

MEMORANDUM

CHAPTER 2

Note: at the instruction of LUC staff Chapter 2's 239 pages has been broken into Chapter 2 A and Chapter 2 B

During the **present** Commission's September 8, **2021** Hearing (the "**Hearing**") the Petitioners raised a concern that the Commission should provide a forum of cross examination of evidence provided by the State Office of Planning. The Commission did not allow cross examination of witnesses. This will be discussed later in this Memorandum.

The **present** Commission is constituted by the State under its **1975 Act 193** as a *quasi-judicial body* to administer the Commission's authority in "*the effective application for an established land use policy through an adversary process in which all interests will have the opportunity to compete in an open and orderly manner.*" (see below).....

1975

ACT 193

H.B. NO. 1870

A Bill for an Act Relating to the Land Use Commission.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purpose.** The legislature finds that although the purposes of Hawaii's land use law remain as valid today as they were at the time of its enactment in 1961, the procedures through which these purposes must be realized have proved inadequate and unworkable. Under existing procedures the land use commission has been unable to reconcile in an orderly and rational manner the increasingly hostile and conflicting points of view which surround land use decisions. This Act sets forth reforms intended to insure the effective application for an established land use policy through an adversary process in which all interests will have the opportunity to compete in an open and orderly manner. The commission is constituted as a quasi-judicial body and mandated to make impartial decisions based on proven facts and established policies.

Source, State Law Library, **1975**, Act 193, (emphasis added)

The Petitioners believe that Commission's process of Declaratory Order consideration does not fit neatly into a land owners challenge to a boundary interpretation issued by the Commission's Executive Officer. In effect the land owner challenges the LUC, the LUC hears the case, it decides if it's Executive Officer's boundary interpretation is correct and finally the Commission issues a Decision and Order. In effect the LUC examines itself.

The LUC controls the entire process from beginning to end. Cross

examination of witnesses was not allowed during the Commission's Hearing (the "**Hearing**") for the Petitioners' Petition DR21-72, *ref., Exhibit 5*. Besides the State Office of Planning's representative to the Hearing, Alison Kato ("**Kato**"), two witnesses from the State Office of Planning were sworn in and testified to the Commission. Therefore the Commission does not appear to have fulfilled its responsibility that is described in the State's Act 193, under which the Commission gains its authority, which Act 193 states.....

- the Commission is to conduct its proceedings "*through an **adversary process in which all interests will have the opportunity to compete in an open and orderly manner***", (ref., Act 193, emphasis added)
- the Commission's mandate "*as a quasi-judicial body*" ..is.. "*to make **impartial decisions** based on **proven facts** and established policies*", (ref., Act 193, emphasis added)

During the Hearing the Commission did not fully examine and consider the **facts** that the Petitioners presented in the Petitioners' text Petition document and its Exhibits and determine whether the presented **facts** were **determined to be facts**. Instead the Commission took the approach of justifying its determination to deny the Petition generally **based on the current facts** rather than **the 1969 facts**, in effect referring the Commission's belief that its **1974** official State Land Use District ("**SLUD**") map was of a higher authority than the **text record** of the Report.

In part the Petitioners described **the 1969 facts** that they Petitioned the

Commission to determine whether they were indeed **facts** to be.....

- the Report was an official Commission record of the Commission's redistricting actions in 1969,
- the **text record** of the Report described the 1969 Commission's redistricting actions,
- the **text record** of the Report described that the 1969 Commission's redistricting of Coastal properties or portions thereof, that lay in the area between east Kohala, to the north, and the City of Hilo, to the south, and that were in agricultural production in 1969, **were not to be redistricted** from the Agricultural District to the Conservation District,
- the Property was in agricultural production in 1969.

The present Commission did not make specific determinations regarding the 1969 factual situations that are described above. Instead, in effect, the present Commission determined that the **undefined pictorial reference** district lines on the Commission's 1974 SLUD map H-65 held precedence over the **text record** of the Report and therefore the Commission determined that the LUC boundary interpretation No. 92-48 (McCully) was correct and the Commission denied the Petition.

The Commission's 1974 SLUD map is not a **factual situation** that existed in 1969. For this reason and more the Petitioners believe that the Commissioners made an error in Law. The Property was not redistricted into the Conservation District during the period between 1969 and 1974.

It was the Commission's Executive Officer that issued Boundary Interpretation No. 92-48 (McCully). If the Commission provided a true

"**adversary process**" (*ref., Act 193, above*) the Commission should have the Commission's Executive Officer (or any witness testimony that he and/or the Commission may care to hear) defend the Executive Officer's boundary interpretation on one side and the Petitioners on the other side, each presenting evidence through testimony that can be cross-examined and if witnesses are called cross-examination of witnesses also allowed.

Instead of the **adversarial process** that is described in **ACT 193**, the Hearing appeared to the Petitioners to be the Petitioners against the Commission with the Commission holding the decision making authority. The Petitioners also filed a formal Notice of Objection with the LUC's administrative office, which is provided for in the LUC's HARules, following the Hearing which was not responded to.

Finally the Hearing was conducted *on-line* using the Commission's adopted Zoom video meeting format. Immediately following the beginning of the Hearing the Petitioners *wi-fi* data transmission rate required that the Petitioners turn off their video feed. In this way the Petitioners were unable to present their Petition in the format that they had prepared for. The Petitioners have requested, in part, that this Motion for Reconsideration of the Petition (the "**Motion**") be heard in order that they may participate in the Hearing in a fair and equal way.

Furthermore the Petitioners have uncovered new additional Hard Evidence documents that are submitted with this Motion that may assist the Commissioners to better understand the **1969** Commission's redistricting **intentions** and **actions**. The new Evidence, in part, is in the form of the **1969** Commission's redistricting Hearing transcripts, *ref.,*

Exhibits 43-44, and redistricting Hearing minutes, *ref., Exhibit 45*, regarding 3 redistricting hearings that the Commission conducted on the Island of Hawaii in **1969**. Also the new Exhibits include various maps, *ref., Exhibits 1,2,3,46*, and newspaper articles, *ref., Exhibits 27-28*.

INTRODUCTION

Kenneth S. Church and Joan E. Hildal (the "**Petitioners**") ask that the Land Use Commission (variably the "**LUC**" or the "**Commission**") consider this Motion for Reconsideration (the "**Motion**") of the Commission's Decision and Order that denied Petition DR21-72 (the "**Petition**") which Petition was for a declaratory order for a new boundary interpretation based on the ***factual situation that existed in 1969*** in regards to the Property and not the ***current situation***.

The Petition and this Motion ask that the Commission clarify and correct the LUC's, **December 16, 1992** McCully Boundary Interpretation No. 92-48 (the "**Interpretation**"). The **1992** Boundary Interpretation was for *TMK (3) 2-9-003; 013* which, since around **1950**, was a single TMK Lot consisting of **13.064 acres**, which included the area of the Property makai, *ref., Exhibit 29 TMK map*.

The County of Hawaii assigned the 13.06 acre property *TMK Parcel (3) 2-9-003: 013* after the new Coastal Highway bisected a larger field area that led down from the village of Wailea to the Pacific Ocean **before 1950** when the new highway cut through the larger field. That single **1992** TMK Lot was a cane field, that was owned and farmed by the *C. Brewer & Company Ltd.* The field had been in cane production since before **1905**, *ref., Exhibits 22 (1905 picture)*. The sugar cane farming operation

ceased in 1992. Thereafter the field generally has remained fallow with modest agricultural plantings and grasses, in order to reduce soil erosion and control wild plant overgrowth of the field area. Subsequently since 1992 three residences, a large commercial greenhouse orchid operation and one structure accessory to the agricultural use of the Petitioners property have been added into the 1992 field area.

The Petition also requested the reimbursement of LUC and Court Reporter fees as described in the Petition . The Petition requested that the LUC issue a new Boundary Interpretation for the Property which is provided for in §15-15-22 (a), (d) and (f) HAR.

The Petition describes that the LUC's Boundary Interpretation No. 92-48 (McCully), *ref., Exhibit 3, boundary interpretation*, for an area which included the Property, is an error by the LUC. Therefore the Petitioners believe that it is fair and just that the LUC issue a new boundary interpretation showing the historically uncultivated *pali* land, that is located makai of the coastal "***ridge top***", in the area of the Property, be located in the Conservation District and the land mauka of the ***ridge top*** be located in the Agricultural District.

The Petitioners have used **bold faced**, *italicized* and underlined text throughout this Memorandum and its Appendix(s) in order to assist the Commissioners in variably understanding the **textual** and **purposivist** interpretations of the State's Laws, the Petition's Exhibits and this Motion's Exhibits and various referenced quotes. Generally ***italicized text***, that is found in this Motion, refers to direct **or** generalized quotes

found in referenced documents and/or text copies of testimony that are relevant to the Petition .

HAR §15-15-84 Reconsideration of decision (b) states.....

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

(emphasis added)

The Petitioners use of the words "**unreasonable**", "**unlawful**" and "**erroneous**" (in various subforms) throughout the Motion and this Memorandum reflect that they be considered and applied by the Commission reflective of the same words that are found in HAR §15-15-84 (above).

The Petitioners have generally **bold faced** and underlined date and referenced text throughout this Motion. Regarding dates it is intended to draw attention to various dates and different commissions, throughout the period, as the historical records of the period spanning this Motion are from a period from **1960** to the present. Further clarifying, for example, the **1969**, **1999** and **present** Commission was/is represented by a different panel of people during those different periods but each Commission is generally applying the same Laws, Rules and referencing the same applicably dated Exhibits. The **bold faced** and underlined highlighted dates are given to assist in following the chronology of the period.

Generally

It is an established ***factual situation***, that it is not unusual that the LUC's **1974** SLUD maps reflect ***mapping errors***. This will be described and evidenced in this Motion's Memorandum.

HAR §15-15-98 Who may petition for a Declaratory Order states.....

*(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)

This Motion to Request the Reconsideration of DR21-72 (Church-Hildal) (the "**Motion**") brings new Evidence to the Commission in order to assist the Commission to reconsider the Commission's denial of DR-21-72. The transcript of the September 8, **2021** Hearing for Petition DR21-72 clearly evidences that the Commissioners' denial of DR21-72 was not based on the factual situation in **1969** but rather it was based largely on the ***current situation***.

Commissioner questions during the open part of the Hearing focused heavily on the ***present factual situation*** and in a smaller way on the **1969 factual situation**. Even more so, the Hearing transcript for the closed Deliberations part of the Hearing, further evidences that the Commissioners' reasoning in its denial of DR21-72 had substantially more to do with the ***present preconceived situation*** and in a much smaller way on the **1969 factual situation**. In this other way the Commission erred in law in its denial of DR21-72.

The Petitioners will bring this Motion for Reconsideration back to the Commissioners along two different paths of reasoning.

In the **first approach** the Petitioners will evidence that the ***undefined pictorial*** Coastal district line that is depicted on the LUC's **1974** State Land Use District map SLUD map H-65 generally represents an administrative error for the entire map. The Petitioners will evidence that the **1969** Commission intended that the **1969** Commission's ***adopted*** Map H-65, *ref., Exhibit 46 maps*, represent the Coastal district line to be located at the Coastal "***ridge top***" just like it did for the other 6 SLUD maps for the Coastal area leading northward between the City of Hilo, to the south, and east Kohala, to the North.

In the **second approach** we will Evidence that, in the event that the Commission ***first finds*** that the Coastal district line that is depicted on the LUC's **1974** SLUD map H-65 is not an administrative error, we will Evidence that the ***undefined pictorial*** Coastal district line should be interpreted to lie at the Coastal "***ridge top***" in the area of the Property.

Following the Hearing the Petitioners have worked with the LUC's administrative staff in securing additional Hard Evidence documents that will support both the **first and second approaches** that the Petitioners described above. The Petitioners also have Evidenced two added newspaper articles. The new Evidence documents are.....

- the **1969** Commission's redistricting hearing transcripts and hearing minutes, *ref., Exhibits 43-45*,
- a series of "***proposed***" and "***final***" maps that were used by the **1969** Commission during 3 public hearings on the Island of Hawaii as they

dealt with community concerns regarding their redistricting considerations, *ref., Exhibit 46 maps*.

- a newspaper article dated July 14, **1969**, which was just before the Commission's final redistricting community meeting, *ref., Exhibit 27*, and
- a newspaper article that followed the final redistricting community meeting, *ref., Exhibit 28*.

In order not to provide repetitive repeats of quoted Evidence documents and discussion both **first and second approaches** are intermingled throughout this Memorandum and its Appendix(s) without pointing to either **approach** specifically.

The State has mandated 5 year boundary reviews and redistricting by the LUC. SLUD boundary amendments, by the Land Use Commission (variably the "**Commission**" or the "**LUC**"), are normally reflected as ***undefined pictorial*** district boundary lines on Commission ***adopted*** maps that reflect the Commission's redistricting ***actions***. The LUC's 5 year redistricting ***actions normally also*** are supported by the Hard Evidence ***text records*** of a consultants report and a transcript of the Commission's final redistricting hearing.

In the case of the Petition, the ***undefined pictorial*** Coastal district boundary line that is depicted on the Commission's SLUD Map H-65, *ref., exhibit 11, map*, is in conflict with the ***text record*** of the Commission's **1969** Report, *ref., Exhibit 32*, and the **1969** Commission's redistricting hearing transcripts and hearing minutes, *ref., Exhibits 43-45*. The Petitioners hold that an **administrative error** occurred when the **1969**

Commission adopted district Map H-65 which depicted the district line to lay generally 300 ft. inland of the high wash of the waves.

The ***text record*** of the Commission's consultant Report for the **1969** "***State of Hawaii Land Use Districts and Regulations Review***", (the "**Report**"), that was prepared by the consulting firm *Eckbo, Dean, Austin & Williams*, is attached to this Motion for Reconsideration of the Commission's denial of the Petition as *Exhibit 32*.

Note: when the word "**Hearing**" is found capitalized it refers as it is described above, this Motion will also describe other Commission hearings, particularly other Commission hearings that were conducted in **1969** , they will simply be described with the uncapitalized word "**hearing**".

From a definition perspective there may be an **undefined pictoral boundary line** or **a defined boundary** line on maps and legal survey documents. An **undefined pictoral boundary** line is a reference line on a map, in this case a SLUD map, that is subject to further interpretation based on "***applicable commission records***", ref., HAR 15-15-22 (d).....

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

and

A **defined boundary** is a boundary line that may refer to a SLUD map but the **defined boundary** is specifically described in metes and bounds,

typically on a highly detailed survey map document, that is prepared by a licensed surveyor, which is often supported by a **text** page that describes the boundary in words and numerals, *i.e.*, *metes and bounds*.

Throughout this Motion for Reconsideration of the Petition (Church-Hildal) maps will be referred to as "**Maps**" and "**maps**". The word Maps is intended to refer to the 1969 Commission's redistricting Maps that bear a date stamp July 18, 1969 and were **adopted** as the final redistricting Maps. The word "**maps**" refers to all other maps.

During the 1969 Commission's redistricting land hearings, the Commission's consultants explained that the **district lines** that were shown on the consultant's **recommended** redistricting maps and the 1969 Commission's final **adopted** Maps, that were set before the Commission, County officials, land owners and the general community at 3 redistricting Commission hearings for the County of Hawaii were to be **interpreted** according to **standard practice**. The 3 hearings were held during the period between April of 1969 through July 18, 1969. At the Commission's redistricting hearing, *ref., Exhibit 44, hearing transcript*, the Commission consultant *Degenhardt* described to the Commissioners, land owners and meeting attendees.....

