioned in 7. (above) are recognized as "parties" to the Hearing, 2 of which were sworn in and gave testimony to the Hearing, according to HRS 91. The Petitioners reserve their right to cross-examine "parties" to the Hearing according to HRS 91-10 (3).

The DO referenced "parties", page 16, clause 58, to the Hearing and the Commission's rules require that OP be a "party" to every Hearing. OP did file a....

"OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT'S
STATEMENT OF POSITION FOR A DECLARATORY ORDER

The Office of Planning and Sustainable Development ("OPSD") would have no objection to the Land Use Commission's granting of Kenneth S. Church's and Joan Hildal's ("Petitioners") request to the Land Use Commission ("LUC") for a Declaratory Order to clarify the December 16, 1992 Boundary Interpretation No. 92-48 for Tax Map Keys: (3) 2-9-003: 29 and 60. The petition area is comprised of two lots; parcel 29 contains 1.116 acres and parcel 60 contains 2.252 acres for a total of approximately 3.368 acres of land ("Petition Area"). The 1992 Boundary Interpretation for the Petition Area indicated that the two parcels were within the Conservation District. TMK parcel 2-9-003: 48 which borders the Petition Area is within the State Agricultural District. "

and

OP's representative "party" to the Hearing was OP's AG representative Alison Kato ("**Kato**") represented OP to the Hearing.

8. *There was no public testimony received by regular or email, or via Zoom on the matter.*

Petitioners **admit** 8. (above)

9. *In their pleadings, Petitioners did not request a hearing on the Petition as provided for in HAR § 15-15-103. Petitioners provided discussion of their position, followed by comments by Alison Kato, Esq. on behalf of OP. Thereafter, a motion was made and seconded pursuant to HAR§ 15-15-1 00(a)(l)(C) to deny the Church/Hilda! Petition. Following a discussion by the Commission, the Motion was amended to include denial of the request to clarify and correct an LUC boundary interpretation as well as seeking reimbursement for filing fees and waiver of court reporter fees; a vote was then taken on the Motion. There being a vote tally of 8 ayes and 0 nays, the motion carried.*

The Petitioners **admit**, in part, and **deny**, in part, 9. (above).

The Petitioners believed that they would be allowed cross-examination of "parties" to the Hearing according to the State's Law HRS 91-10 (3) which is in regards to the State's "Contested Case" procedure Law that is stipulated in HRS 91. During the Hearing and in the text record of the DO parts of State Law HRS 99 were quoted by the Commission as applicable Law.

HRS 99-10 (5) is a clause in

§91-10 Rules of evidence; official notice. In contested cases:

Therefore the Commission, at its sole discretion, appeared to intend that the State's Laws regarding "Contested Cases" be applied to the Hearing. The Petitioners requested that they be allowed to cross-examine "parties" to the Hearing but Commission Chair Scheuer denied the Petitioners be allowed to cross-examine "parties" to the Hearing. Instead the Commissioners appeared to take the position that they had the sole right of cross-examination of "parties".

In effect the Commission defended its own Boundary Interpretation No. 92-48. The Commission controlled the cross-examination of "parties", at its sole authoritative discretion, in what appeared to be the Commission's defense of its own Boundary Interpretation No. 92-48. The transcript of the Hearing is clear evidence that the Commission controlled the Hearing in a way which seemed, to the Petitioners, to be prejudicial and the Commissioners did not appear to be "Open Minded" in Hearing and Determining the Petition.

Commission Chair Scheuer also swore in two additional "parties" to the Hearing from the OP but Chair Scheuer similarly did not provide that the Petitioners be allowed cross-examination of the added OP "parties".

It appears, according to the Hearing transcript record, that the Commission, at its sole discretion,

- variably held a "Contested Case" Hearing, and
- the Commission applied the State's Law HRS 91-10 to control the Hearing process, at its sole authoritative discretion .

The Commissions HARules do not clearly describe a Hearing process that is not and "evidenciary" hearing as the Commission's Executive

Officer, Mr. Orodener ("**Orodener**") is recorded to have described on page 18 of the Hearing transcript. The transcript recorded Orodener to have stated that the Hearing was not an "evidentiary hearing".

Orodener described that the Hearing was a "Declaratory Order Hearing", ref., Transcript page 18, line 13.

This became more and more confusing to the Petitioners as the Hearing progressed. Particularly, during the Hearing, Commissioners, and subsequently the Commission's DO, cited HRS 91-10 (5) Rules of Evidence for "Contested Case Hearings" as applicable State Law but denied the Petitioners the right "cross-examination of "parties" to the Hearing according to HRS 91-10 (3).

The Petitioners filed a Notice of Objection following the Hearing but the Notice of Objection was not posted in the LUC's on-line file nor was it administered. The Petitioners believe that the Commission must vacate its DO and hold a new Hearing for the Petition right from the beginning and allow cross-examination of "parties" to the Hearing with the subsequent right for the Petitioners to file a Motion for Reconsideration again if the Petitioners determine to do so because the Commissioner's understanding of the facts and resulting DO have been tainted by the September 8, 2021 Hearing process.

Simply now Hearing a Motion for Reconsideration (the "Motion") will not provide the Petitioners with their rights that are provided in State Law to both a Hearing and then a Motion for Reconsideration if the Petitioners determine such a Motion to be necessary. Furthermore new Hard Evidence has been discovered by the Petitioners that is strongly

applicable to the Petition. Therefore, if a new Hearing is allowed the Petitioners request that the Motion for Reconsideration of the Petition along with its Evidence become part of the original Petition to be heard and considered by the Commission.

The Hearing was conducted in the electronic ZOOM format. The Petitioners attended the Hearing from their home via the electronic ZOOM format.

The Petitioner(s) do not have a direct or high speed internet connection at their home.

The Petitioners had participated in a LUC hearing several months earlier via ZOOM, from their home, using their existing Wi-Fi connection to the hearing which facilitated their full and clear Hearing participation with both audio and video during that earlier hearing.

Shortly after the Hearing began on Sept 8, 2021 Chair Scheuer, stated that the Petitioner(s) audio and video connection was poor resulting that the audio portion of the Petitioners' presentation could not be clearly heard and understood by the Commissioners.

Chair Scheuer advised that the Petitioners turn off their computer's video feed in order to reduce the volume of electronic wi-fi data being shared by ZOOM in order to improve the audio quality of the Petitioners' presentation to the Commissioners.

The Petitioners turned off their computer's video feed.

Chair Scheuer noted that the Commissioners could then clearly hear the Petitioners' audio presentation.

As a result of the low Wi-Fi data transfer rate and the disconnected video feed the Petitioners believe that they were not able to present their Petition in the video format that they had prepared for the Hearing i.e. the presentation of Evidence documents, on-screen, in order that their presentation be more clearly understood. Particularly a slide by slide, on screen, video presentation was no longer possible as some of the files were digitally large and the low transmission rate would similarly interfere with the Commissioners' and the Petitioners' exchange of information.

The Petitioners believe that had they been able/allowed to support their Petition with their screen shot video presentation, and the cross-examination of "parties" to the Hearing the Commissioners may have become more familiar with the Petition , its Memorandum, supporting Exhibits etc. that may have resulted in a more favorable ruling by the Commissioners.

The Petitioners have attended and participated in other LUC hearings via ZOOM from their home. The Petitioners did not anticipate that the wi-fi data transmission rate would not allow their full and equal participation in the Hearing. The Petitioners are aware that Commission Chair Scheuer, on other occasions during LUC hearings, provided a recess in order that "parties" can secure a better wi-fi connection that would enable both audio and video participation in hearings.

The Petitioners believe that their participation in the Hearing was severely compromised due to their inability to present a video presentation of the Petition and cross-examine "parties" to the Hearing. Through this Motion the Petitioners request that a new Hearing be conducted in whatever format that allows cross-examination of "parties" and the presentation of the Petition's Evidence **and** new Evidence presented in this Motion.

10. *The Property is situated in South Hilo, County of Hawai'i, and is identified as Tax Map Key Nos. (3) 2-9-003:029, and 060 and consists of approximately 3.368 acres of land.*

The Petitioners **admit** 10. (above).

11. *The Property is situated completely within the State Land Use Conservation District according to the Commission's official State Land Use District Boundary quadrangle Map H-65 Papaikou dated 1974.*

The Petitioners **deny** 11. (above). The Petitioners admit that the Property **appears to be** *situated completely within the State Land Use Conservation District according to the Commission's official State Land Use District Boundary quadrangle Map H-65 Papaikou dated 1974.*

The Commission's official State Land Use District Boundary quadrangle Map H-65 Papaikou, which is dated 1974, has **undefined** district boundary **reference** lines on it which provide for subsequent interpretation, regarding the exact **defined** location of the District Boundary, according to **text records** of the redistricting **action** that resulted in the **undefined** District Boundary **reference** lines on the

Commission's map be applied. This is described in considerable detail in the Memorandum to the Motion with references to **text** in Hard Evidence Exhibits.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final, it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains*" , ref., HAR 15-15-22 (f).