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

Source, Exhibit 44, April 25, hearing transcript, page 11,
testimony of Mr. Degenhardt, consultant, Ekbo. (emphasis added)

Uncertainty regarding correct location of district lines on maps was also described by **Laura Thielen**, who was the Director of the State Office of Planning in **2005**, in her testimony to the Commission during the McCully petition A05 757 **for an area which included the Property** that **many map errors** exist.....

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

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

The Petitioners' position is that the **1969** Commission's consultants did not conduct "***an independent analysis saying that this land belongs in this classification because of the attributes of this physical property***". If the Consultants had they may/would have seen that the Property was in agricultural use in **1969**.

A detailed comparison of the ***text record*** of the Report and the ***text record*** of the transcripts and minutes of the **1969** Commission redistricting hearings is provided in Appendix 1. The comparison very clearly provides Hard Evidence that both the Report and the transcripts and minutes of the **1969** Commission's redistricting action are effectively the same. During the Hearing the Commissioners **speculated** that the Commission's **1974** SLUD map H-65 more correctly reflected the **1969** Commission's intended redistricting of land. This can no longer be reasonably held to be the case.

The Commission stated a belief that the **1969** Commission ***adopted*** Maps **but it did not adopt** the Report. The Commission held that its **1974** SLUD maps were therefore more authoritative. Now the new Hard Evidence of the **1969** Commission redistricting hearing transcripts and minutes of meetings is presented with this Motion, *ref., Exhibits 43-45*. The transcripts and minutes are ***text records*** of Official Commission ***actions***. Because the transcripts and minutes Evidence a ***text record*** of the **1969** Commission's intended redistricting actions they hold a higher authority than ***undefined pictorial*** district lines that are depicted on the Commission's **1974** SLUD maps.

Map errors are so common that the County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the **text** of the ordinance is to be applied as a ***final legal authority*** rather than an Official Map when a ***discrepancy exists***, *ref., (b) (1).....*

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

be the final legal authority."

*source County of Oahu, Sec. 21-3-30 Zoning maps
and interpretations rule (emphasis added)*

From a Legal perspective

The Petitioners have found the **present** Commission's position that the Petitioners were not allowed to cross examine the State Office of Planning's representative to the Hearing Alison Kato ("**Kato**") or the other two Office of Planning witnesses that the Commission heard troublesome. The Petitioners were of the understanding that the Commission was supposed to be a neutral quasi-judicial authority. The Petitioners believed that, as a neutral authority, the Commission should be interested in hearing *a full and true disclosure of the facts, ref., §91-10, HRS, Rules of evidence.....*

(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;

The Hearing transcript describes that Commissioner Okuda cited §91 HRS in two places as a legal authority in assisting the Commission in determining the Petition. In the first place Commissioner Okuda cited §91-1 (5), HRS as an authority, *ref., Exhibit 5, transcript, page 29*. It is likely that Commissioner Okuda intended the reference to §91-10 (5). In the second place Commissioner Okuda cited §91-1 HRS when he introduced his **Motion to Deny** DR21-72, *ref., Exhibit 5, transcript page 124*.

The Commissioners cannot rely on §91 HRS in one case and deny the Petitioners the right to cross examine in another if the Commissioners are

truly interested in hearing *a full and true disclosure of the facts, ref., §91-10, HRS, Rules of evidence*.....

*(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;*

emphasis added

During the Hearing the Commissioners exchanged questions and heard explanations by Kato which the Petitioners believed were incorrect or confusing and contradicting. During the Hearing the State's Attorney General Representative, Alison Kato ("**Kato**") and the Petitioners were allowed to make opening statements and subsequently they answered questions from the Commissioners and in the end they were allowed rebuttal.

When, at the beginning of the Hearing, Petitioner Church asked whether he would be allowed cross-examination of witnesses the Commission's Executive Officer Orodenerker stated.....

6 **MR. ORODENKER:** Actually, Mr. Chair,
7 that's -- that's not quite correct. This is not an
8 evidentiary hearing. There are -- it's not an
9 opportunity for cross-examination, and there are no
10 witnesses.

11 The petitioner, or Mr. Church, can make
12 statements to controvert the OP's position, but
13 there -- since this is a declaratory ruling --

14 **COMMISSIONER SCHEUER:** Right.

15 **MR. ORODENKER:** -- it's -- you're not --
16 you can't -- you're really not -- it's not proper to
17 cross-examine counsel.

Source, Exhibit 5, Hearing transcript, page 18

This became problematic when Commission Chair Scheuer swore in and heard testimony from witness **Rodney Funakoshi**, Planning Program Administrator for the State Office of Planning, *ref., Exhibit 5, Hearing transcript, page 90*. Later Commission Chair Scheuer also swore in and heard testimony from witness **Lorraine Maki**, State Office of Planning planner, *ref., Exhibit 5, Hearing transcript, page 100*. The Petitioners were not given the opportunity to cross examine either of the witness.

This became even more problematic when, during the Hearing, several Commissioners referred that the Petition lacked "**a preponderance of evidence**", and the Petition was "**speculative**", and the Petitioners had not met "**the burden of persuasion**".

When Commissioner Okuda introduced his Motion to Deny DR21-72 he cited "**HR 91-1**" as an authority.....

6 COMMISSIONER OKUDA: Okay. Can -- can you
7 hear me? I'm sorry. Okay. HR Section 91-1 either
8 itself or by implication makes it clear that the
9 party that's initiating the proceeding has the
10 burden of proof, including the burden of producing
11 evidence as well as the burden of persuasion. Okay?

12 And the burden of -- of proof, according
13 to the statute or by implication, is the
14 preponderance of the evidence.

15 In this case, I believe the record that
16 has been presented to us, it indicates that the
17 petitioners have not met the burden of proof. That
18 is demonstrated by the statement by the Office of
19 Planning itself that this could go either way.

20 And because of the fact that reasonable
21 people like the Office of Planning, which has the
22 charge of protecting the public interest and the
23 public trust, itself has made the statements that
24 it's made (inaudible).

continued on next page.....

1 statements that it has made".

2 **COMMISSIONER OKUDA:** The statements it has
3 made, although I understand and recognize the other
4 arguments or statements the Office of Planning have
5 made, is indication that the burden of proof has not
6 been met here.

7 There's also a question in my mind about
8 whether or not this issue is speculative in the
9 sense or because of the fact that there is not, in
10 my mind, by a preponderance of the evidence,
11 indication that there will be bona fide agriculture
12 that would really take place.

13 If there is no bona fide agriculture that,
14 in fact, will take place -- and by the word "bona
15 fide agriculture", I mean agriculture that under the
16 statute and the LUC decisions will show that the
17 dwellings are, in fact, a farm dwelling producing
18 income, not simply personal consumption of
19 agricultural products -- if we don't have bona fide
20 agriculture, then it's a speculative, theoretical
21 discussion here.

22 I join in Commissioner Cabral's
23 description of the fact that granting the petition
24 now would bring actually uncertainty onto maps that
25 have been relied on. I believe that there is a

1 | serious issue where parties have entered into a
2 | transaction, believing and understanding they were
3 | buying conservation districted property with all the
4 | burdens that come along with such property, and then
5 | for whatever reason attempt to do something else.
6 | So for those reasons and the other reasons
7 | that were brought out in the questioning, I would
8 | ask that my motion to deny the petition would be
9 | granted. It, of course, does not preclude the
10 | petitioners from moving forward with their district
11 | boundary amendment, provided they meet the burden of
12 | proof on that petition. Thank you.

Source, Exhibit 5, Hearing transcript pages 124-126 (emphasis added)

Clearly Commissioner Okuda was referring to HRS 91-10 (5) Rules of Evidence,

(5) 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.

Commissioner Okuda's reliance on HRS 91-10 Rules of Evidence clause (5) in support of his Motion to Deny DR21-72 appears to be an error in law if the Petitioners were not also allowed cross examination of

witnesses, referring back here to the Commission's Executive Officer Orodener's opening comments.....

6 **MR. ORODENKER:** Actually, Mr. Chair,
7 that's -- that's not quite correct. This is not an
8 evidentiary hearing. There are -- it's not an
9 opportunity for cross-examination, and there are no
10 witnesses.

11 The petitioner, or Mr. Church, can make
12 statements to controvert the OP's position, but
13 there -- since this is a declaratory ruling --

14 **COMMISSIONER SCHEUER:** Right.

15 **MR. ORODENKER:** -- it's -- you're not --
16 you can't -- you're really not -- it's not proper to
17 cross-examine counsel.

Source, Exhibit 5, Hearing transcript, page 18

Clearly Commissioner Okuda intended to cite HRS 91-10 Rules of Evidence as an authority. Commissioner Okuda's remarks clearly showed that the Commissioners believed that the Petition lacked "**a preponderance of evidence**", and the Petition was "**speculative**", and the Petitioners had not met "**the burden of persuasion**". The Petitioners had filed written evidence documents and the State Office of Planning had submitted evidence documents. Resultingly the Petitioners

continue to be confused. Was the Hearing also according to the State's Law HRS 91 or not?

If the Commission is truly a quasi-judicial administrative body the Commission's proceedings have to have authority that is founded in law and the Commission has to be **open minded** and the Commission should be interested in hearing..... *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, ref., §91-10 (3), HRS, Rules of evidence (also quoted earlier here in).*

The authority for the Commission to hear a Petition for a Declaratory Order is described in the Commission's **§15-15-100 HAR, Consideration of petition for declaratory order.**

(a) The commission, within ninety days after submission of a petition for declaratory order, shall:

(1) Deny the petition where:

*(A) The question is speculative or purely hypothetical and does not involve an **existing situation** or one which may reasonably be expected to occur in the near future; or*

(B) The petitioner's interest is not of the type which confers sufficient standing to maintain an action in a court of law; or

(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

(D) The petitioner requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission; or

(2) Issue a declaratory order on the matters contained in the petition; or

(3) Set the petition for hearing before the commission or a hearings officer in accordance with this subchapter. The procedures set forth in subchapter 7 shall be applicable .

(b) If the matter is set for hearing, the commission shall render its findings and decision within one hundred and twenty days after the close of the hearing or, if post hearing brief s are filed, forty- five days after the last brief is filed, unless a different time period is stated at the hearing.

(emphasis added)

The above **§15-15-100 HAR, Consideration of petition for declaratory order** was quoted generally by Commission Chair Scheuer to the Commissioners before the Commission closed the open part of the Hearing and began Deliberations.....

16 | **Exhibit 5, page 117-118, Hearing transcript Commissioner**
17 | **Scheuer instruction to the Commissioners entering deliberations**
18 | **(emphasis added)**

18 | In addition, Section 15-15-102 of the
19 | commission rules provides that the commission for
20 | good cause may refuse to issue a declaratory order
21 | by giving specific reasons. The commission may so
22 | refuse under the following circumstances.

23 | One, where the question is speculative or
24 | purely hypothetical and does not involve the
25 | existing facts or facts which could be expected to

continued on next page

1 exist in the near future.

2 Two, the petitioner's interest is not of
3 the type that would give the petitioner standing to
4 maintain an action if the petitioner were to seek
5 judicial relief.

6 Three, the issuance of the declaratory
7 order may affect the interest of the commission in a
8 litigation that is pending or may reasonably be
9 expected to arise.

10 Or, four, the matter is not within the
11 jurisdiction of the commission.

12 The commission will now conduct formal
13 deliberations on this matter, and I would note for
14 the parties and the public that during our
15 deliberations, I will not entertain any additional
16 input from the parties or the public unless those
17 individuals are specifically requested to do so by
18 the chair. And if called upon, I would require that
19 all comments be limited to the question at hand.

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

Source, Exhibit 5, Hearing transcript, pages 117-118 (emphasis added)

The Commissioners marginally cited #2. and #3 and in a much larger way discussed/deliberated the **present situation** rather than the **1969 factual situation** which **present situation** had no legal applicability to the Petition. Unfortunately the Commission did not generally conform its Deliberations nor its final Decision to deny the Petition to the guidelines that are provided for in **§15-15-100 HAR, Consideration of petition for declaratory order**. The Commission's Deliberations are covered in detail near the end of this Memorandum (see page 165)

Further in this regard (which is covered in detail near the end of this Memorandum) during the Hearing for the Petition several Commissioners expressed concern that **§15-15-100 HAR, Consideration of petition for declaratory order (a) (1) (C)** may apply and during the Commissioners Deliberations several Commissioners cited **§15-15-100 HAR (a) (1) (c)** by reference, in part, to the Commission's Rule text

*(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*

(emphasis added)

Relative to the Petition the State's Constitution section 11.3, Agricultural lands, and the State's **Laws** that are enabled through HRS 205-2 (a) (3) **and** HRS 205-4 (h) and the Commission's HAR 15-15-19 (1) all clearly describe "**the interest of the State**". State's Law HRS 205-2 (a) (3).....

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

(emphasis added),

The "**interest of the State**" also concerned the **1969** Commission when it adopted new redistricting Maps. Throughout the Commission's **1969** redistricting hearing transcripts and minutes the Commission's consultants and the Commission's Executive Officer advised the Commissioners, the County authorities, the land owners and the general community that ***the new district boundaries would not be overlaid on Coastal lands that were in agricultural use***. This is expanded upon and described with copies of text excerpts from the 3 Commission **1969** hearings in *Appendix 1* that are presented in a chronological way for the period between April **1969** and July 18, **1969**. It is also described in a more limited way herein.

Furthermore, now, this Motion provides new Hard Evidence, *ie. Exhibits 43-45, transcripts and minutes*, that the **1969** Commission knew and understood the Laws and "**the interest of the State**" and it never intended that Prime agricultural land, that lay mauka of the Coastal ***ridge top***, to be overlaid by the Conservation District. The "**interest of the State**" was to create a band of unused Coastal land around each of the Islands to be Conservation.

In the area between east Kohala, to the north, and the City of Hilo, to the South, the **1969** Commission generally recognized, following 2 Commission redistricting community meetings in April of **1969**, that.....

- the Coastal land comprised some of the State's **best agricultural land**,
- **a high coastal pali** existed that was part of agricultural districted lots leading mauka,

- that generally existing agricultural use extended right to the coastal "ridge top"
- that the State's goal to create a band of Coastal land around each of the Islands to be Conservation could be accomplished without interfering with the other State goal which is described in the State's Law HRS 205-2 (a) (3).....

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

(emphasis added),

The following is a cascade of authorities that flow from the State's Constitution through the State's Statutes (variably the "**Law**" and the "**Laws**") and into Commission **Rules** that particularly apply to the Petition....

Article XI, Section 1, Constitution of the State of Hawaii.....

"For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."

(emphasis added)

The State's Constitution's section 11.3 Agricultural lands states.....

"The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of Agriculturally suitable lands."

(emphasis added)

State Law § 205-2 (a) (3), HRS Retention of district boundaries states...

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

(emphasis added)

State Law § 205-4 (h) HRS Amendments to district boundaries

states.....

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

(emphasis added)

The Commission's § 15-15-19 (1) HARule Standards for determining

"A"agricultural district boundaries states.....

Except as otherwise provided in this chapter, in determining the boundaries for the "A" agricultural district, the following standards shall apply:

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

(emphasis added)

The State's **Law HRS 205-2 Districting and classification of lands** (a) (1)-(4) defines the 4 State Land Use Districts to be.....

- Urban
- Rural

- Agricultural
- Conservation

Repeated from the above **State Law**, HRS 205-2 (a) (3) Agricultural District states.....

"In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation;"

(emphasis added)

HRS 205-2 (a) (3)'s use of the word "**greatest**" requires that no other district boundary, **not even Conservation** be applied to land if it has **a high capacity for intensive cultivation.**

and

The word "**capacity**", which is also found in HRS 205-2 (a) (3) refers to a **characteristic of land** and not a past, present or future land use.

The **1969** Commission's consultants (*the Report's authors*) also described that they respected the Law when they developed the Report and the Report's redistricting recommendations....

IV. **CRITERIA USED FOR RECOMMENDING REVISIONS TO THE CONSERVATION DISTRICT BOUNDARIES**

In our analysis of areas to be considered for inclusion into the Conservation Districts we closely followed the provisions of the Law. Maps were drawn for each island

Source, Report page 85 (emphasis added)

The **text record** of the Report was not the only record that the **1969** Commission's redistricting recommendations would conform to the Law. At the beginning of the April 25, **1969** Commission's hearing, in the City of Hilo, **the transcript of the hearing** also evidences that the consultants intended to follow the Law. See the following explanation in testimony by Consultant Williams.....

Consultant Williams testifying.....

Under the Agricultural Districts, a general strengthening of the definition of agricultural areas by deleting some of the modifying sections so that the Agricultural Districts ~~xxxx~~ reflect the intention of the Land Use Law and protect prime agricultural land.

Source, Exhibit 44, **1969** Commission hearing transcript, page 4
(emphasis added)

The **State's goal** to create a band of Coastal land around each of the Islands, to be Conservation, could be accomplished by the Commission without interfering with the other **State goal** which is described in the State's **Law** HRS 205-2 (a) (3).....

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

(emphasis added),

Generally *Hamakua Coastal* land leading mauka from the Coastal "**ridge top**" was in agricultural production in **1969**. The soils were deep and fertile. The area was blanketed by sufficient rainfall. The lands **capacity**

for intensive cultivation existed, *ref., HRS 205-2 (a) (3)*. The *Hamakua Coastal* lands had generally been farmed since the mid-**1800**'s. The Commission did not have to redistrict land in conflict with the **Law** because pali land that was not suitable or used for agriculture existed.

- All but the southernmost map H-65 of the other six **1969** Commission maps for the *Hamakua Coastal* area reflect generally that the "***ridge top***" was intended to be the boundary between Conservation makai and Agriculture, mauka, and that was the area that was redistricted,
- In ***Stengle*** petition DR99-21, Exhibit 1, resulted that a very small portion of his land that was in agricultural production in **1969** and that the boundary line on map 59, had overlaid into the Conservation District was Ordered, by the **1999** Commission (DR99-21) to be redrawn to correct the **map error**,
- Muragin boundary interpretation No. 07-19's ***text record*** referenced that the **1969** Commission only redistricted "***coastal lands from the "Top of Sea Pali" was deemed SLU Conservation District***".
- Nothing in the ***text records*** of either the Report, *Exhibit 32*, or the **1969** Commission hearing transcripts and minutes, *Exhibit 43-45*, described that the Coastal land depicted on the southernmost map area, map H-65, where the Petitioned Property is located, was to be treated any differently than the other *Hamakua Coastal* maps.

It is clear that an administrative error occurred when the **1969** Commission's Executive Officer Duran presented the 73 redistricting quadrangle maps, for Hawaii Island, to the Commissioners on July 18,

1969 for adoption. Map H-65 had not been adjusted, as the other Hamakua Coastal maps had been, following the April Commission redistricting public hearings, to reflect the SLUD boundary to be at the Coastal "**ridge top**", *ref., Exhibit 46*.

Duran told the Commissioners when he presented the final maps for adoption.....

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

The Commissioners accepted his statement as a ***factual situation*** and adopted the 73 maps for the Island of Hawaii as **final** adopted redistricting maps. Nothing in the subsequent transcribed deliberations, *Exhibit 43*, before the final vote was cast indicates otherwise. The ***text record*** of the Commission's Report similarly described "***Areas in agricultural use were excluded***". The local newspaper further confirmed stating "***The new designation includes all shore-line which is not currently in some other use***".

Coming back here to the only HARule, that guides the Commission's decision making authority for a Declaratory order regarding a ***factual situation*** is, HAR 15-15-100.....

(a) The commission, within ninety days after submission of a petition for declaratory order, shall:

(1) Deny the petition where:

(A).....(B).....

*(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 (emphasis added)*

As was stated earlier the ***interest of the State*** is clearly described in the State's Law HRS 205-2 (a) (3). It is likely that successful ***litigation*** would require that a negatively affected land owner first apply through the LUC's rules to correct a boundary interpretation, that is issued by the Commission's Executive Officer, that the land owner believes is incorrect.

The Commission's HARules provide that the Commission's Executive Officer first issue a boundary interpretation based on the Commission's official **1974** SLUD maps. In the event that the LUC's Executive Officer, based on the LUC's **1974** SLUD map, issues a boundary interpretation that appears to a land owner to be incorrect, the Commission's HARules already provide a method that a land owner may first request a new boundary interpretation from the Commission's Executive Officer based on the ***factual situation*** that existed in **1969** **or** next petition for ***reconsideration by the Commission to correct and/or remove uncertainty***. It is up to a petitioner to provide evidence, satisfactory to the LUC, that land was not redistricted Conservation in **1969**.

If the Commission **then** incorrectly applies the final ***defined*** boundary ***without proper regard for Hard Evidence, the Commission's HARules*** and/or ***the State's Laws.....***

it is then that litigation may reasonably be expected to arise.

Effectively if the Commission's denial of DR21-72 (Church-Hildal) is upheld by the Commission, following this Motion for Reconsideration, the Commission sets up the potential for the State, the Commissioners and

the LUC administrative staff's **liability** that is described in §15-15-100 HAR (a) (1) (c)

*(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*

(emphasis added)

Exhibit 5, Transcript of the Petition, evidences that the Commissioners were also concerned that allowing the Petition may increase the Commissioners work load. While that is not a valid authority to deny a Petition it can easily be worked around through administrative procedure of the LUC's administrative office.

The Commissioners need not be concerned that it would **increase the Commission's work load** to allow the Petition or order SLUD map H-65 be redrawn. If the SLUD map H-65 is not redrawn the Commission can pass the authority to its Executive Officer to consider **other applicable** Hard Evidence. Then the Executive Officer would **first** look to the line on the SLUD map and issue a boundary interpretation based on that. If a land owner then writes back and says '**hey no my land was in agricultural use in 1969**' then the Executive Officer may require the land owner to provide suitable **proof** that their land was in agricultural use in **1969** and then issue a new boundary interpretation based on that. This is already provided for in HAR 15-15-22 (d).

Somewhat similarly the DLNR has a clause - HAR 15-15-7 (f) that allows the OCCL's Administrator to "**allow**" Non Conforming Use of land if a land owner provides Hard Evidence that is found to be satisfactory....

"The burden of proof to establish that the land use or structure is legally nonconforming shall be on the applicant"

When the Petitioners requested that the DLNR allow their nonconforming use of the Property for agriculture the OCCL required historical pictures and field maps as **proof**.

Further regarding **liability** the Petitioners searched the LUC's on-line records of past petitions for Declaratory Orders that are comparable to the Petition. Only two were found to exist, DR99-21 (Stengle) (**conservation to agriculture**) and DR96-17 (Castle Foundation) (**conservation to urban**), *ref., Exhibit 25 Castle Foundation*. **Both of these were allowed by the Commission and no petitions for a similar Declaratory Order, that was denied, appear to exist** in the LUC's on-line records.

Further regarding the potential for **litigation**.....

Next below is text that has been copied from the Commission's **2021** Hearing's transcript's page 66.....

18 | And one of those circumstances is the
19 | issuance of a declaratory order may affect the
20 | interests of the commission in litigation that is
21 | pending or may reasonably be expected to arise.

Source, Exhibit 5, Hearing transcript, page 66

This was echoed throughout the Hearing and also referenced in the Commissioners' Deliberations portion of the Hearing as applicable reasoning to deny the Petition. The **Law** requires that the Commissioners uphold their "**Oath of Office**" in administering the State's **Laws**. When Commissioners do not uphold the **Laws** that Hard Evidence supported problematic **litigation** may also be successful.

The Petitioners believe that the States Laws HRS 205-2 (a) (3) and HRS 205-4 (h) should have been applied to the Petition because the Commissioners and Kato appear to have determined that "**uncertainty**" existed regarding whether the Commission's **1974** SLUD map H-65 was of a higher authority than the Report, which, when compared Kato found "**confusing**". When **confusion** exists considering the State's Laws is advised.

During the Hearing Commissioner Okuda reminded the Petitioners that the Commissioners took an "**oath**", when the Commissioners were appointed to the LUC, to "**follow**" and "**apply**" the State's "**Law**". The following 2 pages contain Hearing transcript copy "**screen shots**" of Commissioner Okuda's remarks.....

15 **COMMISSIONER OKUDA:** Thank you very much,
16 Mr. Chair. And thank you very much for the
17 petitioners for making their presentation. Let me
18 just ask some preliminary questions. Mr. Church, Ms.
19 Hildal, you understand that the Land Use Commission
20 is a quasi-judicial body, meaning we have to follow
21 the law whether or not we like the law. Do you

Source, Hearing transcript, Exhibit 5, page 34 (emphasis added)

6 **COMMISSIONER OKUDA:** You mentioned you had
7 difficulty getting professionals such as attorneys
8 to represent you in this matter. But do you
9 understand that whether a party or person or entity
10 is represented by an attorney or not represented by
11 an attorney, the Land Use Commission must apply the
12 law without favoritism or without fear, irrespective
13 of whether or not a party has an attorney or doesn't
14 have an attorney? Do you understand that?

Source, Hearing transcript, Exhibit 5, page 35 (emphasis added)

15 | **COMMISSIONER OKUDA:** Okay. And -- and I
16 | assure you myself and other members on the
17 | commission and including the staff, we neither favor
18 | or disfavor anyone because they have or they don't
19 | have an attorney or because who they are or who they
20 | are not. We really try to just look at the law that
21 | we are -- have taken an oath to apply. So I assure
22 | you that.

Source, Hearing transcript, Exhibit 5, page 36 (emphasis added)

Finally regarding the Commission's concerns regarding the potential for "**litigation**" the Petitioners believe that when the Commission follows the State's Laws the likelihood of successful "**litigation**" will not result or the effective cost of a mistake will be reduced because the continuing issuing of incorrect boundary interpretations will not result.

The Petitioners believed that they had submitted the Petition, which in effect, asked the Commission to determine a **factual situation** that existed in 1969. Throughout the Hearing, *ref., the Exhibit 5, Hearing transcript, and particularly Commissioner Okuda's introduction to a Motion to Deny DR21-72 Hearing transcript pages 124-126*, copied herein, it can be seen that the Commissioners asked questions and made statements which had nothing to do with the **factual situation** that existed in 1969.

The Petitioners submitted Hard Evidence facts and effectively Petitioned that the Commission determine Petition DR21-72 based on the ***factual situation*** that existed in **1969**. Petition DR21-72 was filed with 19 Exhibits of Hard Evidence. The Petitioners have now added considerably to those 19 Exhibits for a total of 46 Exhibits submitted herein. The Commissioners described that the Petitioners did not meet the Commission's standard of ***preponderance of evidence*** or meet the *burden of persuasion*. The Commissioners cited HRS 91 as its authority to require a ***preponderance of evidence*** and meet the *burden of persuasion*. That is not what Commission Chair Scheuer instructed the Commissioners as their legal authority when determining DR21-72 when Deliberations began, he described 4 legal authorities that are to be applied for a Declaratory Order.....

16 | **Exhibit 5, page 117-118, Hearing transcript Commissioner**
 17 | **Scheuer instruction to the Commissioners entering deliberations**
 18 | **(emphasis added)**

18 | In addition, Section 15-15-102 of the
 19 | commission rules provides that the commission for
 20 | good cause may refuse to issue a declaratory order
 21 | by giving specific reasons. The commission may so
 22 | refuse under the following circumstances.

23 | One, where the question is speculative or
 24 | purely hypothetical and does not involve the
 25 | existing facts or facts which could be expected to

Continued on next page.....

1 exist in the near future.

2 Two, the petitioner's interest is not of
3 the type that would give the petitioner standing to
4 maintain an action if the petitioner were to seek
5 judicial relief.

6 Three, the issuance of the declaratory
7 order may affect the interest of the commission in a
8 litigation that is pending or may reasonably be
9 expected to arise.

10 Or, four, the matter is not within the
11 jurisdiction of the commission.

12 The commission will now conduct formal
13 deliberations on this matter, and I would note for
14 the parties and the public that during our
15 deliberations, I will not entertain any additional
16 input from the parties or the public unless those
17 individuals are specifically requested to do so by
18 the chair. And if called upon, I would require that
19 all comments be limited to the question at hand.

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

The Commissioners all confirmed that they understood the 4 above listed criteria to be the basis of their Deliberations and decision.

Thereafter the Commissioners generally discussed the **current factual situation** that had nothing to do with the **factual situation in 1969** as reasoning supporting the motion to deny DR21-72, *ref., the section of this Motion's Memorandum that is titled **COMMISSION DELIBERATIONS*** near the end of this Memorandum. (see page 166)

The Petitioners refer the Commission to *Exhibit 1, DR99-21 (Stengle)* as an example. In DR99-21 Stengle did not provide any Hard Evidence. Stengle referenced the **1969** Report and that appeared to meet the **1999** Commission's standard of ***preponderance of evidence*** and/or meet the ***burden of persuasion***. The minutes, *Exhibit 1, DR99-21 (Stengle)*, of the hearing for Stengle reflect very few questions by the Commissioners regarding the ***current situation*** of his land use. **Stengle's Petition even described that he intended to sell the land.**

In summary the Petitioners asked the Commission to determine the ***factual situation*** that existed in **1969**. **A fact, if determined is a fact, facts do not require a high degree of speculation, persuasion or a preponderance of evidence,** in order to determine/interpret whether a **fact is a fact.** The Hard Evidence of the Exhibits attached to this Motion are facts that describe that the Property was not redistricted in **1969**. The only Hard Evidence that shows otherwise is the Commission's **1974** SLUD map H-65 which has a **reference** boundary line on it. The Petition and this Motion provide Hard Evidence that the **1974** SLUD map is an

administrative error and the ***undefined pictoral reference*** Coastal District line that is depicted on that map is incorrect.

THE PREPONDERANCE OF EVIDENCE AND THE BURDEN OF PERSUASION

The Hard Evidence ***facts*** that are presented in the Petition, and now further added to in this Motion for Reconsideration of the Petition by the Commission, are as follows.....

1. In **1969** the Commission hired the firm *Eckbo, Dean, Austin & Williams* (the "**Firm**") to, among other things, conduct a review of the State's Land use Boundaries and submit to the Commission redistricting ***recommendations*** (the "**Report**") *ref., Exhibit 32 the Report*, supported by recommended/proposed and final redistricting maps ("**maps**" and "**Maps**"), *ref., Exhibit 46 maps and Maps*,
2. The Report is an "***applicable commission record***" to the Petition DR21-72, *ref., HAR 15-15-22 (d)*,
3. The *text record* of the Report page 3 describes
"Chapters 4 through 7 are a summary of the recommended changes to the district boundaries in the four counties. **Since these were acted upon during the preparation 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)
4. The *text record* of the Report's **Chapter 4**, page 36 describes..