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f), i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

12. *The previous owner, McCully, requested and received a Boundary Interpretation in 1992 (No. 92-48) which interpreted/showed the entire area of the Property to be within the State Conservation District.*

The Petitioners **admit**, in part, and **deny**, in part, 12. (above). The Petition asked that the Commission determine and apply the "**factual situation**" that existed in 1969 to the Petition according to HAR 15-15, Subchapter 14, DECLARATORY ORDERS, 15-15-98 Who may petition (a).....

*"On petition of any interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a **specific factual situation.**"*

(emphasis added)

The Petitioners **deny**, in part, 12. (above). The McCully boundary interpretation 92-48 did not exist in 1969. Therefore it is not highly relevant to the present Commission's determination of the ***factual situation*** that existed in 1969.

13. *Petitioners purchased the property from McCully, in 2014.*

The Petitioners **admit** 13. (above) however.....

- whom the Petitioners purchased the Property from, and
- '*how much the Petitioners paid*' for the Property

is irrelevant to the "***factual situation***" that existed in 1969 and the Commission's consideration and application of such facts. It appeared to the Petitioners that the cost of the Property was a distracting consideration of the Petition which can clearly be seen in the transcript of the Hearing. This is expanded upon considerably in the Motion and its Appendix(s).

14. *The Property is owned in fee by the Petitioners.*

The Petitioners admit 14. (above) that they are the "fee simple" joint owners of the Property.

15. *When the Petitioners purchased the Property it was undeveloped land.*

The Petitioners deny 15. (above). While the Petitioners may have referred to the Property as being undeveloped in the Petition the description was not intended to distract the Commissioners from existing applicable Commission records which described that the Property was fully developed agricultural use land. During the period between the late 1800's to 1992 the Property was part of a large cane field.

Following the cessation of cane farming on the Property a cover crop of field grasses had been planted and maintained in order to preserve the prime agricultural characteristics of the Property from loss of soil due to erosion. During a BLNR hearing, Board member Yeuen who lives a short distance to the north of the Property at Ninole, described that the cover crop of grasses represented uninterrupted agricultural use of the Property. The BLNR Ordered that its OCCL issue a permit in order that the Petitioners may construct a 750 sq. ft. structure accessory to the existing agricultural use of the Property. Subsequently the OCCL recognized the Petitioners' right to continue the Nonconforming Agricultural Use of the Property according to the DLNR's HARule 15-15-7.

When the Petitioners purchased the Property it had been developed with a paved roadway and a 1000+ ft. water conduit provided that was connected to County water. Several areas of agricultural plantings also existed on the Property. These particulars, regarding the status, use and development of the Property in 1969, exist in a number of LUC records that are "applicable commission records", ref., HAR 15-15-22 (d).

The Petition requested that the Commission consider and apply the "**factual situation**" that existed in 1969, *i.e. the historic agricultural use of the Property*, to the Petition according to HAR 15-15, Subchapter 14, DECLARATORY ORDERS, 15-15-98 Who may petition (a).....
*"On petition of any interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a **specific factual situation**."*

(emphasis added)

The above information is provided as background information. The Property's use in 2014 to the present date is irrelevant to the Commissioners considerations regarding the "***factual situation***" that existed in 1969 as the Petitioners applied for in the Petition.

16. *Petitioners acknowledge that when the Property was purchased in 2014 they conducted research and knew it was classified within the State Conservation District.*

The Petitioners **deny** 16. (above) the text record of the Hearing transcript Evidences that the Petitioners stated that they were aware that the

Property "**appeared**" to be *classified within the State Conservation District.*

The Petition asked that the Commission determine and apply the "**factual situation**" that existed in 1969 to the Petition according to HAR 15-15, Subchapter 14, DECLARATORY ORDERS, 15-15-98 Who may petition (a).....

*"On petition of any interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a **specific factual situation.**"*

(emphasis added)

Whether or not the Petitioners believed that the Property was Conservation Districted when the Petitioners purchased the Property is irrelevant to the Commissioners considerations regarding the "**factual situation**" that existed in 1969.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a

period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

17. Petitioners relied on the Property being within the State Conservation District and sought and received permits from the State Department of Land and Natural Resources ("DLNR") for a single-family residence, accessory structure, with portions of the Property to be under cultivation or grassed.

The Petitioners **admit**, in part, and **deny**, in part, 17. (above). The text record of the Hearing transcript Evidences that the Petitioners stated that they were aware that the Property "**appeared**" to be *classified within the State Conservation District*. The Petitioners **admit** that they *sought and received permits from the State Department of Land and Natural Resources ("DLNR") for a single-family residence, accessory structure*.

The Petitioners **deny** that they received permits from the DLNR for *portions of the Property to be under cultivation or grassed*, but the Petitioners **admit** that they did seek that the DLNR **approve** of their use

of the Property for non-conforming agricultural use according to HAR 13-5- (6) and (7) however the "**approval**" was vague.

The Petition asked that the Commission determine and apply the "**factual situation**" that existed in 1969 to the Petition according to HAR 15-15, Subchapter 14, DECLARATORY ORDERS, 15-15-98 Who may petition (a).....

*"On petition of any interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a **specific factual situation**."*

(emphasis added)

The Property's current uses by the Petitioners is irrelevant to the Commissioners considerations regarding the "**factual situation**" that existed in 1969.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

18. *In July 2015, Petitioners requested and were sent a copy of the 1992 McCully boundary interpretation (No. 92-48) to assist in their preparation of a petition for district boundary amendment.*

The Petitioners **deny** 18. (above). The Petitioners have several copies of the McCully boundary interpretation but the Petitioners are unaware whether the LUC provided any of them. Furthermore the Petition asked that the Commission determine and apply the "***factual situation***" that existed in 1969 to the Petition according to HAR 15-15, Subchapter 14, DECLARATORY ORDERS, 15-15-98 Who may petition (a).....

*"On petition of any interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a ***specific factual situation***."*

(emphasis added)

The Source of the McCully boundary interpretation is irrelevant to the Commissioners considerations regarding the "***factual situation***" that existed in 1969.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

19. On October 7, 2016, Petitioners requested a formal boundary interpretation and submitted a copy of their County of Hawai'i subdivision map which included metes and bounds description of their parcels for the purpose of the County subdivision process.

The Petitioners **admit** 19. However 19. is irrelevant to the Commissioners considerations regarding the "**factual situation**" that

existed in 1969. It is a fact that the LUC has not issued the requested formal boundary interpretation.

20. *On October 17, 2016, the Commission responded to the request asking for additional information to explain the discrepancy in metes and bounds description between the McCully parcel boundaries as identified in the officially recognized McCully boundary interpretation (No. 92-48) and Petitioners' subdivision parcel boundaries. Petitioners were given until December 30, 2016 to provide the requested information. No response was received by that date.*

The Petitioners deny 20. (above). Perhaps a date error i.e. an error in the year exists in 20. (above). Also 20. is irrelevant anyways to the Commissioners considerations regarding the "**factual situation**" that existed in 1969.

21. *On May 22, 2020, Petitioners requested a new boundary interpretation asking the Commission as a whole to address a perceived uncertainty in the district boundaries pursuant to HAR§ 15-15-22(f). Petitioners provided additional information but the same survey map without addressing the issue of the discrepancy in metes and bounds survey lines between the official boundary interpretation (No. 92-48) and Petitioners' subdivision survey map. Petitioners were informed by email dated June 25, 2020 that they needed to follow the process for boundary interpretations and their current filing was improper.*

The Petitioners neither **admit** or **deny** 21 (above) in whole or in part. Because, in part, 21. is irrelevant to the Commissioners considerations regarding the "**factual situation**" that existed in 1969. Subsequent to the referenced *May 22, 2020* date in 21. (above) the Petitioners did seek the services of 3 surveyors (2 with one firm) and one with another firm in order to correct any boundary error that may exist. The licensed surveyors all explained that it is impossible to determine which survey is correct and therefore declined to survey the Property. The surveyor that did the McCully survey in 1992 is no longer in practice. Subsequent to the referenced *May 22, 2020* date in 21. (above) the Petitioners did relay the information that the surveyors told the Petitioners to LUC staff person Scott Derrickson. No further communication was received by the Petitioners from the LUC in these regards until presently in the DO where it is described that the matter remained unresolved due to a fault of the Petitioners.

22. *On June 17, 2021, Petitioners filed a Petition for a Declaratory Order pursuant to HAR §15-15-22(f). As argued by Petitioners at the Commission meeting, "[t]he current petition is to issue a declaratory order that [Petitioners' property] was never zoned in conservation in the first place" and should be zoned agriculture.*

The Petitioners **admit** 22 (above) however the Petitioners believe that the above described "meeting" was a Commission "Hearing". The DO refers to the "meeting" being a "Hearing" in 4 places, particularly for reference here is the DO, FINDING OF FACT # 2. "On September 1, 2021, the Commission mailed an agenda and hearing notice for a meeting on

September 8-9, 2019 to the Petitioner; and, the Statewide, email, and Hawai'i County and Maui County mailing lists."