*"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", (emphasis added)

5. The Commission held 3 redistricting hearings on Hawaii Island, 2 in April of **1969** and a **final** redistricting hearing on July 18, **1969** which **text record** of the hearings exist in the form of transcripts and minutes, *ref., Exhibits 43-45*,
6. The above described transcripts and minutes are "**applicable commission records**" to the Petition, *ref., HAR 15-15-22 (d)*,
7. The County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the **text** of the ordinance is to be applied as a **final legal authority** rather than an Official Map when a **discrepancy exists**, *ref., (b) (1)*.....
*"Where a discrepancy exists between a district boundary shown on the adopted zoning **map** and that which is described in the text of an ordinance establishing the boundary, **the text of the ordinance shall be the final legal authority.**"*

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

8. In the **text record** of the transcript of the final Commission redistricting hearing for Hawaii Island, *Exhibit 43 transcript*, the Commission's Executive Officer Duran described the final redistricting maps, that were set before the Commission for adoption, stating, in part,.....
*"Another significant proposal of **these maps** is the designation of the shoreline presently in the agricultural district **but not in agricultural use**, into the conservation district". (emphasis added)*

is an "**applicable commission record**" to the Petition, *ref., HAR 15-15-22 (d)*,

9. The **text record** of the transcript of the **final** Commission hearing, *Exhibit 43 transcript*, is of greater authority, in regards to a boundary interpretation, than the exact location of the **undefined reference** district line that is depicted on the Commission's **1974** map H-65, *ref., Exhibit 11, 1974 map H-65 and Exhibit 46 map and Maps*, because the transcript describes how the **undefined reference** district line that is depicted on the Commission's Maps was to be interpreted if/when adopted by the Commission, and it is an "**applicable commission record**" to the Petition, *ref., HAR 15-15-22 (d)*,

10. The **text record** of the Commission's hearing transcript for *McCully LUC petition A05 757 that is dated August 11, 2005, page 120, testimony by Laura Thielen, the Director of the State Office of Planning*, where it is recorded that Thielen testified regarding an area which included the Property.....

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

is an "**applicable commission record**" to the Petition, *ref., HAR 15-15-22 (d)*

11. The Commission has corrected its **1974** SLUD map errors in the past, *ref., Exhibit 1, Stengle and Exhibit 25 Castle Foundation*,

12. Both Stengle and Castle Foundation lands first appeared on the Commission's 1974 SLUD maps to have been redistricted conservation,
13. In 1999 the Commission ordered that the 1974 SLUD map for Stengle's land be corrected to reflect that the land mauka of the Coastal "**ridge top**" remained in the Agricultural District,
14. In 1996 the Commission ordered that the 1974 SLUD map for the Castle Foundation's land be corrected to reflect that the land remained in the Urban District,
15. Exhibit 32, the Report, Chapter 8, **page 86**, provided **Hard Evidence** of a **factual situation** that the 1969 Commission intended, that in areas where a steep Oceanside **pali** and **cliff top** existed, the Coastal pali "**ridge top**" was to be interpreted to be the District boundary,
16. Exhibits 11, 15, 15, 17, 18, 19, 20, 22, 29, 31 and 46, maps and pictures, provide **Hard Evidence** of the **factual situation** that a steep Oceanside **pali** and **cliff top** existed on the ocean-side makai boundary of the Property,
17. Exhibits 10, 16, 22, 29 and 31, letter, field map, TMK map all provide **Hard Evidence** of a **factual situation** that the portion of the Property, mauka of the "**ridge top**" was in agricultural use in 1969,
18. Exhibit 32, the Report's Chapters 4-7, describe **Hard Evidence** of a **factual situation** that the **text record** of the Report's generally used words like "**recommended**" and "**approved**" were used in order

to differentiate between the Report's "**recommended**" redistricting maps and **approved** Maps,

19. Exhibits 43-45, the **text record** of the 1969 Commission redistricting hearing transcripts, provide **Hard Evidence** of a **factual situation**, that further confirms that the **text record** of the Report's page 36, to be the same record of the Commission's redistricting **action** as the final redistricting hearing transcript, *ref., Exhibit 43 transcript*, i.e. that the Commission only intended to redistrict **unused Coastal pali** lands that were in the Agricultural District into the Conservation District,

20. The **Hard Evidence** of a **factual situation** is the State's Law HRS 205-2 (a) (3) which is clear that the State intended a **mandatory requirement** on the Commission to apply in its decision making authority.... (3) *In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation;* (emphasis added),

21. The **Hard Evidence** of a **factual situation** is that the word "**capacity**", that is found in HRS 205-2 (a) (3) is a characteristic of land and not a land use,

22. The **Hard Evidence** of a **factual situation** is that the word "**greatest**" that is found, as a mandatory stipulation, in HRS 205-2 (a) (3) means no other land use district, other than Agriculture, is to be applied by the Commission in its decision making authority to land that

has a high capacity for intensive cultivation , not even Conservation District, (emphasis added) and particularly if a reasonable alternative exists that will provide a balance between State zoning priorities *ie. pali land vs. prime agricultural land - for example map H59 vs. map H65*,

23. The **Hard Evidence** of a ***factual situation*** of the Commission's HAR 15-15-19 (1)'s ***mandatory*** stipulation that the Commission apply, in its decision making authority, that the Agricultural District (1) *It **shall include** lands with a **high capacity for agricultural production**;* (emphasis added).
24. The **Hard Evidence** of a ***factual situation*** is that the word **shall**, when found in the Commission's HAR 15-15-19 (1) is a ***mandatory*** stipulation that the Commission apply in its decision making authority,
25. Exhibit 32, the Report, the **Hard Evidence** of the ***factual situation*** of the Report's Chapter 8, **page 85** clearly described that the **1969** Commission's consultant identified "***In our analysis of areas to be considered for inclusion into the Conservation Districts we closely followed the provisions of the Law***" when the consultants developed "***recommended***" maps for the Commission to ***approve***,
26. The Law that item 25 referred to would have included HRS 205-2 (a) (3) *In the establishment of the boundaries of agricultural districts **the greatest possible protection shall be given to those***

lands with a high capacity for intensive cultivation;' (emphasis added),

27. The **factual situation** is that the present Commission has taken an oath of office to **uphold the law**,

28. The **Hard Evidence** of a **factual situation** is the **State's Law** (HRS 205-4 (h)) (ie. if today's Commission believes that "**uncertainty remains**") regarding whether the **text record** of the Report and the Commission's redistricting hearing transcripts and hearing minutes, *ref., Exhibits 43-45*, **or** the Commission's **1974** SLUD map is authoritative, the **State's Law** clearly states another mandatory requirement that.....

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

(emphasis added)

29. Exhibit 28, news article, provides **Hard Evidence** of a **factual situation**, following the Commission's **July 18, 1969** Community Hearing, that the news article described that the Commission **approved** that **lands in agricultural use were excluded from redistricting**,

30. Exhibit 44, hearing transcript, provides **Hard Evidence** of a **factual situation** that the **1969** Commission's Hilo hearing, transcript

page 11, affirms that the Commission's representative consultants testified to the Commission and land owners that the recommended district lines that were depicted on the maps were not intended to be "**a rigid or firm**" district boundary line but rather that such lines be subsequently interpreted based on physical land characteristics and existing land uses -

"It is flexible in the same manner as all boundaries are upon application".

31. Exhibit 44, hearing transcript, provides **Hard Evidence** of a **factual situation** on its **page 42** that affirms that the Commission's representative consultants testified to the Commission and land owners that in **coastal areas** where the **recommended** district line on maps showed the district line location to be generally 300 ft. mauka of the shoreline....

"shoreline land which is not in agricultural use"..... "is better to be classified conservation than presently to be in agriculture",

32. The **Hard Evidence** of the **factual situation** is that the Commission's April **1969 recommended** SLUD maps H-65 and H-59, **Exhibit 46, both show** the Coastal district line to be generally located 300 ft. mauka of the high wash of the waves,

33. The **Hard Evidence** of the **factual situation** is that the Commission's July 18, **1969 approved** SLUD map H-59 shows the district line was moved makai to the Coastal "**ridge top**" and the district line on Map H-65 remained unchanged generally 300 ft. inland,

34. The **Hard Evidence** of the **factual situation** is that the former railroad crossed Stengle's land, Muragin's land and the Petitioners Property, *ref., Exhibits 1, 2 and 3 map pages,*

35. Exhibit 32, the **text record** of the Report's Chapter 5, page 36, describes **Hard Evidence** of the **factual situation** that the Coastal area leading south from the City of Hilo is generally "**the unique product of recent lava flows running directly into the sea**" and therefore the SLUD map for that area also shows the district line to be 300 ft. inland of the "**high water mark**" and the Commission "**approved**" of that district map,
36. Exhibit 32, the text record of the Report's Chapter 5, page 36, describes **Hard Evidence** of the **factual situation** that the '*extension of the Conservation District be extended from east Kohala, to the north, to the City of Hilo, to the south,*' as had been depicted on the Commission's April **recommended** redistricting map was only "**partially approved**", particularly that lands that are in agricultural use remain in the Agricultural District, i.e. some gulch bottom land that was in agricultural use was also not redistricted Conservation, *ref., Map H-59, Exhibit 46,*
37. Exhibit 32, the text record of the Report's Chapter 5, page 36, describes **Hard Evidence** of the **factual situation** that the **recommended** district line that was shown on the April **1969** SLUD maps for the Coastal area leading northward from the City of Hilo was intended by the Commission to reflect "**the ridge top as a boundary line**" and the Commission "**Approved**" that location and the Report also states particularly "**Areas in agricultural use were excluded**" **and** the district line on maps for the Coastal area leading south from the City of Hilo to Kapoho remain 300 ft. inland of the wash of the waves,

38. Exhibits 10 and 16, *field map and letter*, and Exhibit 29, *TMK map*, provide **Hard Evidence** of the ***factual situation*** that the former railroad did not lie ***at the edge of the agricultural use*** but rather ***bisected*** a large field, *ref., Report page 86 criteria 1.*, which area included the Property in **1969** ,

39. Exhibit 32, the Report's Chapter 8, page 86, provides **Hard Evidence** of the ***factual situation*** that the **1969** Commission intention was to apply the district line in Coastal Areas...

"In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used",

40. The Hard Evidence of the Commission's **1974** SLUD map H-65 conflicts with the text record of the.....

- ***text record*** of the Report's Chapter 4, page 36, *ref., Exhibit 32, the Report* and
- ***text record*** of the transcript of the **1969** Commission's redistricting final hearing, *ref., Exhibit 43 hearing transcript*,

41. Exhibit 32, the Report's Chapter 8, page 86, describes the ***factual situation*** that the **1969** Commission applied the district line in Coastal Areas..

"Where no readily identifiable physical boundary such as any of the above could be determined a line 300 feet inland of the line of wave action was used.",

42. Exhibit 1 describes the **Hard Evidence** of the ***factual situation*** of the **1999** Commission's DR99-21 (Stengle) applied the **1969** Report as an **APPLICABLE LEGAL AUTHORITY** that the Coastal ***"ridge top"*** be the district boundary,

Fourty one of the Exhibits of Hard Evidence describe a ***factual situation***, which, if applied, the Petition should be allowed by the Commission.

Only one of the Exhibits of Hard Evidence exists, the Commission's 1974 SLUD map H-65, Exhibit 11 that appears to show the area of the Property was redistricted Conservation, which Exhibit 11, in effect, is in conflict with the 40 **Hard Evidence** Exhibits and/or references that are described above. The map does not show a ***defined*** boundary. The map shows a district line that, if found correct, to be a ***reference*** line that has to be supported by a ***text record*** that describes how the **1969** Commission intended its ***defined*** location to be interpreted to be. The ***text record*** of **both** the Report and the Commission's **1969** redistricting hearing transcript provide Hard Evidence that the district line was not to be interpreted in a way that overlaid the Conservation District on to lands that were in agricultural use.

Perhaps now the **present** Commission will agree that the Petitioners have met the Commission's standard of ***preponderance of evidence and burden of persuasion*** criteria for a Declaratory order regarding the factual situation that existed in **1969**. Again the Petitioners remind the Commissioners, that in the case of Stengle and Castle Foundation, the petitioners provided very little, if any, Hard Evidence, yet their petitions were allowed by the Commission and the Petitioners' Petition was denied.

The **present** Commission generally applied that the **1969** Commission's Report did not hold a higher authority than the **1969** Commission's

adopted 1974 SLUD Maps. **This Motion and its Memorandum now provide the additional new Hard Evidence** of the three 1969 Commission hearing transcripts (*Exhibits 43-45*) that further confirm that the **text record** of the Report mirrors the three 1969 Commission hearing transcripts which all 3 transcripts and the Report evidence that the 1969 Commission's redistricting **actions** never intended that Coastal land, **that was in agricultural use**, be redistricted.

Map Errors

Map errors are so common that the County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the **text** of the ordinance is to be applied as a **final legal authority** rather than an Official Map when a **discrepancy exists**, ref., (b) (1).....

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

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

and Thielen's testimony to the Commission in 2005 regarding an area which included the Property.....

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

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

and.....

Even the **text record** of another Review report, the LUC's "**Five Year Boundary Review**", Volume II, March 1991 report describes that the LUC's 1974 Official maps often contain district boundary **map errors**, ref., exhibit 5, the 1992 report.....

**District Review and Mapping Study
Five Year Boundary Review, Volume II, March 1991**

State-wide Summary

INTRODUCTION

The existing system of land use regulatory controls in Hawaii, at both State and County levels, is often criticized for being redundant or overly complicated. As indicated by the land use inconsistencies shown on the accompanying maps, many small inconsistency areas appear to be the result of mapping error or other factors not clearly identifiable by mapping techniques alone. Surprisingly, approximately half of the inconsistent areas involve parcels comprised of a land area containing less than 15 acres.

County land use maps are not always obtained. If the amendment is approved by only one governmental body, the amendment is reflected on only one map. Consequently, an apparent inconsistency area is therefore created.

Continued on next page.....

Generally, regulatory inconsistencies resulted primarily from: 1) mapping errors, or 2) if proposed boundary amendments had not completed the boundary amendment process and the

proposed land use change was not currently reflected on the applicable map. As reflected in the State-Wide Summary Table, approximately 238,873 acres were mapped as inconsistent with the various County General Plans. These inconsistencies represent approximately 5.7 percent of the total land area in the State.

*Source the LUC's "Five Year Boundary Review",
Volume II, March 1991 report*

Particularly, for additional reference in the above copied text, "**These inconsistencies represent approximately 5.7 percent of the total land area in the State.**"

The above

- Thielen quoted testimony to the Commission in 2005,
- the Oahu ordinance and the 1992 redistricting report, and
- the 1992 redistricting report to the Commissioners

all clearly show that the Commission's 1974 SLUD maps are not always correct. As further proof there also exist Stengle (Exhibit 1, DR99-21) and Castle Foundation (Exhibit 25, DR96-19) Declaratory orders that have both also corrected map errors.

HAR 15-15-22 Interpretation of District Boundaries refers to **boundary lines** that are found on maps, It first describes.....

(a) Except as otherwise provided in this chapter:

which is followed by.....

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

It is clear that it is not a mandatory requirement that the *district name or letter appearing on the land use district map* **nor** a line on the map is a final authority when you put HAR 15-15-22 (a) (1) and (a) **together**.....

*A district name or letter appearing on the land use district map applies throughout the whole area bounded by the district boundary lines.....
Except as otherwise **provided** in this chapter:*

*HAR 15-15-22 (d) **provides** further guidance when **determining a boundary**.....*

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

and finally *HAR 15-15-22 (f)* brings (a) though (e) together if

"uncertainty" remains.....

(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.*

During the present Commission's Hearing for the Petition Commissioner Chair Scheuer pressed Kato to agree that district map H-65 may have been intended by the **1969** Commission to be treated differently than other *Hamakua Coastal* maps. Clearly the Commission's **1969** redistricting hearing transcripts **and** the Report are both **"applicable**

commission records" and both of their ***text records*** are effectively the same, particularly that **lands that were in agricultural use were not intended by the 1969 Commission to be redistricted Conservation.** There is nothing in either the Report **or** the transcripts that describe that map H-65 was intended to be treated any differently than other Hamakua Coastal maps by the **1969** Commission. The ***text record*** of transcript, ref., Exhibit 43, the **1969** is of a higher authority than any ***undefined pictorial*** districting reference lines on maps or Maps

If the *undefined pictorial* district lines on maps were intended to be final it would not be provided in HAR 15-15-22 that the Commission consider such matters further AND there would not exist examples where the Commission determined otherwise.

THE HARD EVIDENCE OF THE 1969 COMMISSION'S REDISTRICTING ACTION

- Exhibit 32, The Report.
- Exhibits 43-45 Transcripts of the **1969** Commission redistricting hearings.
- Exhibits 27 and 29 Newspaper reports of the **1969** Commission redistricting hearings.
- Exhibit 46 April 1969 Commission recommended redistricting maps and July 18, 1969 final redistricting maps.

Exhibit 32, The Report

In order to understand the Hard Evidence value of the Report, as it applies to the Petition, one has to first understand the Report's structure on a Chapter by Chapter basis. Failure to do so will result in **confusion** and **uncertainty** because the Commission's 1974 SLUD map H-65 is in conflict with the Report and the 1969 Commission's redistricting hearing transcripts. The Report's page 3 describes this to the reader.....

Chapters 4 through 7 are a summary of the recommended changes to the district boundaries in the four counties. Since these were acted upon during the preparation of this report, we are able to provide the Commission's decisions with respect to them. In this way, the text becomes not just a report to the Commission but a record of its actions as well. These four chapters are a functional necessity, but may be unentertaining reading to those not intimately familiar with the Hawaiian landscape.

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

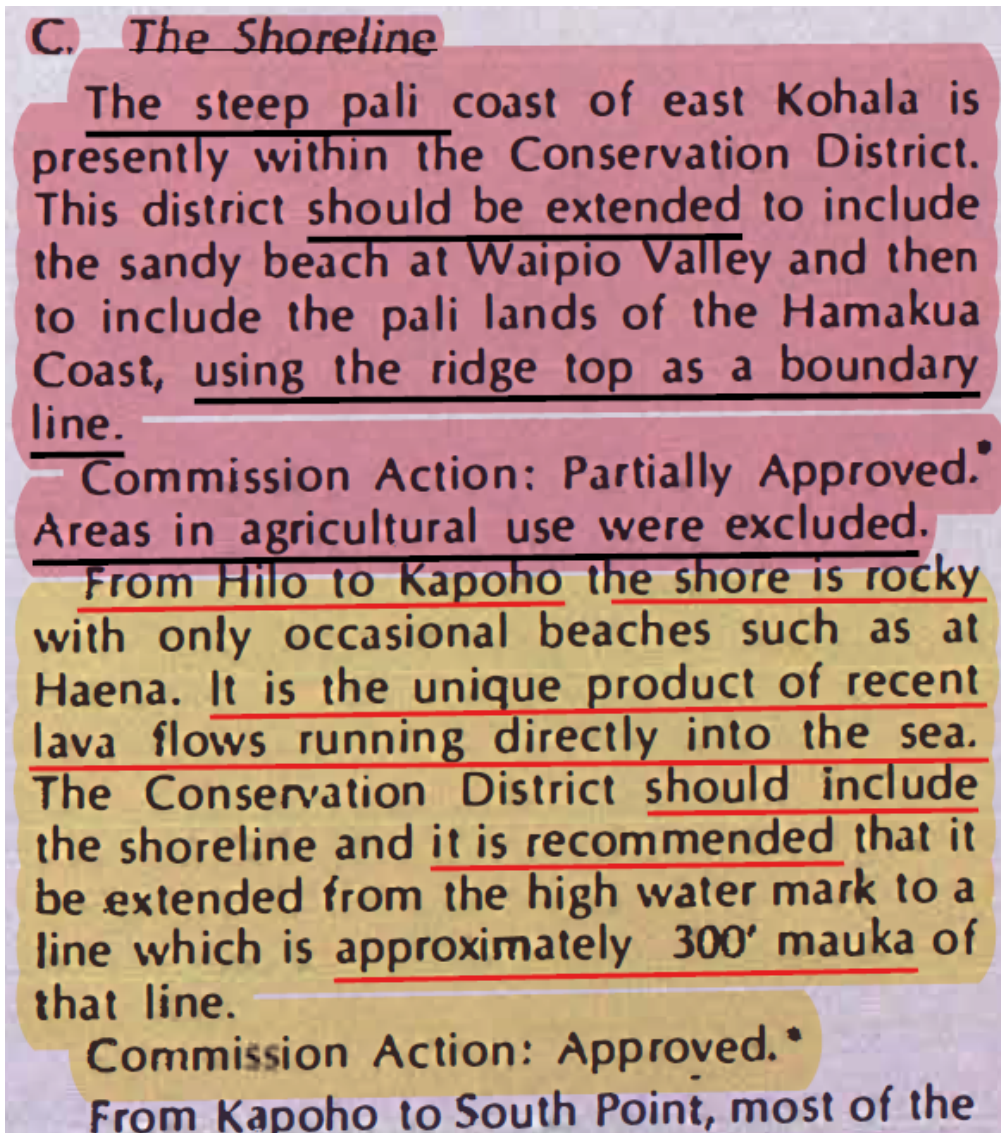
The Report's page 3, above, and the Report's Chapter 5, page 36 are foundational **text records** that support the Petition (Church-Hildal).

Please note above the words phrases and sentences.. "**recommended**" and "**Commission's decisions**" and

"the text becomes not just a report to the Commission but a record of its actions as well. These four chapters are a functional necessity".

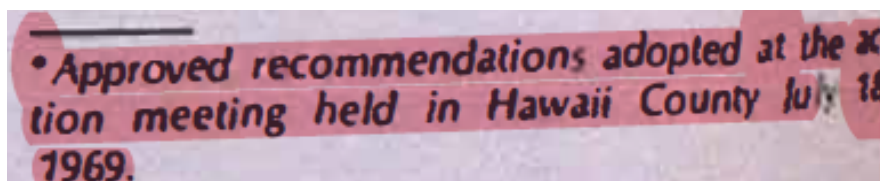
The Report's page 36 follows....

The DBA for the **first** land area of the eastern side of the Island of Hawaii, including the ***Hamakua Coastal*** is described in the Report's, Chapter 5, page 36,



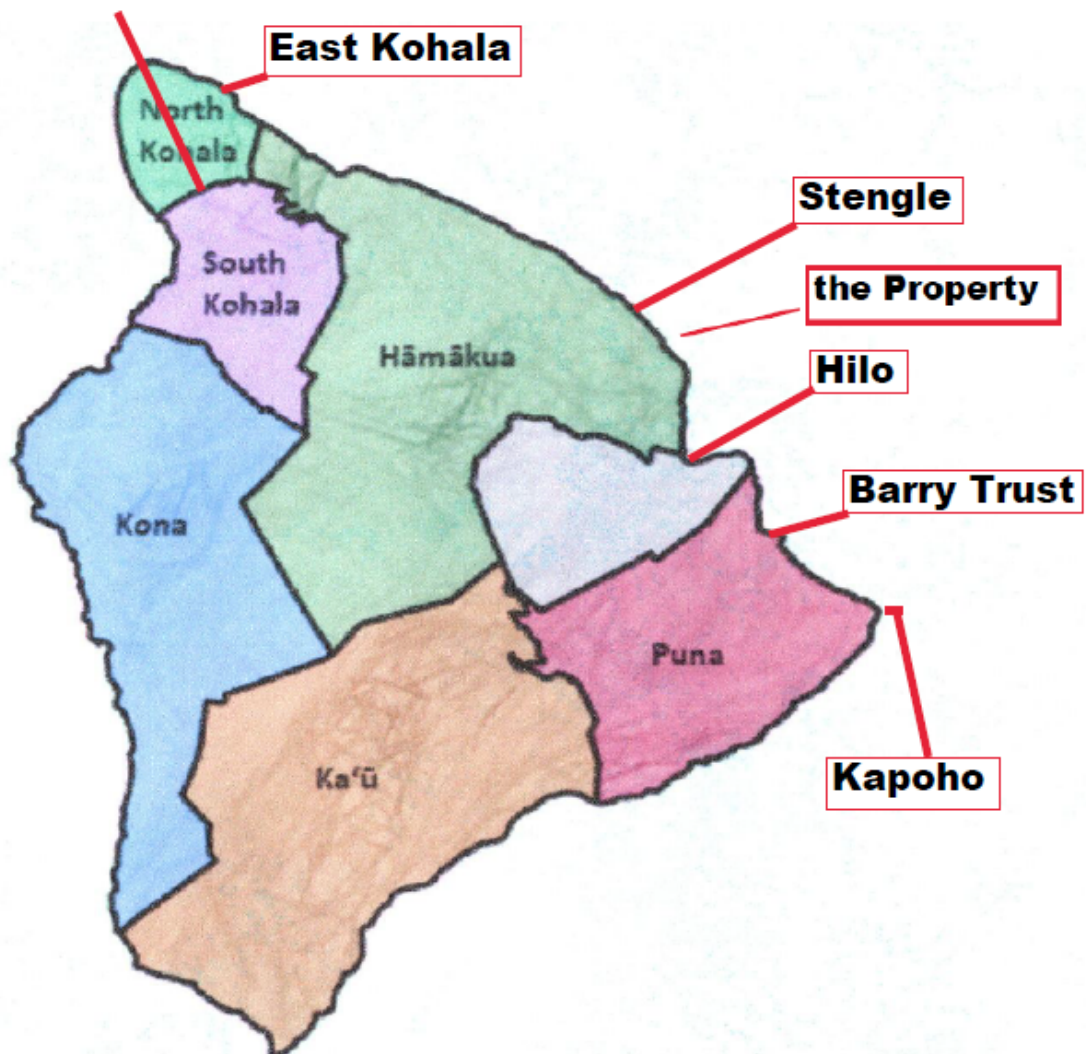
Source, Exhibit 32, Report page 36, (emphasis added)

Source, Report page 36 (emphasis added)



Source, Report page 36 (emphasis added)

The above copied section of the Report's Chapter 5, page 36, also covers the **second** land area that lay between the City of Hilo and Kapoho.



Source County maps (text boxes and lines added)

The Commission's consultant Report, above, described **two different areas that had very distinct physical land characteristics** *ie. suitability for the intense production of agricultural crops. vs. bare rock*.

The **first area**, from East Kohala, to the north, and the City of Hilo, to the South, comprised the ***historic cane field areas of the Hamakua Coast*** (ie. *Prime Agricultural land type C*).

The **second area** from the City of Hilo to Kapoho, comprised a "***rocky***" shoreline with "***occasional beaches***" and with "***recent lava flows running directly into the sea***" (ie *land type E*)..

*"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."

Source, Report page 36 that is shown above (emphasis added)

Next we turn to the Report's **Chapter 8**, page 86.

The only criteria that describes the Property on Page 86 is Criteria 3.

The former r.r. was not "**at the edge of the agricultural use**".

The r.r. bisected the ag. field, ref., Exhibits 10, 16, 29.

Criteria 4. was mistakenly generally applied to all of map H-65 where the Property is located.

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

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

Source, Report, page 86, (emphasis added)

In order for the **undescribed pictorial reference** lines on district maps to gain definition there has to exist a **text record** that assists in interpretation of the **defined** district boundary. The above text copy from the Report's page 86 and the 1969 Commission final redistricting hearing transcript (Exhibits 5 Report and Exhibit 43 transcript) give further Hard Evidence describing the same "**Areas in agricultural use were excluded**" irrespective of where the **undescribed pictorial** district reference lines on any particular map shows it to be.

Furthermore the text copy from the Report's page 86, above, only described "**recommended**" district lines. The Report's page 36 described that the "**recommended**" map was only "**Partially Approved**". "**Areas in agricultural use were excluded**".

The Coastal district line on the April **recommended** maps showed the Coastal district line to lie 300 ft. inland of the Coast, **ref., Exhibit 46 maps** for most of the Coast of Hawaii Island. The Report and the transcripts of the Commission's hearings describe that the community raised issue with the district line appearing 300 ft. inland of the wash of the waves, particularly on lands that were in agricultural use in the area between east Kohala, to the north, and the City of Hilo, to the south ie. Hamakua Coastal land.

The Report's page 36 describes that the April **recommended** 7 maps, for the area that extended from east Kohala, to the north, and the City of Hilo, to the south, were only "**partially approved**" by the Commission on July 18, **1969**. Effectively the Commission "**approved**" that the Conservation District be extended on "**pali**" land. The "**partial approval**" likely reflected that some bottom land was also excluded from the being redistricted Conservation ie., some gulches and Waipio Valley etc.

The **text record** of the Report's page 36 described that the Commission **approved** that "**pali**" lands, makai of the Coastal "**ridge top**" be redistricted Conservation for the area between east Kohala, to the north, and the City of Hilo, to the south. **Both the text record of the Report and the text record of the transcript of the Commission's July 18,**

1969 hearing, ref., Exhibit 43 transcript, and the April hearing transcript and minutes, Exhibits 44-45 minutes and transcript, agree that the 1969 Commission intended to not overlay the Conservation District on lands that were in agricultural use in the Hamakua Coastal area. The conflict in the Hard Evidence is that is what Petition DR21-72 (Church-Hildal) asked the Commission to do. Map H-65 is in conflict with the ***text records*** of the **1969** hearing transcripts and minutes, particularly the Commission's Executive Officer Duran's introduction of "**these maps**" to the Commissioners for adoption.....

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

Transcripts of the 1969 Commission's redistricting actions

The following are copies of text **first** from the July 18, **1969** hearing, ref., *Exhibit 43, transcript*, followed by copies of text from the transcript hearings that back up Duran's **these maps** , ref., *April transcript and minutes, ref., Exhibit 44 transcript, and Exhibit 45 minutes.....*

The *Exhibit 43, transcript* describes **Commission's Executive Officer Duran** explanation to the Commissioners of the recommended 73 redistricting maps that were the final agenda item to be considered and acted upon by the Commissioners. ***Duran*** referred the Commissioners to "**these maps**"

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

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

Note above:

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

In 1969 the Petitioned Property was in agricultural use but a steep coastal *pali* area existed as part of the makai side of the Property which *pali* area was not in agricultural use.

Referring again here to the July 18, 1969 Commission hearing transcript, where, after an open meeting discussion, a motion was made to adopt the redistricting maps that the Commission's Executive Officer Mr. **Duran** introduced to the Commission, which is referenced above, in the referenced transcript page 7.....

COMMISSIONER:

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

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

Following unrelated deliberations and without further amendment to the motion, the Commission voted and the Commission's Executive Officer, Mr. **Duran** announced the vote outcome...

MR. DURAN:

Motion is carried, Mr. Chairman.

Source, Exhibit 43, Page 35, hearing transcript (emphasis added)

Note: the **adopted** maps will be referred to here after as "**Maps**" and all other maps will be referred to as "**maps**".