23. *Based on the Petition, Petitioners' arguments, and responses to questions by the Commissioners, Petitioners seek a declaratory order based on an assertion that the Commission erred in setting the boundaries in 1969 and therefore requires the district boundaries on LUC Official Map No. H-65 Papaikou be changed to reflect a top of ridge orientation and a new Boundary Interpretation map for the affected properties be issued.*

The Petitioners **admit**, in part, and **deny**, in part, 23. (above). The 1969 Commission did not *set the boundaries* in 1969 per say. The Report's page 36 described as follows.....

"C. Shoreline

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

Commission Action: Partially Approved.

Areas in agricultural use were excluded.

From **Hilo to Kapoho the shore is rocky with only occasional beaches** such as at Haena. It is the unique product of recent lava flows running directly into the sea. The Conservation District should include the shoreline and it is recommended that it be extended from

the high water mark to a line which is approximately 300' mauka of that line.

Commission Action: Approved.

The Property is located 14.5 miles north of the City of Hilo. The Report's page 36 text reference to "Hilo" can only mean the City of Hilo. The land leading south from the City of Hilo *is the unique product of recent lava flows running directly into the sea*. The characteristics of the Property's land area is not *the unique product of recent lava flows running directly into the sea*. The entire area of the Judicial District of the County of Hawaii leading northward from the City of Hilo is not *the unique product of recent lava flows running directly into the sea*.

It is a total mis-characterization of the facts for the DO to imply that the 1969 Commission intended that the prime agricultural land leading northward from the City of Hilo, which City of Hilo is located in the Judicial District of South Hilo, be districted in the same way as the land leading southward from the City of Hilo. The text on the Report's page 36 does not refer anywhere to be applied to a Judicial District. The Report's reference to a Judicial District is found on the Report's page 37 which was referring to Urban land areas.

The present Commission did not accept the text record of the Report's page 36 (relevant text is copied above) as authoritative over the ***undescribed*** district boundary ***reference*** line on the Commission's 1974 SLUD map H-65.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

With this Motion the Petitioners present further and new Hard Evidence, the transcripts and minutes of the 1969 Commission redistricting community hearings, that confirms the text record of the Report's page 36 referred to the City of Hilo, is true and accurate and the Commission's 1992 boundary interpretation No. 92-48 is incorrect.

The text record of the 1969 Commission's redistricting hearings on Hawaii Island Evidence that the 1969 Commission adopted quadrangle maps including map H-65 that depicted the **undefined** district boundary **reference** line on map H-65. Leading up to the final redistricting hearing in 1969, the Commission held 2 redistricting hearings on Hawaii island where public input was sought in April of 1969. During those hearings land owners voiced considerable concern that the Commission's "recommended" maps appeared to overlay the Conservation District on to lands that were in agricultural use.

The Commission's consultants repeatedly assured land owners that irrespective of what the district line on the maps appeared to demark, the redistricting would not be subsequently interpreted to apply to '**Coastal lands that were in agricultural use**'. Text copies of several relevant transcript portions are copied throughout the Memorandum that show this Evidence to be true.

Particularly one transcript text copy, Exhibit 44, hearing transcript, page 11, testimony of Mr. Degenhardt, 1969 Commission consultant describes clearly that the line on the redistricting map was not intended to be "**rigid or firm**" but rather "**flexible in the same manner as all boundaries are upon application.**" Mr. Degenhardt was a professional land use planner with professional credentials. His above quoted explanation cannot be ignored by today's Commissioners when **undefined** district boundary **reference** lines on maps are interpreted and applied as if they are '**rigid and firm**'.

Following the 2 April 1969 Commission redistricting hearings a final hearing was held on Hawaii Island where the Commission's Executive Officer Mr. Duran introduced the final agenda item to the Commissioners, the adoption of some 73 quadrangle maps with the final district reference lines on them for the Commission to consider and adopt. When introducing the maps Durran described to the Commissioners that the district line on the maps was not intended to be interpreted that lands in agricultural use would be redistricted Conservation, ref., Exhibit 43, **July 18, 1969**, Commission hearing transcript, page 7.....

"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."

Without substantial discussion the Commissioners adopted **these maps** that Duran presented to them unanimously. It is fair to assume that the Commissioners accepted their Executive Officers assurance that **these maps**, that Duran had set before them for adoption, had been corrected since the same Commissioners' hearings on Hawaii Island in April of 1969 which transcript of Hearings are Exhibited to this Motion as Exhibits 44 and 45. During those April Commission Hearings the Commission encountered considerable resistance from the Community regarding the district line being overlaid on Coastal lands that were in agricultural use in 1969.

The Petitioners sought that the Commission issue a new boundary interpretation, through the Commission's Declaratory Order process, for the Property defining the Coastal "ridge top" to be the SLUD boundary. The Petitioners believe that it is irrelevant where the ***undefined*** district

boundary **reference** line on map H-65 appears to be located. HAR 15-15-22 (d) provides "*The executive officer may use all applicable commission records in determining district boundaries.*"

The **undefined** district boundary **reference** line that is depicted on map H-65 has to have a basis in a **text record** that described where the 1969 Commission's intended the **defined** boundary to be located.

The Petition relied on the Commission's 1969 consultant Report which stated on its Chapter 5, page 36.....

"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."

24. *Petitioners argued that in 1969, the State conducted the first five-year review of State land use districts. During which time, consultants hired by the State drafted a report making recommendations for changes to regulations and maps to the Commission for their consideration and approval.*

The Petitioners **admit** 24 (above).

25. *Petitioners' position stated that the Report provides the following:*

- *At a meeting on July 18, 1969 in the County of Hawai'i, the Commission considered and approved a coastal boundary line from the Report between the Conservation and Agricultural Districts using the*

ridge top as a boundary line for the windward side of the island to include the pali land of the Hamakua Coast and ending in Hilo.

- The island-wide maps from the Report and those presented at Commission meetings were of such a large scale that State land use district boundary lines could not be interpreted to the proposed recommendations in the Report as it related to the Hamakua Coast.

(Note the Petitioners have broken 25. (above) into several parts in order that the Petitioners may address specific areas as follows.....)

The Petitioners admit, in part, and deny, in part, 25. (above). While the Petitioners may have referred to the Hamakua Coast being on the "windward side" of Hawaii Island the Petitioners do not recall stating specifically that the Report stated that the *Commission considered and approved a coastal boundary line from the Report between the Conservation and Agricultural Districts using the ridge top as a boundary line for the windward side of the island to include the pali land of the Hamakua Coast and ending in Hilo.* The Petitioners admit that they did state their belief that the Report's page 36 described that the Coastal "ridge top" was to be applied to the "Hamakua Coast".

The Petitioners admit that they stated their belief that the Report identified that area where the Coastal "ridge top" ended at the City of Hilo. This was based on the next Coastal area description in the Report's page 36 began at "Hilo", (text copied earlier in 23. above) which Coastal area leading southward from the City of Hilo was, as the Report's page 36 described, to be "**rocky with only occasional beaches such as at**

Haena. It is the unique product of recent lava flows running directly into the sea."

This description did not.....

- depict the Coastal area running northward from the City of Hilo which contained historic sugar cane Coastal lands that had deep rich soils and which were not "***rocky with only occasional beaches such as at Haena."*** OR "***It is the unique product of recent lava flows running directly into the sea."***
- depict the northern portion of the Coastal area running northward from the City of Hilo which City is located centrally along the Coast on quadrangle map H-66, and
- depict the Coastal area running northward from the City of Hilo in the County's district "South Hilo".

The Report's evidence is clear, the Report's page 36 described the City of Hilo to be the southern end of the "ridge top" Coastal boundary. This is now further confirmed in the new Hard Evidence of the 1969 Commission's redistricting hearings on Hawaii Island. The Coastal area, mauka of the Coastal "ridge top" leading northward from the City of Hilo were in agricultural use in 1969 and the Coastal area leading southward from the City of Hilo were not generally in agricultural use in 1969 because ***it was the product of recent lava flows***. The text record of the 1969 Commission's redistricting hearing transcripts and minutes clearly describe that portions of Coastal lands that were in agricultural use in 1969 were not to be redistricted into the Conservation District.

The Petitioners **admit** that they identified to the Commissioners that *the island-wide maps from the Report and those presented at Commission meetings were of such a large scale that State land use district boundary lines could not be interpreted to the proposed recommendations in the Report as it related to the Hamakua Coast.*

It is a matter of Evidence that **the 1999 Commission accepted** the assertion in DR99-21 (Stengle) Decision and Order's page 3, that *the island-wide maps from the Report and those presented at Commission meetings were of such a large scale that State land use district boundary lines could not be interpreted to the proposed recommendations in the Report as it related to the Hamakua Coast.*

Further to DO item 25.....

- *The Report, in its Appendix D, provides a reference to each of the 73 quadrangle maps shown on the island-wide map for Hawai'i island. These quadrangle maps are at a larger scale than the island-wide map but could not be interpreted to the definition proposed in the Report; and, that the Report does not indicate whether these maps were available at the community meetings.*

The Petitioners partially **admit** to the above bulleted clause in 25. (above). The Petitioners had no way of knowing exactly what the referenced maps size and definition were. The Petitioners noted Stengle's assertion, which stated same, and which the 1999 Commission accepted to be true resultingly the Petitioners resented it to be true in the Petition

- *At the July 18, 1969 Commission meeting to consider the Report's recommendations, the Commission only "partially approved" the Report's proposed boundary in the area of the Hamakua Coast, indicating that areas in agricultural use were excluded.]*
- *The State land use district boundary in the area of the Property shown in the Report's (page 41) and the H-65 Papaikou quadrangle show the line to not go along the "top of ridge" but rather it bisects an agricultural use field along the mauka boundary of a railroad crossing the field area.*

The Petitioners **admit** to the bulleted two clauses in 25. (above) however the Petitioners **deny** that the Report's page 41 map, when magnified, more **clearly shows that the Property was neither proposed not approved to be redistricted in 1969.** This is described in more detail in this Motion's Memorandum and Exhibits.

26. *Petitioners stated that in 1974 the Commission adopted Official Map H-65 Papaikou quadrangle showing the area including the Property to lie entirely within the State Conservation District.*

The Petitioners partially **admit** 26. (above). Only when the map is highly magnified does the district line incorrectly **appear** to follow the former railroad.

27. *Petitioners stated that previous owner, McCully, requested and received, in 1992, a boundary interpretation (No. 92-48) pursuant to HAR § 15-15-22, showing the entire area of the Property to lie within the State*

Conservation District. Further, that the 1974 Official Map was used for the boundary interpretation.

The Petitioners **admit** item 27. (above). However it is irrelevant to the Commissioners' determination of **factual situation** that existed in 1969.

28. *Petitioners argue that a 1999 Commission declaratory order DR99-214 to correct a boundary interpretation for a property along the Hamakua Coast was granted by the Commission affirming the top of the coastal ridge as the boundary between Conservation and Agricultural Districts at that location; and correcting the 1974 Official Map H-59 Papaaloa quadrangle. Petitioners' property is approximately **five miles north** of this location.*

The Petitioners partially **admit** item 28. (above).

Significantly the 1999 Commission **ordered that map H-59 be corrected** to reflect the Coastal "ridge top" to be the boundary. LUC staff corrected the map. District lines on the Commission's 1974 Official SLUD maps are not final. They can be and are corrected. Similarly in the Case of Castle Foundation the Commission ordered also that the district line on that map to be corrected.

The Petitioners' Property is approximately five miles **south** of this location. The Petitioners and the State Office of Planning also pointed to LUC boundary interpretation 07-19 (Muragin) which lies in between Stengle's land and the Property where the district line for Muragin's land was also interpreted to be the Coastal "ridge top".

29. *Petitioners state that previous owner, McCully, petitioned to amend the land use district boundaries in 2005 (LUC Docket A0S-757) which was denied and again in 2009 (LUC Docket A09-783) which was withdrawn.*

The Petitioners **admit** item 29. (above). However it is irrelevant to the Commissioners' determination of **factual situation** that existed in 1969.

30. *During the 2009 petition, the State Office of Planning ("OP") submitted written testimony referring to the Report and OP Exhibit 10 representing a magnified version of three plates of the H-65 Papaikou quadrangle map considered and then approved by the Commission on July 18, 1969. The lines on each of the three plates "clearly show the District line to follow the mauka boundary of the former railroad which crossed the field area of the Property and not the top of the coastal ridge.*

The Petitioners neither **admit** nor **deny** 30. (above). This would be up to OP to admit or deny. However the Petitioners believe 30. to be true.

However the district lines on the maps that are referred to are not **defined** district boundary lines, rather the lines are **undefined** district **reference** lines which can only be **defined** based on existing text records and not simply based on the apparent location of the line on the maps.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be

provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

31. Petitioners assert that OP incorrectly assumed that map shown on Panel C in its Exhibit 10 was approved by the Commission at its July 18, 1969 meeting; the Panel C map did not reflect the "Approved" criteria of excluding agricultural lands in production and the top of the coastal ridge; and, the map is in conflict with what was approved at the meeting.

The Petitioners **admit**, in part, and **deny**, in part, 31. (above). At the time of the Petition filing the Petitioners did not have real dated copies of the full sized maps Panels A-C. Since that time the Petitioners can now confirm that the 3 Panels correctly show the district lines as they are

depicted on the maps. However *the Panel C map **does** not reflect the "Approved" criteria of excluding agricultural lands in production and the top of the coastal ridge; and, **the Petitioners present new Hard Evidence, i.e. the 1969 Commission's redistricting hearing transcripts and minutes which further confirm that** the map is in conflict with what was approved at the meeting.* The Petitioners add here now that it is the interpretation of the **defined** location, ref., boundary interpretation 92-48 McCully, of the district **reference** line on the Commission's final 1969 map H-65 and the Commission's 1974 official SLUD map H-65 that is in conflict with the text record of the Report's page 36 and the text record Evidenced in the now referenced 1969 transcripts and minutes Exhibits 43-45.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's

Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

32. *Petitioners assert that in May 2021 they accessed a copy of the Report and determined that the Property was never correctly rezoned into the State Conservation District.*

The Petitioners **admit** 32. (above).

33. *Petitioners argue that "the incorrect zoning and/or interpretation of the zoning and/or the error on the Official Map H-65 of the Property is not an error of the Petitioner(s) but is an error of the LUC. This meets the "[f]or good cause" requirement of § 15-15-34(b), HAR."*

The Petitioners **admit** 33. (above).

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions

and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

Petitioners' Arguments with respect to Reimbursement and Waiver of Fees

34. *Based on the Petition, Petitioners' arguments, and responses to questions by the Commissioners, Petitioners seek a reimbursement of the filing fees for the current petition for declaratory order being processed by the Commission; and waiver of court reporter fees.*

The Petitioners **admit** 34. (above).

35. *Petitioners argue that HAR § 15-15-34(b) provides that the Commission may for good cause waive or suspend any rule except those relating to jurisdictional matters.]*

The Petitioners **admit** 35. (above).

36. *Petitioners argue that HAR§ 15-15-45.1, regarding the Commission's fee schedule for filings and reimbursement of hearing expenses, is not jurisdictional, and, therefore the Commission has discretion to waive or suspend such fees.*

The Petitioners **admit** 36. (above).

37. *Petitioners argue that HAR§ 15-15-45.2, regarding the Commission's rule that fees are non-refundable, is not jurisdictional, and, therefore the Commission has discretion to waive such fees.*

The Petitioners **admit** 37. (above).

38. *The Commission conducted a periodic review of State land use district boundaries pursuant to HRS 205 in 1969. The Commission hired Eckbo, Dean, Austin & Williams to conduct the review and provide a report with recommendations for their consideration.*

The Petitioners **admit** 38. (above).

39. *The authors of the Report stated that" ... Our job as technicians, however, was not to make the final decisions, but to present recommendations, alternatives and the consequences of decision on these alternatives ... "*

The Petitioners **admit** 39. (above) however the Report's page 3 also stated.....

"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 this report, we are able to provide the Commission's decisions with respect to them. In this way, the text becomes not just a report to the Commission but a record of its actions as well. These four chapters are a functional necessity"

(emphasis added).

40. *The Report provided that in considering recommendations revising the Conservation District boundaries, "The final boundaries are the Land Use Commission's judgment as a result of considerable input of information from studies, site inspections, information received at the public hearings, talks with landowners and the Commissioners' own personal knowledge and experience."*

The Petitioners **admit** 40. (above).

41. *The Report provided the following recommendations to the Commission regarding amending lands along the coast within the Hilo District:*

*"From Hilo to Kapoho the shore is rocky with only occasional beaches such as at Baena. **It is the unique product of recent lava flows running directly to the sea.** The Conservation District should include the shoreline and it is recommended that it be extended from the high water mark to a line which is approximately 300' mauka of that line. Commission Action: Approved." (emphasis added)*

The Petitioners **admit**, in part, and **deny**, in part, 41. (above) which is, in part, a text copy from the Report's page 36.