The text record of the transcript, that is copied above, is of a higher interpretive authority than the ***undefined pictorial*** district lines that are depicted on the LUC's 1974 SLUD map H-65.

There is nothing in the Hard Evidence of either text record that describes that Map H65 was to be treated differently than any of the other 6 maps for the Hamakua Coastal area. Both text records of the Report and the transcripts and minutes are very clear "***Areas in agricultural use were excluded***".

It is unfortunate that the Commission was looking at 73 district maps that day. Like most Commission's the Commissioners relied on their Executive Officer to present them with maps that were correct. Even more-so had a Commissioner decided to scrutinize the maps, first the scale of the maps would have made interpretation of the location of district lines to be very difficult to accurately determine. The scale of the maps, 1" = 3000 ft. could not be interpreted by anyone in the detail that would be necessary to interpret the recommended and final DBA boundaries. The area of the Property on quadrangle H-65 map would have looked like.....



Source current quadrangle Map H-65 (to scale)

The 300 ft. mauka **district line location** on the Commission's consultant "***proposed***" maps was raised by a number of concerned land owners at

the above described Commission **1969** hearings in both City of Kona and Hilo, *ref., 1969 hearing transcript exhibits 43, 44 and 45.*

A detailed side-by-side comparison of the transcripts and the Report is found in Appendix 1.

Both Commission's representative consultants *Degenhardt* and *Williams* went to considerable lengths during the hearings to describe to **land owners** and the Commissioners that **lands that were in agricultural use were not to be interpreted subsequently to have been redistricted conservation even if the maps appeared to show otherwise.** The following are some of the examples of the hearing attendee's question and the Commission's representative consultant's reply that is copied from Exhibit 44, hearing transcript.....

Yes. I'm Ken audience question . I wanted a little more clarification on this 300 foot setback in agricultural. I'd like the staff to explain maybe a little bit about the philosophy behind it and what is the intended use for this route that ... as far as the private landowners are concerned.

Source, Exhibit 44, Hilo hearing transcript page 42 (emphasis added)

The Commission's representative consultant's reply is as follows.....

Consultant Williams replies to land owner "Ken"

I think what we're saying is that land , shoreline land which is
not in agricultural use is easier to destroy. It is better
to be classified as conservation than presently
to be in agriculture agricultural uses
so that the intention to that from
agricultural products in any way. try to
indicate the variety of situations that we have run into designating
the shore line district. In the one case it represents the
sea, the Pali Coast and would be the point at
which we would classify it, or draw lines, classify land makai
of that as conservation.

Note: the "text" describes "*shoreline land which is not in agricultural use*" and "*the pali coast*"

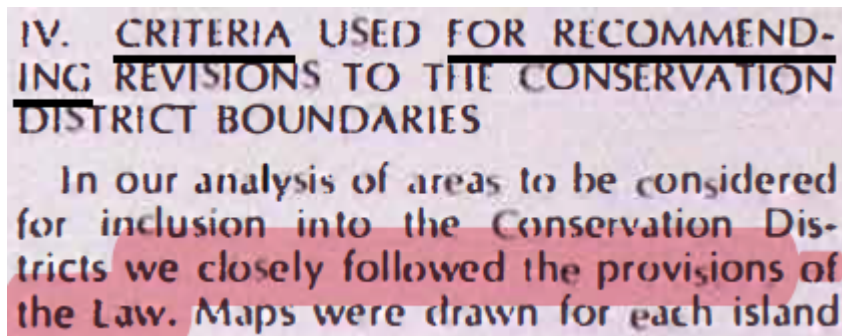
Source, Exhibit 44, April hearing transcript page 43 (emphasis added)

Note: The gaps in the transcript text, above, appear to have resulted from the transcription being done later from a tape recording of the hearing. Not all sections of the tape recording appear to have been clearly discernible by the transcriber.

Generally *Hamakua Coastal land owners* owned the land right to the high wash of the waves. In **1969** the entire area of the shoreline lots were in the Agricultural District. The Oceanside ***pali lands*** portion of the agricultural districted lots were the portion of the land area that were

referred to in the above referenced "***not in agricultural use***" ***recommended*** redistricting action. The **1969** Commission's hearing transcripts clearly indicated that it was the ***pali lands*** of agricultural use lots that were ***recommended*** and ***approved*** to be the redistricted land area and not the prime agricultural field areas that lay mauka of the Coastal "***ridge top***" that were in agricultural use in 1969.

To redistrict Hamakua Coastal agricultural land would have gone against the State's Law HRS 205-2 (a) (3). The **1969** Commission's consultants (*the Report's authors*) also described that they respected the Law when they developed the Report, the Report's redistricting recommendations and maps....



Source, Report page 85 (emphasis added)

The ***text record*** of the Report was not the only record that the **1969** Commission's redistricting recommendations would conform to the Law. Again the ***text record*** of the Report and the ***text record*** of the transcripts mirror each other. At the beginning of the April 25, **1969** Commission's hearing, in the City of Hilo, ***the transcript of the hearing*** also evidences that the consultants intended to follow the Law. See the following explanation in testimony by Consultant Williams.....

Consultant Williams testifying.....

Under the Agricultural
Districts, a general strengthening of the definition of agricultural
areas by deleting some of the modifying sections so that the Agri-
cultural Districts ~~xxxx~~ reflect the
intention of the Land Use Law and protect prime agricultural land.

Source, Exhibit 44, 1969 Commission hearing transcript, page 4
 (emphasis added)

The LUC's 1974 map H-65 is in conflict with the ***text record*** of the Report and the ***text record*** of the transcripts of the redistricting hearings. Again Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the ***text*** of the ordinance is to be applied as a ***final legal authority*** rather than an Official Map when a ***discrepancy exists, ref., (b) (1)***.....

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

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

The LUC should have a similar HAR 15-15. It would save everyone, including the State, a lot of time and money, including the Commissioners volunteer time.

Further on, in the same hearing transcript the consultants describe that they also did not intend to overlay the Conservation District on "**existing agricultural uses**".....

Consultant Dagenhard testifying regarding maintaining land that is in agricultural use in the agricultural district

The second set of criteria

we used in the agricultural district are existing agricultural uses.

Source, Exhibit 44, 1969 Commission hearing transcript, page 9
(emphasis added)

The **1969** Commission very clearly intended that district lines on Maps be "**flexible in the same manner as all boundaries are upon application**" (see next copy).....

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

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

Consultant *Degenhardt's* reference "***It is flexible in the same manner as all boundaries are upon application.***" is further confirmed to be a standard practice of regulatory authorities, even Hawaiian authorities. As described earlier herein map errors are so common that the County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the ***text*** of the ordinance is to be applied as a ***final legal authority*** rather than an Official Map.

The back and forth discussion between the land owner and consultant *Williams* went on for over one additional page with the consultant pointing back to his testimony in City of Kona the previous day where he had clarified the recommended district lines as it regarded 300 ft. setbacks on maps to a **Hamakua Coast landowner**....

Mr. Richard M. Frazier - Honokaa Sugar Company

Mr. Frazier queried Mr. Williams as to his definition of the 300-foot setback for shoreline areas. In acknowledgment, Mr. Williams answered that the 300-foot setback is used only in areas where there are no physical features, i.e., the top of a pali or ridge, a road, or any other identifiable feature. Furthermore, special uses are permitted within the 300-foot line (on the flat), but such uses must be secured through the special permit procedure.

Source, Exhibit 45, hearing minutes page 11 (emphasis added)

Several other text copies of the transcripts are found in Appendix 1.

The Commission's past **actions**, where the Commission found its district mapping errors occurred or maps to not be authoritative over "**applicable commission records**", further supports that the Commission's official district maps are not always to be held authoritative over the other Commission records. It is a reasonable provision in the Commission's HARules that the a land owner may Petition the Commission to also consider and apply other applicable Hard Evidence when a district line on a Commission map is believed to depict a mapping error.

The current Commission's very obvious reluctance to consider **applicable commission records**, *ref.*, HAR 15-15-22 (d), and instead hold **pictoral** descriptions that show **undefined pictoral** district lines on the Commission's maps to be final is inconsistent with past Commissions boundary interpretations and Declaratory Orders, the Commission's own HARules and the State's Statutory Laws.

The Petitioners believe that the Commission's denial of Petition DR21-72 was arbitrary, capricious and/or with discrimination and is inconsistent with the **preponderance of evidence** that was exhibited in the Petition particularly when compared to 2 similar Petitions DR99-21 (Stengle) and DR96-19 (Castle Homes), neither of which appear to have submitted a **preponderance** of evidenciary documents with them, *ref.*, *Exhibits 1 and 25*.

HAR 15-15-22 (*which was quoted earlier herein*) is the Commission's Rule that governs authoritative district boundary **interpretations**. HAR 15-15-22 (d) and (f) provide the rules for **interpreting** a District Boundary when the Commission's **1974** SLUD maps are in conflict with other Hard

Evidence.

A boundary amendment has to be more than an ***undefined pictorial*** line on a map. In the case of the Petition the district map is a reference document against a record, ie. ***text records*** such as

- Exhibit 16, field map,
- Exhibit 10, the fields manager, John Cross letter,
- Exhibit 15, historical cane field picture,
- Exhibit 32, the Report, and
- Exhibits 43-45, the **1969** Commission redistricting hearing transcripts.

While such a district map may be ***adopted*** by a redistricting Commission, the ***undefined pictorial*** district lines on such a map have to have a text basis describing the amended map.

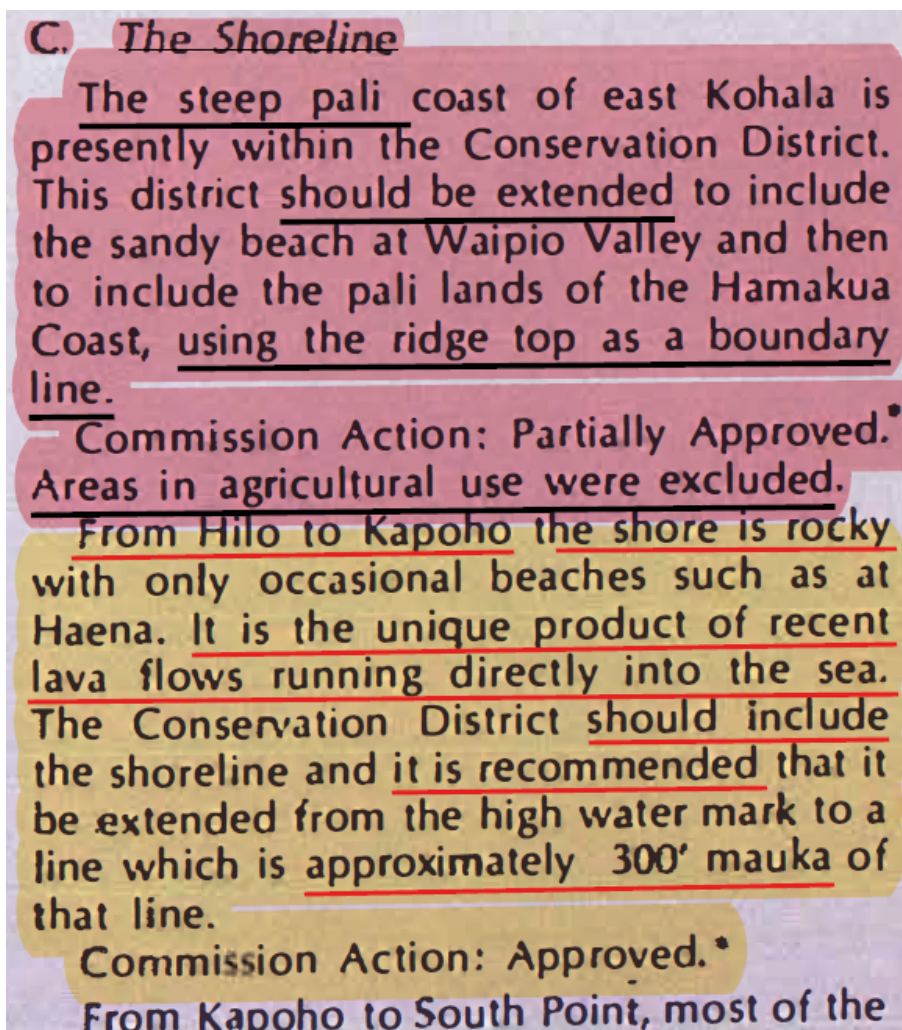
An ***undefined pictorial*** District Boundary line on a District map is for reference when interpreting a District Boundary against the ***text record*** of what was originally proposed and what was finally adopted.

In the referenced cases of Stengle (Exhibit 1, DR99-21) and Castle Foundation (Exhibit 25, DR96-19) and boundary interpretations for map H-59, ie., Muragin (Exhibit 2, No. 07-19) all referred back to the ***text record*** of the Report which ***text record*** was held by the Commission as authoritative over the ***undefined pictorial*** on district maps. In the case of the Petition the Petitioners point to both.....

- the text record of the Report (Exhibit 32), and
- the **1969** Commission redistricting hearing transcripts and hearing minutes (Exhibits 43-45).

The "**shoreline**" area of the *Hamakua Coast*, where the Property is located, was generally redistricted from the Agricultural District to the Conservation District in **1969** (the "DBA"). The LUC's Official **text record** of the DBA for the entire Island of Hawaii is described in the referenced transcripts and minutes of the three **1969** Commission redistricting hearings, *ref., Exhibits 43-45* and is further discussed in more detail in Appendix 1.

The DBA for the area of the eastern side of the Island of Hawaii, including the **Hamakua Coastal** is described in the Report's, Chapter 5, page 36,



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

The Commission's consultant Report, above, described **two different areas that had very distinct physical land characteristics** *ie. suitability for the intense production of agricultural crops.*

The **first area**, from East Kohala, to the north and the City of Hilo, to the South, comprised the ***historic cane field areas of the Hamakua Coast*** (*ie. Prime Agricultural land type C*).

The **second area** from the City of Hilo to Kapoho, comprised a "**rocky**" shoreline with "**occasional beaches**" and with "**recent lava flows running directly into the sea**" (*ie land type E*).

*"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."

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

Leading up to the Commission's final July 18, **1969** redistricting hearing two other Commission hearings occurred in April of **1969**, *ref., Exhibits 44 and 45 hearing transcript and hearing minutes.* "**Proposed**" redistricting maps were shown for meeting attendees that showed the district line

generally to be **300 ft. inland** of the high wash of the waves, *ref., exhibit 46 maps and Maps.*

The **1999** Commission cited the Report's page 36 in DR99-21 (Stengle) in its Decision and Order cited APPLICABLE LEGAL AUTHORITIES.....

APPLICABLE LEGAL AUTHORITIES

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

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

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

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

Source DR99-21, Exhibit 1 (emphasis added)

When the present Commission considers and applies all of the Hard Evidence vs. just the Commission's **1974** SLUD map it is very clear that the **1969** Commission did not intend that the district map H65 overlay the Conservation District 300 ft. inland of the high wash of the waves as the map appears to represent.

As previously described herein **Map errors** are so common that the County of Oahu has a rule in its County of Oahu, Sec. 21-3-30 Zoning maps and interpretations rule, which describes that the **text** of the ordinance is to be applied as a **final legal authority** rather than an Official Map, *ref., (b) (1)*.....

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

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

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

- the **text record** of the **1969** Commission hearing's minutes, and transcripts, *ref., Exhibits 43-45*, which describe...