The Petitioners **admit** part of the text 41. (above) which text area is bounded by quotation marks i.e. " " is correct, however the Coastal land area leading northward from the City of Hilo, which City is located

somewhat centrally in the South Hilo Judicial District, in is not a "**product of recent lava flows running directly to the sea.**" The Coastal area leading northward from the City of Hilo is Prime agricultural land. The land area leading southward from the City of Hilo is a "**product of recent lava flows running directly to the sea.**"

The Petitioners deny the first 3 lines of 41. (above). The Report did not refer to the "Hilo District" which as is described above in the DO. The Petitioners are not aware that a defined "Hilo District" exists. The County has 2 Judicial Districts with the word "Hilo" in it. One is the South Hilo District where the City of Hilo is located somewhat centrally in. The other County Judicial District is the North Hilo District. The Petitioners Property is located at the northern boundary of the South Hilo Judicial District 14.5 miles north of the City of Hilo. Both Stengle's and Muragin's properties are located in the North Hilo Judicial District approximately 5 miles north of the Property.

41. (above) appears to be a deliberate misrepresentation of the text record of the facts that are identified on the Report's page 36 by the State's professional's that had a part in the writing of this section of the DO.

42. *The Report provides a description of the South Hilo Judicial District which" ... includes the Urban District of Hakalau, Honomu, Pepeekeo, Papaikou, Wainaku and the greater Hilo area including Puueo, Waiakea-Keaukaha, Amaulu Camp and Waiakea Homesteads."*

The Petitioners neither **admit** or **deny** 42. (above). The Report is a book in excess of 200 pages. It appears that the above reference came from the Report's page 37 which was text that was not referring to redistricting of Shoreline areas that is described on the Report's page 36.

It is irrelevant to the Petition regarding any assertions in the DO that refer to the County of Hawaii's Judicial Districts of either North Hilo or South Hilo to have any relevance to the Report's page 36 which page 36 describes the 1969 Commission's redistricting actions relevant to the Hamakua Coast which Coastal area includes the Property.

The DO does not identify where the referenced text section was copied from. It is a fact that the Report's page 3 describes that

"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 this report, we are able to provide the Commission's decisions with respect to them.** In this way, the text becomes not just a report to the Commission but a record of its actions as well. These four chapters are a functional necessity"
(emphasis added).

It is a fact that the Report's page 36 is found in the Report's **Chapter 5** which text related to Coastal areas.

Going forward for the next section of the DO begins a path of description that may have the effect to mislead the reader regarding what the Report's page 36 reference to "Hilo" meant.

43. *The Property covered in the declaratory order is within the South Hilo District on the island of Hawai'i.*

The Petitioners **admit** 43. (above) however the reference to South Hilo District is irrelevant to the 1969 Commission's redistricting actions that are described in the Report's Chapter 5, page 36. The Report's reference to South Hilo District relates to Urban districting of land on the Report's page 37 which lay inland of the shore and which description relate to specific urban areas by name. Shoreline land is described relating to easily defined shoreline reference points such as the City of Hilo, Kapoho point, South point etc.

44. *On July 18, 1969, the Commission held a hearing in Kona, Hawai'i to consider and adopt maps pursuant to the 1969 district boundary review. The minutes of this hearing state:*

" ... 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 ."

The Petitioners **object** that 44. (above) be allowed to be part of the DO. The "minutes" of the hearing in Kona were not evidenciary documents to the Petition Hearing which was held on September 8, 2021. Therefore it is incorrect to assert that the Commissioners considered and applied the information that is described in 44. (above).

None-the-less the Petitioners state their belief that the referenced "minutes" were not "minutes" but were a "transcript". In order to determine the context of the quote in 44. (above) one has to consider and apply another area of the "transcript". Once the additional area text of the "transcript" of the July 18, 1969 Commission hearing is read and understood along with the transcript and minutes of 2 April 1969 Commission redistricting hearings on Hawaii Island it will become clear that the intent of the 1969 Commissioners to overlay the Conservation District on to Coastal lands that were in agricultural use in 1969.

The referenced transcripts and minutes describe that the Commission never intended that the undefined district reference line on the 1969 Commission's redistricting maps was not intended to be interpreted to overlay the Conservation District on to Hawaii Islands prime agricultural lands. The Property is located in an area that is identified in the Report to be prime agricultural land. The Petitioners have submitted Exhibited copies of the transcripts and minutes of the 1969 Commission's redistricting hearings for Hawaii Island with the Petitioners Motion (the "**Motion**") for Reconsideration of the Commission's denial of the Petition DR21-72 (the "**Petition**").

45. Petitioners provided a series of maps for H-65 Papaikou used by the Commission during the 1969 land use district boundary review showing proposed boundaries, proposed amendments, and final boundaries as adopted at the July 18, 1969, hearings. Each of these maps consistently shows the area containing the subject Property to be proposed for inclusion in the State Conservation District with the boundary along the mauka edge of the railroad right-of-way.

The Petitioners **deny** 45. (above). The Petitioners did not *provided a series of maps for H-65 Papaikou used by the Commission during the 1969 land use district boundary review showing proposed boundaries, proposed amendments, and final boundaries as adopted at the July 18, 1969, hearings.* The Petitioners Exhibits 3 was taken from a copy of an OP exhibit to the McCully's 2009 petition to redistrict an area, which included the Property. The OP exhibit appeared to show LUC maps for Papaikou quadrangle. The Petitioners Exhibit 5 is a copy of a State Office of Planning ("OP") document, that was dated around 2009. That document shows "Plates A, B and C" which appear to be highly magnified portions of quadrangle map H-65 dating from the period of 1969.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

46. As of July 18, 1969, approval of the revised district maps included Map H-65 Papaikou which showed the State Conservation District boundary at the location of the Property to be along the mauka edge of the railroad right of way.

The Petitioners **deny** 46. (above). The Petitioners did not Evidence the referenced 1969 map for H-65 Papaikou quadrangle. None-the-less any "district boundary" line on a map is an undefined boundary reference line on the LUC's maps. When the LUC interprets a defined boundary location the LUC must also consider and apply text records that support the interpretation regarding the defined location of a district boundary. The Commission's HARules provide that a land owner may request a boundary interpretation repeatedly and without restriction to time limits.

If it was the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

47. *As part of the periodic boundary review in 1974, the Commission approved official boundary maps with statewide coverage, which included H-65 Papaikou. At that time, the Property in question was completely within the State Conservation District.*

The Petitioners **admit**, in part, and **deny**, in part, 47. (above). The Petitioners **admit** that *As part of the periodic boundary review in 1974, the Commission approved official boundary maps with statewide coverage, which included H-65 Papaikou.*

The Petitioners **deny** that *At that time, the Property in question was completely within the State Conservation District.* The Petitioners **admit** that the Property **appeared** to be located makai of the undefined district reference line on map H-65.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

48. The district boundaries on the Commission's official map H-65 Papaikou, dated 1974 are the same as those district boundaries approved for map H-65 Papaikou, dated July 18, 1969, with respect to the Property.

The Petitioners **deny** 48. (above). The *district boundaries approved for map H-65 Papaikou, dated July 18, 1969* was not an Exhibited map to the Petition.

49. *HAR §§ 15-15-17(b) and 15-15-111, provide that the boundaries of land use districts are shown on the official land use district maps, entitled "Land Use District Boundaries, dated December 20, 1974," as amended, maintained and under the custody of the commission and located in the commission office.*

The Petitioners **admit**, in part, and **deny**, in part, 49. (above).

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location

than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

50. State land use district boundaries existing as of June 2, 1975 continue in full force and effect, subject to any amendments as provided in HRS 205, or as ordered by a court of competent jurisdiction based on any litigation filed as of July 1, 1975, or within thirty days of any final decision and order made as part of the commission's 1974 periodic boundary review, whichever occurs later. No litigation was filed to contest the boundaries of the subject Property during or after the 1974 periodic boundary review.

The Petitioners **do not admit** 50. (above). The Petitioners **do not admit** that an undefined district boundary reference line on maps is a defined boundary. The Petitioners state that the area of the Property was not proposed for redistricting in 1974 and it was not redistricted in 1969. Therefore litigation contesting a boundary amendment was not required in either the Petitioners case **nor was it required in the Exhibited DR99-21 Stengle** yet the Commission allowed DR99-21 that the undefined district reference line on Map H-59 be adjusted to the Coastal "ridge top".

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be

provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

51. Petitioners did not request a hearing pursuant to HAR § 15-15-103, and a hearing is not necessary before the Commission issues a declaratory order in this matter.

The Petitioners neither **admit** nor **deny** 51. (above). The Petitioners received a Notice of Hearing issued by the LUC. The Petitioners began the Hearing believing that they would be allowed cross-examination of "parties" to the Hearing. The Petitioners and the OP representatives were the only "parties" to the Hearing. During the Hearing at least 2 Commissioners and the DO cited State Law HRS 91-10 (5) to be an

APPLICABLE LEGAL AUTHORITY regarding the Petition. HRS 91-10 applies to "contested case hearings".

The Commission has the right convert the Petition to a contested-case hearing at its sole discretion. It appears that by applying HRS 91-10 (5) the Commissioners were holding a contested case hearing and the Petitioners should have been allowed cross-examination of "parties" to the Hearing.

HRS 91-10 (3) had to also apply and the Petitioners should have been allowed cross-examination of "parties" to the Hearing. The Petitioners were denied that they be allowed cross-examination of "parties".

52. Petitioners indicated that if their declaratory order is denied they may consider further "legal avenues." Petitioners ask to reopen a matter previously settled and relied on by them and other landowners; and the Commission inquired whether granting the declaratory ruling might lead to litigation by other property owners whose property "would suddenly be considered to either be now an agricultural district or possibly have been previously restricted from uses by being determined to be in the conservation district[.]"

Clause 52. (above) is irrelevant to the Petition and the Commission's decision making authority. The Petition asked that the Commission determine and apply the "**factual situation**" that existed in 1969 regarding the district zoning of the Property, ref., HAR 15-15-98. Furthermore concerns regarding litigation are not founded in State Law.

It is a fact that the State's tort liability for any incorrect Commission's decision's and action's apply for a period not exceeding 2 years when the Commission's decision's and action's occurred.....

§662-2 Waiver and liability of State. *The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. [L 1957, c 312, pt of §1; Supp, §245A-2; HRS §662-2; am L 1972, c 164, §2(a)]*

Attorney General Opinions

State liable for torts of **volunteers working for state agencies**. *Att. Gen. Op. 85-8*

§662-4 Statute of limitations. *A tort claim against the State shall be forever barred unless action is begun **within two years** after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply. [L 1957, c 312, pt of §1; Supp, §245A-4; HRS §662-4; am L 1976, c 219, §16] (emphasis added)*

§662-7 Attorney general. *The State shall be represented by the attorney general of the State in all actions under this chapter. [L 1957, c 312, pt of §1; Supp, §245A-7; HRS §662-7]*

It is a fact that the Commission's HAR 15-15-22 (f) provides that a land owner apply to the Commission to reconsider a boundary interpretation by the Commission's Executive Officer if the land owner believes that the boundary interpretation is incorrect. No statute of limitations exists in the LUC's HARules.

It would only be after that the State, the LUC and/or the Commissioners may be found liable or subject to censure.

In the case of the Petition the Petitioners have also supplied the following Hard Evidence with this Motion (the relevant Exhibits are cited earlier in this Motion).....

- Hard Evidence that the area of the Property that lies mauka of the Coastal "ridge top" was in agricultural use in 1969,
- Hard Evidence that a former railroad bisected the agricultural field in 1969 and did not "*lie at the edge of the agricultural use*",
- Hard Evidence that the Property lies in an area between east Kohala and the City of Hilo, which Property lies 14.5 miles north of the City of Hilo which is a Coastal area that is generally known to be the "***Hamakua Coast***", and which Property lies in an area north of **quadrangle map H-66 Hilo**, which area(s) the Report and the 1969 Commission's redistricting transcripts and minutes describe areas ***in agricultural use were not to be determined to have been redistricted***,
- Hard Evidence that a steep Coastal pali and "***ridge top***" exist at the makai side of the Property,
- Hard Evidence that a railroad bisected the agricultural use field areas of Stengle's land, Muragin's land and the Property in 1969,
- Hard Evidence that the 1999 Commission issued a DO that a new boundary interpretation be issued for Stengle's land which DO specifically identified in its APPLICABLE LEGAL AUTHORITIES

section the Reports description that the Coastal "**ridge top**" be applied as the district boundary for the "**Hamakua Coast**" directly citing the text record of the Report's page 36 as authoritative,

- Hard Evidence that the 2007 LUC boundary interpretation 07-19 (Muragin) applied the district boundary to be the Coastal "**ridge top**" which followed Stengle's DR99-21 where the Commission ordered that map H-59 be adjusted to reflect the Coastal "ridge top" be the boundary line.

It is a fact that the Commissioners need not be concerned regarding liability, ref., HAR 15-15-100 (a) (1) (C), for any **final** boundary determination errors unless such errors existed during the last two years, where a property owner has exercised their full rights before the Commission under very similar circumstances in the same Map area H-65 and regarding similar submitted Hard Evidence supporting the land owners petition for a Declaratory Order regarding an incorrect boundary interpretation.

The LUC's web site has a list of all of the Declaratory Orders that have been issued by the Commission for the last 2 years, where the Commission has denied a petition, and none of the LUC's DO's for the last 2 years meet the above described criteria. Therefore the described **liability** according to **§662-4 Statute of limitations begins when this Petition is denied by the Commission.**

It is a fact that any Concerns that the Commissioners have regarding that allowing the Petition may result in an increase in requests that the

LUC issue new boundary interpretations for land owners **is not a decision making criteria** for the Commission to apply to the Petition.

The Petitioners believe that any liability, that may be applied, begins if this Motion is denied because the Hard Evidence shows that the Property was not to be rezoned in 1969 or subsequently.

53. *The Commission finds that the issuance of a declaratory order in this matter may affect the interest of the State, or the Commission in a litigation that is pending or may reasonably be expected to arise.*

The Petitioners **admit**, in part, and **deny**, in part, 53. (above).

The Petitioners **admit** that *the State, or the Commission* may become liable if the Commission continues to deny the Petition.

It is a fact that the State's tort liability for any incorrect Commission's decision's and action's apply for a period not exceeding 2 years when the Commission's decision's and action's occurred.....

§662-2 Waiver and liability of State. *The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. [L 1957, c 312, pt of §1; Supp, §245A-2; HRS §662-2; am L 1972, c 164, §2(a)]*

Attorney General Opinions

*State liable for torts of **volunteers working for state agencies**. Att. Gen. Op. 85-8*

§662-4 Statute of limitations. *A tort claim against the State shall be forever barred unless action is begun **within two years** after the*

claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply. [L 1957, c 312, pt of §1; Supp, §245A-4; HRS §662-4; am L 1976, c 219, §16] (emphasis added)

§662-7 Attorney general. *The State shall be represented by the attorney general of the State in all actions under this chapter. [L 1957, c 312, pt of §1; Supp, §245A-7; HRS §662-7]*

It is a fact that the Commission's HAR 15-15-22 (f) provides that a land owner apply to the Commission to reconsider a boundary interpretation by the Commission's Executive Officer if the land owner believes that the boundary interpretation is incorrect. No statute of limitations exists for boundary interpretations and there is no limit in HARules that limit the number of boundary interpretations that may be requested. Just because a previous boundary interpretation was not challenged immediately does not mean that it cannot be subsequently requested and/or challenged because "uncertainty remains".

It would only be after that the State, the LUC and/or the Commissioners may be found liable or subject to censure.

In the case of the Petition the Petitioners have supplied the following Hard Evidence with this Motion (the relevant Exhibits are cited earlier in this Motion).....

- Hard Evidence that the Property was in agricultural use in 1969,
- Hard Evidence that a former railroad bisected the agricultural field in 1969 and did not "*lie at the edge of the agricultural use*",

- Hard Evidence that the Property lies in an area between east Kohala and the City of Hilo, which Property lies 14.5 miles north of the City of Hilo, which is a Coastal area that is commonly known as the "**Hamakua Coast**", and which Property lies in an area north of quadrangle map H-66 Hilo, which area(s) the Report and the 1969 Commission's redistricting transcripts and minutes describe areas *in agricultural use were not to be determined to have been redistricted*,
- Hard Evidence that a steep Coastal pali and "**ridge top**" exist at the makai side of the Property,
- Hard Evidence that a railroad bisected the agricultural use field areas of Stengle's land, Muragin's land and the Property in 1969,
- Hard Evidence that the 1999 Commission issued DR99-21 that a new boundary interpretation be issued for Stengle's land which DR99-21 specifically identified in its APPLICABLE LEGAL AUTHORITIES section the Reports description that the Coastal "**ridge top**" be applied as the district boundary for the "**Hamakua Coast**" directly citing the text record of the Report's page 36 as authoritative.....

"APPLICABLE LEGAL AUTHORITIES

(pages 6 & 7 Exhibit 1, DR99-21 Decision and Order)

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). "

- Hard Evidence that the 2007 LUC boundary interpretation 07-19 (Muragin) applied the district boundary to be the Coastal "**ridge top**".
 "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. "

It is a fact that the Commissioners need not be concerned regarding liability, ref., HAR 15-15-100 (a) (1) (C), for any **final** boundary determination errors unless such errors existed during the last two years, where a property owner has exercised their full rights before the Commission under very similar circumstances in the same Map area H-65 and regarding similar submitted Hard Evidence supporting the land owners petition for a Declaratory Order regarding an incorrect boundary interpretation.

The LUC's web site has a list of all of the Declaratory Orders that have been issued by the Commission for the last 2 years, where the Commission has denied a petition, and none of the LUC's DO's for the last 2 years meet the above described criteria. Therefore the described **liability** according to **§662-4 Statute of limitations begins when this Petition is denied by the Commission.**

It is a fact that any Concerns that the Commissioners have regarding that allowing the Petition may result in an increase in requests that the LUC issue new boundary interpretations for land owners **is not a decision making criteria** for the Commission to apply to the Petition.