(i) that the **1969** Commission adopted redistricting Maps on **May 18, 1969** that were based on community input at 2 previous hearings that were dated April 24, and 25th, *ref., Exhibits 43-45*,

(ii) that the **1969** Commission **and** the community were repeatedly told, by the Commission's representative consultants **and** the Commission's Executive Officer, Duran, that "**lands in agricultural use would not be redistricted**" **and** the district

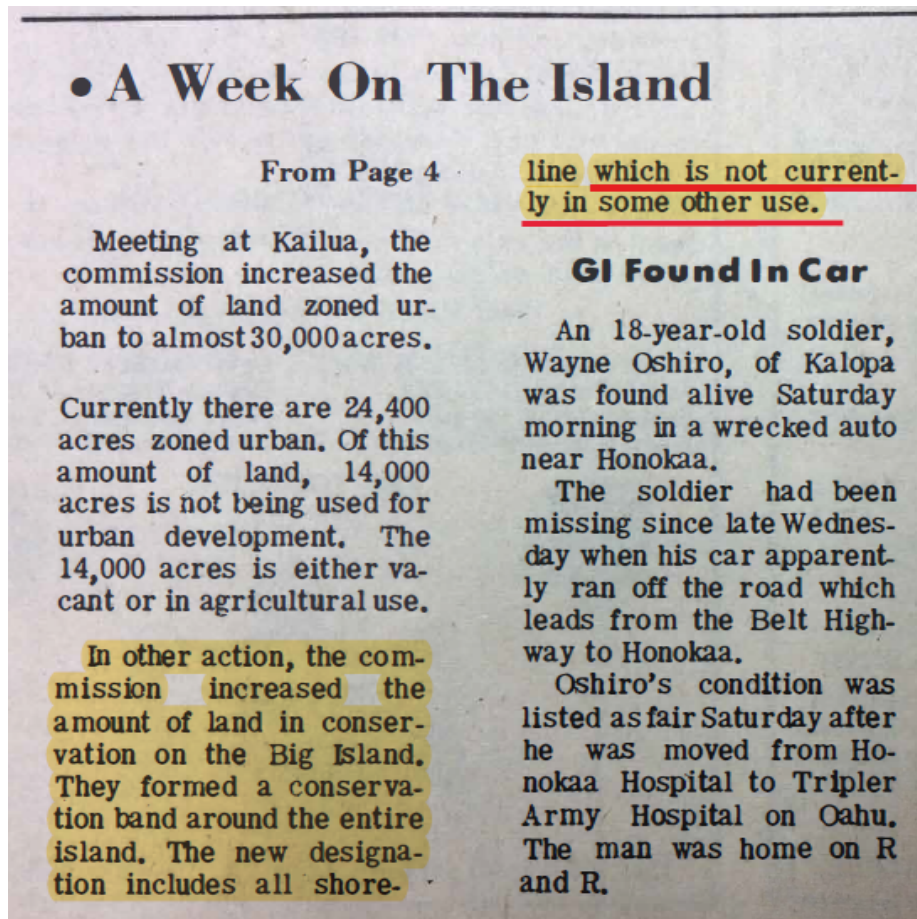
lines on the maps were intended to represent the general extension of the Conservation District along the Hawaii Island coast..... ***"It is flexible in the same manner as all boundaries are upon application."***, ref., Exhibits 43-45 transcripts and Appendix 1,

- the ***text record of the Commission's Report's*** pages 3 and 36, which further confirmed that the **1969** Commission's redistricting of land in the area of the ***Hamakua Coast***, the Coastal ***"ridge top"*** would be the ***defined*** district boundary, ref., Exhibit 32, Page 3 of the Report describes.....

Chapters 4 through 7 are a summary of the recommended changes to the district boundaries in the four counties. Since these were acted upon during the preparation of this report, we are able to provide the Commission's decisions with respect to them. In this way, the text becomes not just a report to the Commission but a record of its actions as well. These four chapters are a functional necessity, but may be unentertaining reading to those not intimately familiar with the Hawaiian landscape.

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

- the ***text record*** of the Tribune-Hearal newspaper article states, ***"The new designation includes all shoreline which is not currently in some other use."***, ref., Exhibit 28,.....



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

- the **text record** of the Commission's 1999 DR99-21 (Stengle), page 7, ref., Exhibit 1, where the Commission recognized the authority of the **text record** of the Report's description that the 1969 Commission intended that the extension of the Conservation district from east Kohala

"be extended to include the sandy beach at Waipio Valley and then to include the pali lands of the Hamakua Coast, using the ridge top as a boundary line."

over the Commission's 1974 SLUD map H-59, ref., Exhibit 1,

- the apparent redrawn coastal boundary **line** on the Commission's Official **1974** SLUD map H-59 in **1999** following DR99-21 (Stengle), *ref., Exhibits 1 & 12*, and
- the Commission's **proposed** maps that led up to the final Maps that were **adopted** by the **1969** Commission, *ref., Exhibits 37-39 and 46 maps*,
- the **text record** of the LUC's boundary interpretation No. 07-10 (Muragin) which confirmed in a similar way to DR99-21 (Stengle) that

"the landward portion of the subject parcels was designated SLU Agricultural, any coastal lands from the "Top of Sea Pali" was deemed SLU Conservation District", *ref., Exhibit 2*,

- the **text record** of the present Commission DR21-72, *Exhibit 5, Hearing transcript, page 107*, where Commission Chair Scheuer and Kato **agreed** that the district line on the Commission's **1974** SLUD map H-65 was supposed to have been drawn "**at a later date**" and **'based on the Report'**.

Frankly the Hard Evidence is that Commission variably describes and interprets how the district lines were applied to maps in a way that...

- often contradict what the **1969** Hard Evidence of the transcripts of the 1969 redistricting hearings,
- conflicts with the Report descriptions of what the redistricting describe, and

- conflicts with other statements that the Commission makes (*ie. the above quoted Exhibit 5, present Hearing transcript for DR21-72 (Church-Hildal), page 107 testimony exchange between Commissioner Chair Scheuer and Kato*),
- adds to confusion for everyone.

In DR99-21 (Stengle) the Commission described in its FINDINGS OF section, item 12, ref., Exhibit 1, page 28 that the LUC staff.....

"Staff based its determination of the parcels' land use designation on an enlargement of the Commission's State Land Use District Boundaries Map, H-59 (Papaaloa), which represented the Agricultural and Conservation District boundary as following the 200-foot contour line, and upon review of the "State of Hawaii Land Use Districts and Regulations Review" prepared by Eckbo, Dean, Austin & Williams to document the recommendations and actions in the 1969 Five-Year Boundary Review. The report reflected that along the Hamakua Coast of the island of Hawai'i, the Conservation District boundary was to follow the top of the ridge or pali. Areas in agricultural use at that time were excluded."

Nowhere does the Report's page 86 criteria 1-4 describe that "**contour lines**" were applied as district lines. Furthermore the **1969** Commission's redistricting hearing transcripts and hearing minutes **do not** describe "**contour lines**" to be applied as district lines on maps. **Naturally the land owner was confused by the Commission's invention of a district line description that was inconsistent with the Report** and now also the **1969** Commission hearing transcripts and hearing minutes.

At present we have the following LUC statements (below), over time, regarding how district lines on maps were intended by the **1969** Commission. The statements have no consistent basis in

- the **text record** of the Report, and
- the **text record** of the **1969** Commission's redistricting hearing transcripts or hearing minutes which are of a higher evidence authority than the LUC's 1974 SLUD maps.

The LUC's various explanations of the correct location of the **undefined pictorial** boundary lines on maps (that have been previously described herein, in Appendix(s) or if not will be subsequently described herein) go something like this.....

- Scheuer to Kato..... "**followed the railroad**"
- Scheuer and Kato agree..... the "**maps were based on the Report**"
- DR99-21 (Stengle) the LUC's first boundary interpretation stated..... the "**boundary as following the 200 ft. contour line**",
- In the end in DR99-21 (Stengle) determined that the correct location of the District Line was to be the Coastal pali "**ridge top**",
- In DR21-73 (*Honoipu Hideaway*) the LUC applied the line where it believed a **former road** was located,

- In DR21-73 when (*Honoipu Hideaway*) asked that the LUC's first boundary be reconsidered based on the fact that the later dated map's road was inconsistent with the correct map the LUC decided to not apply it to the road and instead applied it to a line **300 ft. inland of the Coast.**

There has to be a consistent application of supporting reasoning, founded in hard text copy, that is applied by the LUC to district lines on maps. It appears to have been and just whatever description suits the LUC at any given time when it tries to explain its subjective and inconsistent interpretation of the **1969** Commission's intended redistricting **actions** vs. the Commission's **1974** SLUD maps. Again, the State's Law is bluntly clear, it is agricultural land that is to get the "**greatest**" protection and application by the Commission. The term "**greatest**" can only mean that the application of no other districting authority is greater than Agricultural Districting, **not even Conservation.**

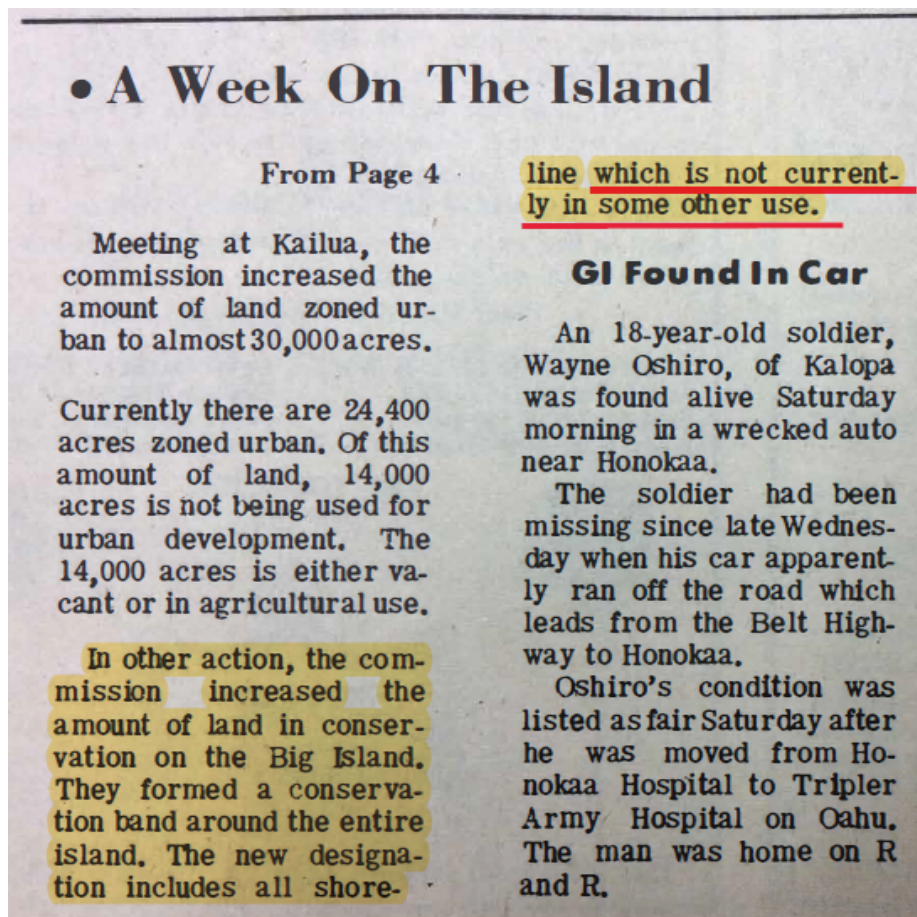
The Commission would not have a provision in its administrative Rules that provides that the Commission's SLUD maps be the final authority if the *Commission provided otherwise to also.....*

"use all applicable commission records in determining district boundaries", ref., HAR 15-15-22 (d).

Map H-65 has to have some basis in a **text record** of the *Ordinance* or *other applicable commission record* (HAR 15-15-22 (d)). The only record of the *Ordinance* to redistricting the *Hamakua Coastal* land to Conservation, that the Petitioners have been able to find, is the **1969**

Commission redistricting hearing transcripts and the earlier copied Report's pages 36 and 3

The LUC's **1974** State Land Use District ("**SLUD**") map H-65 and the **2021** Commission's denial of Petition DR21-72 (Church-Hildal) is in conflict with the redistricting **approved** by the Commission on July 18, **1969** and particularly, in the case of the Property, also is in conflict with the Report's map page 41, *ref., Appendix(s) 5 and 7 and exhibit 6*, the State's **Law HRS 205-2 (a) (3)** and the transcripts of the 1969 Commission's redistricting hearings.....



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

Like everyone else at the meeting, the Tribune-Herald's reporter believed that ***the Commission did not approve*** the redistricting of lands in the County of Hawaii that were "***currently in some other use***". It is obvious that everyone assumed that the final Maps would be redrawn to reflect, or already reflected, what the Commission's Executive Officer Duran described the final Commission redistricting ***action*** to be

"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."

Subsequently those Maps were again ***adopted*** in **1974** by the Commission. Effectively an administrative error continued.

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

"Land which has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed according to modern farming methods."

source, ALISH document

(See also Exhibit 35 soils maps)

As stated earlier herein if it was the Commission's intention that its Maps and maps were authoritative it would not be provided in the Commission's Rules that the Commission may determine otherwise and there would not exist examples of such Commission boundary interpretations that appear to be in conflict with the District Line that

is/was shown on Commission's SLUD maps (for example all of District Map H-59, Stengle, Muragin, exhibit 1, **and** Castle Foundation, exhibit 25 **and** ref., Appendix(s) 2 and 3).

The Report's page 41, **ref., exhibit 6**, is the only map shown in the Report that shows the "**recommended**" and "**adopted**" district boundary changes in the area of the Property. The page 41 map does not appear to show that the land area mauka of the '**coastal cliff**', in the area of the Property, was rezoned into the Conservation District in **1969** however the **1974** Commission SLUD map appears in conflict with the Report's page 41 map, **ref., Exhibit 6 map**.

The Commission considered the consultant's redistricting **recommendations** that were in the form of maps and Maps at a **final** Community meeting in the County of Hawaii on July 18, **1969**. The Report's *Chapter 5 page 41, ref., Exhibit 6*, shows a map of the entire Island of Hawaii. The Petitioners have added text boxes on the map for purposes of reference and/or emphasis to certain areas of the map.

Particularly an arrow is overlaid on the map that shows the general location of the petitioned Property. Subsequently Exhibit 6's pages shows progressively magnified areas of the map in the area of the Property. The Petitioners certify that this representation of the map and its magnifications have not been doctored or photo shopped but just magnified and arrows etc. and text added. The magnifications were drawn from on a high resolution photo copier copy of page 41 at the Hilo Public Library.

The legend on the map page 41 describes different district colors and colors and forms of checkered lines that described "**proposed**" areas that the Report's authors first "**proposed**" that the Commission subsequently review and "**adopt**" to be rezoned. The legend further describes what areas were subsequently "**adopted**" to be rezoned into the Conservation District at a **final** Commission meeting on July 18, **1969**.

In Declaratory order DR99-21 (Stengle), *ref., exhibit 1*, the Commission ordered that a new boundary interpretation be issued for Stengle's land. Stengle's land lies short distance to the north of the Property. In Stengle's case the Commission Ordered that a **map error** for Map H-59 be corrected to reflect that the State Land Use Boundary separating the Conservation District makai from the Agricultural District mauka be the "**top of the ridge or pali**"

A. DECLARATORY ORDER

FOR GOOD CAUSE APPEARING, the Commission hereby rules that the Boundary Interpretation No. 98-36 dated October 29, 1998, and Boundary Interpretation No. 98-50 dated January 12, 1999, are clarified and corrected to reflect that the Property mauka of the top of the ridge or pali, approximately shown on Exhibit "A" attached hereto and incorporated by reference herein, is designated within the State Land Use Agricultural District.