The Petitioners **deny** clause 53 (above) that *the issuance of a declaratory order in this matter may affect the **interest of the State.***

The **State's interests** are clearly described

It is a fact that the State's Constitution and the cascading State's laws and the resulting Commission's Rules clearly establish the "***interest of the State***" (see copy below) that the Commission **is** and, **in the past**, always **shall** apply that agricultural districting of land to have the **greatest** priority when the Commission determines and redistricted lands or in the case of the Petition resolves uncertainty between conflicting Hard Evidence regarding the 1969 Commission's redistricting actions, ref., HRS 205-2 (a) (3), HRS 205-3, HRS 205-4 (h), Exhibit 32 the Report, Exhibits 43-45 hearing transcripts and minutes, and district map H-65.

It is a fact that HAR 15-15-100 (a) and HAR 15-15-100 (a) (1) (C) state that the Commission may Deny the petition where:.....

"(C) The issuance of the declaratory order may adversely affect the interest of the State, the commission, or any of the officers or employees in any litigation which is pending or may be reasonably be expected to arise; or"

The relevant copy of HARules are cited over the previous few pages.

54. *The Petitioners relied on their own interpretations of information that had previously been the basis for Commission decisions. They did not provide the Commission with any new information. (emphasis added)*

The Petitioners **deny** 54. (above). The Petitioners provided 19 Exhibits of applicable **new information**, particularly information that showed that

.....

- the Property was in agricultural use in 1969,
- a former railroad bisected the field area of the Property,

- the State's Law HRS 205-2 (a) (3) and the Commission's HARule 15-15-19 (1) have a mandatory requirement that when the Commission applies districting boundary considerations the Commission is to protect land with a "high capacity" for agricultural production as the Commission's "greatest" priority.
- the word greatest means that Agricultural Districting is to be given a greater priority than Conservation.
- the word capacity does not refer to a past, current or future land use but rather a characteristic of land.

and now with this Motion particular Hard Evidence is also provided that ..

- a former railroad bisected Stengle's and Muragin's land also,
- Stengle's and Muragin's land were in agricultural use in 1969,
- transcripts and minutes of the 1969 Commission's redistricting hearings on Hawaii Island that confirm that the 1969 Commission never intended to redistrict the area of the Property that lays mauka of the Coastal "ridge top" into the Conservation District because the Property was in agricultural use in 1969.

55. The OP testified that since the 1969 periodic boundary review was not clear with respect to the Property being located along the mauka boundary of the railroad right-of-way on Map H-65 Papaikou, the Commission has discretion to make the decision. Whether the 1969 map is clear, does not end the Commission's inquiry as the Property boundary was subsequently confirmed in the Commission's adoption of Official Map H-65 Papaikou during the 1974 periodic boundary review. Then in 1992, a boundary interpretation (No. 92-48) was done for the Petitioners' predecessor in interest. At that time, the Commission determined that the

entire area of the Property is located within the State Conservation District. The Commission finds that the Petitioners have not shown by a preponderance of the evidence that the location of the State Conservation District boundary was done in error or is somehow invalid.

The Petitioners **admit**, in part, and **deny**, in part, 55. (above).

The Petitioners state that if the correct location of the boundary is *not clear with respect to the Property being located along the mauka boundary of the railroad right-of-way* it is incumbent on the Commission to also consider and apply the State's Law HRS 205-2 (a) (3) and the Commission's HARule 15-15-19 (1) which are both mandatory and both exist today the same as they existed in 1969 and not just map H-65 which has already been established to appear to be in conflict with the Report and now also in conflict with the 1969 Commission's hearing transcripts and minutes, ref., Exhibits 43-45.

The Petitioners **admit** that OP "party" Alison Kato stated that the Report **vs.** the LUC's 1974 map H-65 creates uncertainty. However Kato also stated that it appeared that the former railroad bisected a large 1969 field in which the Property was located and that the Report described that areas in agricultural use were intended by the 1969 Commission to be excluded from redistricting. Kato also described that the Report's page 86 described that the railroad should only be applied to be the district boundary if it lay at the edge of the agricultural use. Also OP "party" Maki also disagreed with Commission Chair Scheuer's assertion that more than a few examples exist where the LUC's 1974 district maps have been found to be incorrect.

Had the Petitioners not been denied their right to cross-examine the OP "parties" to the Hearing more clarity may have been discovered for the Commissioners consideration and application to the Petition.

Further regarding a portion of *Clause 55 (above)*....

"the Property boundary was subsequently confirmed in the Commission's adoption of Official Map H-65 Papaikou during the 1974 periodic boundary review....."

Again the LUC's 1974 maps do not define the location of District Boundaries. The District Lines on the maps are undefined reference lines. It is only when text records are applied that the defined location of a district line may be correctly made. This is true in the case of the Property just as much as it was in the case of DR99-21 (Stengle) and Muragin boundary interpretation No. 07-19.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if *"uncertainty remains."*

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a

period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

Further regarding a portion of *Clause 55 (above)*....

"The Commission finds that the Petitioners have not shown by a preponderance of the evidence that the location of the State Conservation District boundary was done in error or is somehow invalid. "

The Petitioners **deny** that they did not meet the Commission's standard of the preponderance of evidence. Commission Chair Scheuer and Commissioner Okuda and the DO all described that the State Law HRS 91-10 (5)'s requirement that a preponderance of evidence applied to the Hearing. HRS 91-10 (3) also provide for cross-examination of "parties" to the Hearing. The Commissioners cannot apply the preponderance of evidence standard and deny cross-examination of witnesses.

The Petitioners' submitted Evidence far exceeded Stengle's evidence. Stengle's petition was allowed by the Commission based on the text record of the Report and, when compared to the Petition, Stengle

submitted very little Evidence in his petition for very similar land to the Property.

In Stengle's DO, DR99-21, the 1999 Commission cited the Report as follows in its APPLICABLE LEGAL AUTHORITIES section.....

*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). (emphasis added)*

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}. (emphasis added)*

The Property is **bounded by steep cliffs or a pali** and the Property is located in an area that is commonly referred to as **the Hamakua Coast**. Therefore the **ridge top as a boundary line** should also be applied as the District Boundary in the area of the Property. The Report's page 36 describes.....

"C. Shoreline

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

Commission Action: Partially Approved.

Areas in agricultural use were excluded.

From **Hilo to Kapoho the shore is rocky with only occasional beaches** such as at Haena. It is the unique product of recent lava flows running directly into the sea. The Conservation District should include the shoreline and it is recommended that it be extended from the high water mark to a line which is approximately 300' mauka of that line.

Commission Action: Approved.

56. The Commission finds that neither of these interpretations rise to the standard required the preponderance of the evidence - for changing the district boundaries on LUC Official Map No. H-65 Papaikou to reflect a top of ridge orientation and issuance of a new Boundary Interpretation map for the affected properties.

The Petitioners **deny** 56. (above) for all of the reasons given in 55 (above). The Petition requested that a new boundary interpretation for the Property to be issued. It is the discretion of the Commission whether map H-65 be changed. Stengle's application also only asked for a new boundary interpretation. It was the 1999 Commission which ordered map H-59 be changed.

The Petitioners also have brought forward in this Motion several new Hard Evidence documents.....

- Exhibit 43, the transcript of the July 18, 1969 final Commission redistricting hearing for Hawaii Island,
- Exhibit 44, the transcript of the April 26, 1969 Commission redistricting hearing for Hawaii Island which was held in the City of Hilo,
- Exhibit 45, the minutes of the April 25, 1969 Commission redistricting hearing for Hawaii Island which was held in the City of Kona,
- Exhibit 29 1992, TMK (3) 2-9-003: 013, 1992, 13.064 field and property map,
- Exhibit 6, Report page 41, map plate,
- Exhibit 35 Soils maps.
- Exhibits 27 and 28, 2 newspaper articles spanning the period between April of 1969 through August of 1969.

CONCLUSIONS OF LAW

Jurisdiction

This section of the DO contains clauses 1.-9.

The Petitioners **admit** to clauses 1. - 9. however the Petitioners add the following comments regarding clauses 7. , 8. and 9.

Regarding

7. HRS §91-10(5) provides "Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence."

The Petitioners state that the Commission cannot apply *HRS §91-10 (5)* as a CONCLUSION OF LAW and not allow the Petitioners the right of cross-examination of "parties" according to *HRS §91-10 (3)*....

"Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;"

Regarding

8. *HAR §15-15-100(a)(l)(C)* provides that the Commission can deny the petition where *"the issuance of the declaratory order may adversely affect the interest of the State, the commission, or any of the officers or employees in any litigation which is pending or may be reasonably expected to arise ... "*

The Petitioners refer their response to the above 8. in 53. earlier in this document.

Regarding

9. *the applicability of a declaratory order, HAR §15-15-104 states that "[a]n order disposing of a petition shall apply only to the **factual situation** described in the petition or set forth in the order. It **shall not be applicable to different fact situations** or where additional facts not considered in the order exist. The order shall have the same force and effect as other orders issued by the commission."* (emphasis added)

The Petitioners **admit** 9. (above) however the Commissioners spent an inordinate amount of time discussing the current factual situations and a

disproportionate small amount of time discussing and examining the ***factual situations*** relevant that existed in 1969.

Jurisdiction to Redistrict Land and Interpret District Boundaries

10. HRS §205-2(a) provides the Commission with the authority to place lands within one of the four major land use districts: Urban, Rural, Agricultural, and Conservation.

The Petitioners **admit** to 10. (above) however the Petitioners also point out that HRS 205-2 (a) (3) describes the **mandatory** stipulation.....

(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; and

which the Petitioners submit equally applies to the Petition.

When the 1969 Commissioners redistricted land in 1969, the Report and the new Hard Exhibits, that are submitted with this Motion, describe that for Hamakua Coastal lands the unused Coastal pali portion of Hamakua Coastal lands was to be redistricted Conservation for the area below the Coastal "ridge top" and the area mauka, if in agricultural use was to remain in the Agricultural District.

11. Regarding the retention of district boundaries, HRS §205-3 states that "Land use district boundaries existing as of June 2, 1975, shall continue in full force and effect subject to amendment as provided in this chapter or order of a court of competent jurisdiction based upon any litigation filed prior to July 1, 1975, or filed within thirty days after service of a certified copy of any final decision and order made as part of the commission's 1974 periodic boundary review, whichever occurs later.

The Petitioners admit to 11. (above) however the Commission's 1974 district maps only show an undefined district boundary reference line on the maps. It is only when a final defined district boundary is determined can the district boundary be referred to as a final, defined, district boundary.

In 1999, in the case of DR99-21 (Stengle), the Commission found the undefined district reference line on its district map H-59 could not be applied as a defined boundary for Stengle's land. The 1999 Commission applied the Coastal "ridge top" to be the defined district boundary and not the undefined district reference line on the LUC's map H-59. This was also applied in the case of the LUC's boundary interpretation No. 07-19 Muragin.

Similarly in the case of DR96-19 Castle Foundation the 1996 Commission found the undefined district reference line on its district map could not be applied as a defined final boundary for the Castle Foundation's land. The Commission ordered that a new boundary interpretation be issued for Castle Foundation's land. It is unclear whether the district map was corrected.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

12. *HAR § 15-15-22 regarding the interpretation of district boundaries states that:*

(a) *Except as otherwise provided in this chapter:*

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

The Petitioners point to (a) above.... *Except as otherwise provided in this chapter:*. It is provided *otherwise provided in* HAR 15-15. HAR § 15-15-22 (d).....

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

The Report and the 1969 Commission hearing redistricting transcripts and minutes are all "*applicable commission records*". The Report and

the 1969 Commission hearing redistricting transcripts and minutes all describe that the area of the Property mauka of the Coastal "ridge top" that were in agricultural use were not intended by the 1969 Commission to be interpreted to have been redistricted Conservation in 1969.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

(b) All requests for boundary interpretations shall be in writing and include the tax map key identification of the property and a print of a map of the

property. All requests for boundary interpretations involving shoreline properties shall be accompanied by a survey map showing the locations of the shoreline as provided in section 205A-42, HRS. Any erosion or accretion through natural processes shall be reflected on the map.

Further, any shoreline structure, piers, and areas of man-made fill which were constructed or completed since the date of adoption of the state land use district boundaries existing as of the date of the request for boundary interpretation shall be reflected on the map.

(c) The executive officer may request the following information:

(1) Additional copies of the print, including reproducible master map of the print or an electronic copy in a recognized format of the executive officer's designation; and

(2) Additional information such as, but not limited to, tax map key maps, topographic maps, aerial photographs, certified shoreline surveys, and subdivision maps relating to the boundary interpretation.

The executive officer may employ, or require that the party requesting the boundary interpretation employ, at its sole expense, a registered professional land surveyor to prepare a map for interpretation.

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

(e) The following shall apply whenever uncertainty exists with respect to the boundaries of the various districts:

*(1) Whenever a district line falls within or abuts a street, alley, canal, navigable or non-navigable stream or river, it may be deemed to be in the **midpoint** of the foregoing. If the actual location of the street, alley, canal, navigable or non-navigable stream or river varies slightly from the location as shown on the district map, then the actual location shall be controlling; (emphasis added)*

The Petitioners point out that the LUC's McCully boundary interpretation No. 92-48 did not place the SLUD boundary at the midpoint of the former railroad which bisected a large agricultural use field in which the Property's current area is a part of.

(2) Whenever a district line is shown as being located within a specific distance from a street line or other fixed physical feature, or from an ownership line, this distance shall be controlling; and

(3) Unless otherwise indicated, the district lines shall be determined by the use of the scale contained on the map.

(f) Whenever subsections (a), (b), (c), (d), or (e) cannot resolve an uncertainty concerning the location of any district line, the commission, upon written application or upon its own motion, shall determine the location of those district lines.

The Petition was filed according to (f) above.

13. *Regarding land use district boundaries, HAR § 15-15-111 states that:*

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

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

While the maps may be *entitled "Land Use District Boundaries, dated December 20, 1974"* the district lines depicted on the maps are undefined district boundary reference lines to which text records have to be applied in order that a final defined district boundary may be established. That is what the Petition requested that the Commission do.

If it were the State's and the LUC's intention, that the undefined reference district boundary lines, that are shown on the Commissions Official 1974 SLUD Maps, were highly authoritative, defined and final it would not be provided in the Commission's Rules that remedies are provided if "*uncertainty remains.*"

Furthermore there is no statute of limitations for requests for boundary interpretations or repeated boundary interpretations and boundary amendments in the Commission's HARules 15-15. Even Final Decisions and Orders by the Commission may be appealed to a State Court for a period of 30 days following a Final Decision and Order of the Commission.

Finally there would not exist examples of Commission boundary interpretations that were subsequently adjusted by a Commission's Declaratory Order that defined the district line to be in a different location than the location that was first depicted to be in a different location than the Commissions Official 1974 SLUD Maps first showed the district line to be located, according to HAR 15-15-22 (d) and (f) i.e. DR 99-21 (Stengle) and DR 96-19 (Castle Foundation).

The Commission denied the Petition by a vote of 8 aye and 0 nay.

Jurisdiction to Waive Rules, Establish Fees and Request Reimbursement

14. HAR § 15-15-34(b) states that, "[u]nless contrary to statute, the commission may waive or suspend any rule when the commission determines that: (1) good cause exists for such waiver; and (2) strict enforcement of such procedural rule would impose a manifest injustice upon a party or person who substantially complied with the commission's rules in good faith. No rule relating to jurisdictional matters shall be waived or suspended by the commission."

15. HRS §205-4.1 authorizes the Commission to "... establish reasonable fees for the filing of boundary amendment petitions and petitions for intervention to cover the cost of processing thereof and for the reproduction of maps and documents. The commission also may assess a reasonable fee or require reimbursements to be made for court reporter expenses, .. "

16. The Petitioner is responsible for fees pursuant to HRS § 15-15-45.1. This administrative rule provides that: "(a) Unless otherwise provided herein, ... a motion for declaratory order, ... by any person other than a state or county department or agency shall be accompanied by a filing fee by cashier's check, for \$1,000, ...

(b) A petition for an amendment to a district filed by any person other than a state or county department or agency shall be accompanied by a filing fee by cashier's check for \$5,000, ...

(e) The petitioner, movant, or applicant for any petition, motion, or application shall, unless otherwise ordered by the commission, reimburse

the commission for or pay at the direction of the commission any expenses related to the publication of any required hearing notice, expenses of court reporter services, expenses of the hearing room, expenses for audio/visual services and equipment, and any other hearing-related expenses.

(f) After notice and opportunity to be heard, the commission may also assess any party to any proceeding before the commission a reasonable fee or require reimbursements for hearing expenses as determined by the commission, including without limitation, expenses of court reporter, hearing room, and expenses for audio/visual services and equipment."

17. *HAR § 15-15-45.1 states that, "[t]he fees set forth in this chapter shall not be refundable."*

18. *With regard to petitions for declaratory orders, HAR § 15-15-104.1 provides that "[t]he Petitioner shall be responsible for fees pursuant to section 15-15-45.1 herein."*

The Petitioners **admit** 14., 15., 16., 17, 18. to be true however the Commission has the authority to wave its rules. In the case of the Petition and this Motion the Petitioners state that the Commission erred in boundary interpretation 92-48. Therefore it is a reasonable request that the Commission wave its above applicable rule and refund the Petitioned amount.