Accordingly, this Commission determines that State Land Use District Boundaries Map, H-59 (Papaaloa), be amended to reflect that the Property mauka of the top of the ridge or pali is designated within the State Land Use Agricultural District.

source DR99-21, Commission Final Decision and Order, exhibit 1

There also exists Boundary Interpretation No. 07-19 (Muragin). Muragin's property is located between Stengle's and the Property. The Commission's boundary interpretation also reflects a correction to a **map error**.....

Dear Ms. Muragin:

Subject: **BOUNDARY INTERPRETATION No. 07-19**
 Tax Map Key No. (3) 3-2-03: 1, 2, & 40
 Ninole, North Hilo, Hawaii

This is in response to your letter dated July 16, 2007, requesting a boundary interpretation for the subject parcels. Please accept our apologies for the lateness of this response.

Upon receipt of your request, we reviewed the Commission's records currently on file at our office and the information that you provided.

For your information, the designation of the subject parcels was established on August 4, 1969, and in accordance to Hawaii Administrative Rules Subchapter 16, 15-15-111. As depicted on the official State Land Use (SLU) District Boundaries Map H-59, Papaaloa Quadrangle, the landward portion of the subject parcels was designated SLU Agricultural, any coastal lands from the "Top of Sea Pali" was deemed SLU Conservation District. For a more precise determination, the top of pali shall be located in metes and bounds relative to subject parcels and with the additional locations of the SLU Agricultural / Conservation District as depicted on your attached boundary interpretation survey map.

source LUC Boundary Interpretation No. 07-19, Exhibit 2

The final magnification of the Report map, *ref., Report page 41, exhibit 6*, shows a further magnification of the area where the Property is located as well as comparable Properties of Stengle (*ref., exhibit 1, Petition DR21-72*) and Muragin (*ref., exhibit 2, Boundary Interpretation No. 07-19*).

The **1969** Report's page 41 map enlargements show that the area North of Hakalau and south of the Property, which northern area is also shown on the LUC's **1974** map H-59 and southern area is shown on the LUC's **1974** map H-65, **depicted a wide band of land** that was "***proposed and***

adopted" for rezoning to the Conservation District (shown as a *dashed green/blue line area*).

The area where the Property is located, however, was depicted in a solid green color with a much narrower band of land that was "***proposed and adopted***" for rezoning to the Conservation District.

All that can be reasonably determined from the Report's page 41 map is that a **very narrow band of coastal pali land** in the area of the Property was "***adopted***" to be rezoned into the Conservation District in **1969** and, comparatively, that a **much wider band** of coastal land to the north and south was also "***adopted***" by the Commission to be rezoned. This appears to be in conflict with the LUC's **1974** State Land Use District maps H-59 and H-65 and DR99-21 (Stengle).

No other maps of this character are shown in the Report however the Report has an Appendix which refers to USGS quadrangle maps also but they do not appear to be otherwise referred to in the Report nor were the maps described in the Report's page 36 to have been ***approved*** at the Commission's final Community Meeting in the County of Hawaii on July 18, **1969**. Particularly also the Report's page 36 describes that.... '***lands in agricultural use were excluded***'.

In the LUC's **1999** DR99-21 (Stengle) the LUC determined that the LUC's map H-59 conflicted with the ***text record*** of the Report for Stengle's property. There also exists the LUC's **2007** Boundary Interpretation No. 07-19 (Muragin) and the Commission's **1996** DR96-19 (Castle Foundation) *ref., exhibit 25*. Stengle's and Muragin's land, as well as the

Petitioners Property, are located on the Hamakua Coast, a Coastal area that begins immediately to the north of the City of Hilo and extends northward for at least 40 miles.

By 2007 Muragin's Boundary Interpretation indicates that the LUC determined.....

For your information, the designation of the subject parcels was established on August 4, 1969, and in accordance to Hawaii Administrative Rules Subchapter 16, 15-15-111. As depicted on the official State Land Use (SLU) District Boundaries Map H-59, Papaaloa Quadrangle, the landward portion of the subject parcels was designated SLU Agricultural, any coastal lands from the "Top of Sea Pali" was deemed SLU Conservation District. For a more precise determination, the top of pali shall be located in metes and bounds relative to subject parcels and with the additional locations of the SLU Agricultural / Conservation District as depicted on your attached boundary interpretation survey map.

Source, Muragin Boundary Interpretation, exhibit 2

In the Petitioner's modest attempt to investigate mapping errors we found another example of a **map error**. The LUC's 1996 DR96-19 (Castle Foundation), *ref., Exhibit 25*, describes that the LUC's Official redistricting 1974 map for that property also showed some 20 acres of land to be in the Conservation District which conflicted with the 1974 Commission's redistricting report. Subsequently the Commission issued a Declaratory Order ("**DO**") that a new Boundary Interpretation be issued and the District Map be modified to reflect the DO.

- DR99-21 (Stengle) pointed to a conflict between the **text record** of the Commission's 1969 first 5 year District Boundary Report vs. the Commission's Official 1974 SLUD map.

- DR96-19 (Castle Foundation) pointed to a conflict between the **text record** of the Commission's **1974** second 5 year District Boundary Report vs. the Commission's Official **1974** SLUD map.

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

.....

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

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

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

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

and finding of fact 19.....

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

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

and the Declaratory Order corrected the Map

DECLARATORY ORDER

FOR GOOD CAUSE APPEARING, the Commission hereby rules that the boundary reclassification under Decision and Order issued on June 2, 1975, in Docket No. 074-8 and Boundary Interpretation No. 92-40 dated September 15, 1992, is clarified and corrected to reflect that the 24.059-acre Property, identified as TMK 4-2-14: 4, and approximately shown on Exhibit "A" attached hereto and incorporated by reference herein, is designated entirely within the State Land Use Urban District.

Accordingly, this Commission determines that State Land Use District Boundaries Map O-14 (Mokapu) be amended to reflect that the 24.059-acre Property is designated entirely within the State Land Use Urban District.

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

In all 4 cases, Petition DR21-72 (Church-Hildal), DR99-21 (Stengle) and DR96-19 (Castle Foundation) and the LUC's Boundary Interpretation No. 07-19 (Muragin) the Commission's Official 1974 SLUD maps are in conflict with the *text record* of the 1969 and *the text* record of the 1974 Statewide Boundary Review reports. In the Case of DR99-21 (Stengle) and DR96-19 (Castle Foundation) the petitions **were not supported** by a preponderance of evidenciary documents but were Ordered favorably by the Commission. Also no EA or Commission FONSI was required or evidenced.

In both Stengle's and Castle Foundation's cases the Commission's 1974 district maps showed the district line to overlay portions of their land. In both cases they Petitioned a DO from the Commission to correct the

redistricting error. Very little evidence was supplied in either case and the Commissions approved the correction to the 1974 SLUD maps. The Petitioners supported their Petition DR21-72 with over **19 Exhibits** of **Hard Evidence**, particularly copies of the Report, field maps and a letter from the field manager. The Petitioners were told that their Petition ***lacked a preponderance of evidence*** and also ***lacked the burden of persuasion***.

The Petitioners ask why are they being discriminated in such an unfair way?

The Petitioners' analysis of the Report is described in ***Appendix 1 and 5*** to this Memorandum. Particularly the Petitioners' analysis differs from OP's because we believe that when the Report is considered in a ***textual*** and ***purposivist*** way the ***text record*** of the Report, in all of the chapters of the Report, removes the potential for ***"a lack of clarity"*** by using **key words** like ***"recommended"*** vs. ***"approved"***. The Report's **page 3** points out that the Report describes its authors work developing district boundary ***recommendations*** to the Commission and the subsequent Commission's ***"actions"*** in ***"approving"*** of the Report's ***recommendations*** which are recorded on its page 36 (*relative to the Property*).

The following OP's analysis appears to not have differentiated its analysis of the Report similarly. Effectively the Petitioners believe that where OP's testimony describes ***"There is a lack of clarity"*** in its **Conclusion** section, which is found in *Exhibit 4, OP's testimony page 8*, we believe

that the Report's pages 3 and 36 bring "**clarity**" to the Report. See next excerpt from OP testimony.....

The guidelines and conditions set forth in the Boundary Review Report generally indicated where the boundary between the Agricultural and Conservation Districts should be located, but the boundary was not mapped in detail such that it was unclear where the boundary was located for any particular property. As such, the location of boundary must be identified by applying the above guidelines and conditions to the physical and historical aspects of the subject property.

The Boundary Review Report indicates in two places that the top of the ridge should be used as the boundary between the Agricultural and Conservation Districts. (See Section II.C. on Pg. 36 and Condition 3 on Pg. 86). While the general pattern was to draw the Conservation District Boundary along the pali, there was considerable deviation from this standard, which likely reflected other factors such as a road. Under Condition 1 on Pg. 86, if the land along the shoreline had a road or other access way within reasonable proximity to the shoreline that was at the makai edge of the agricultural use, then that road could be used as the boundary instead of the top of the pali. If the agricultural use went beyond the road or other access way, however, it would not be appropriate to use that road or access way as the boundary. In addition, the Boundary Review Report indicates that the Conservation District excluded those coastal areas

Here, the Petition Area is located along the Hamakua Coast and includes a railroad right-of-way. If the railroad right-of-way was considered to have been "at the edge of the agricultural use within reasonable proximity to the shoreline[.]" then it may have been utilized as the boundary line, as illustrated in the proposed Conservation District boundary and final boundary adopted in 1969 in the immediate vicinity of the Petition Area. If, however, the Petition Area was in agricultural use makai of the railroad right-of way at the time of the boundary adoption, then it is less likely that the railroad right-of-way would have been used as the boundary line under Condition I on Pg. 86. Petitioners' present Petition indicates that the Petition Area may have been in agricultural use at the time the boundary was determined. If so, it is possible that

have been in agricultural use at the time the boundary was determined. If so, it is possible that the Boundary Review Report could have intended the boundary at the Petition Area to be located at the top of the sea pali rather than the railroad right-of-way.

CONCLUSION

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

(emphasis added) *source OP written testimony,
Exhibit 4, Pages 7-8*

The above copy of OP's testimony does particularly indicate OP's agreement that

"the boundary was not mapped in detail As such the boundary must be identified by applying the above guidelines" (from the first paragraph, OP testimony above)

and in the next paragraph above.....

*"the top of the ridge **should be** used as the boundary between the Agricultural and Conservation Districts." "In addition the Boundary Review Report indicates that the Conservation District excluded these coastal areas that were in agricultural use at that time."*

During Petition DR21-72 (Church-Hildal) Commission's September 8, **2021** Hearing, beginning on its page 83 through page 106, OP AG representative Alison Kato testified.....

8 | **MS. KATO:** Sorry. OPSD's position is based
9 | on the 1969 report, and based on our review of the
10 | 1969 report, it just -- we don't think that it's the
11 | boundary is clearly at the top of the pali or
12 | clearly at the railway or any other particular
13 | location. And we just included those cases to show
14 | that it is unclear and to give you some examples of
15 | similar coastal properties and indicate, you know,
16 | the history of the area.

*source Motion for Reconsideration, Petition DR21-72
(Church-Hildal), exhibit 5, transcript of Hearing proceedings
(emphasis added)*

and again Kato further testified.....

5 MS. KATO: I understand that there is --
6 that there is a map that was used. But whether that
7 map is correct or not, I don't know.

8 COMMISSIONER OHIGASHI: Well, that was the
9 official Land Use Commission map that was adopted by
10 the Land Use Commission.

11 MS. KATO: I understand that the map is
12 not entirely clear, and it's a very general line-
13 drawn --

14 COMMISSIONER OHIGASHI: That's not my
15 question. My question is was it adopted by the Land
16 Use Commission?

17 MS. KATO: I believe so. But I don't think
18 the map is clear.

Both Kato and Commission Chair Scheuer and Commissioner Ohigashi were incorrect. The district map that they were referring to was "***not the official 1974 Land Use map***". The only map in the evidence was the Commission's 1974 Official SLUD map. The Map that the 1969 Commission adopted was dated 5 years earlier. Furthermore the lines on the map are not "***defined district boundary lines***" they are "***reference lines***" that are subject to interpretation based on "***text records***". In all 3 cases the former railroad bisected the agricultural field areas.

and again Kato testified on page 95-96.....

22 **COMMISSIONER SCHEUER:** Okay. You stated
23 earlier in response to a commissioner's question
24 that the maps are unclear. And I would suppose,
25 specifically, you mean Map H65 is unclear. In which

1 way do you believe Map H65 is unclear?

2 Because it's posted to the LUC's website,
3 and I'm looking at it, and I realize that if you are
4 trying to perhaps determine the specific location of
5 the railway that, you know, you might want to drill
6 down to a location.

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

14 **MS. KATO:** I think it's a very small map,
15 so it's a little hard to tell exactly where that
16 line is drawn, but I also believe that if you
17 determine that it wasn't the intent to draw the
18 boundary there, then the map could be wrong.

19 And that has been found in other cases
20 where they've determined that the map was drawn
21 incorrectly in relation to the intent.

Again Commissioner Scheuer is incorrect. The district line on the LUC's 1974 map does not "**running along the railway line for the entirety, or nearly the entirety of this map.**" It does appear to run along the railway in the area of the Property but on Map H-59 (Muragin) it also appears to run along the former railroad also, ref., *Exhibits 1,2,3 and 37 several pages of maps.*

2 MS. KATO: Our position in saying that
3 it's unclear is based on the possibility of which
4 conditions likely apply, and in some cases, it's
5 been assumed that the railroad right-of-way is the
6 correct location.

7 But the petitioner has provided evidence
8 that the properties past the railroad right-of-way
9 were used in agricultural use. And according to the
10 condition in the 1969 report, access ways like the
11 railroad right-of-way are used where it's at the
12 edge of the agricultural use.

13 But the records indicate that that was not
14 the edge of the agricultural use. So it makes it
15 less likely that that railway was used or should
16 have been used, based on the boundary review report,
17 in which case there's another --

source exhibit 5, transcript of Hearing proceedings (emphasis added)

Clearly Kato testified, that the maps are not clear and cannot be relied upon to be final, **over and over again** and the **text record** of the Report has to also be considered. Kato described that there existed other cases where the line on the District map was in conflict with text records. Kato summed it up in the above text saying that '**the railway should not have been used as the boundary**' irrespective of what the map indicates.

Administrative interpretation and Deference, *ref., Appendix 8 Deference*, between whether **undefined pictorial** lines on District maps vs. the **text record** of the Report, and now also the transcripts of the Commission's **1969** redistricting hearings, has/have to hold a higher administrative authority particularly because the State's law also requires the highest order of interpretation and Deference be applied "to those lands with a high capacity for intensive cultivation;"

The State's Land Use **1961** Law, HRS §205-2 (a) (1-3), Districting and classification of lands, states.....

'HRS §205-2 Districting and classification of lands. (a) There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts. The commission shall set standards for determining the boundaries of each district, provided that:(1)

.....urban districts;

(2).....rural districts.....;

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

The term **greatest possible** means that when determining the location of a State Land Use District Boundary **no other district boundary, not even Conservation be applied** without compelling consideration and reasoning,

HRS §205-2 Districting and classification of lands **Law applies just as much today as it did in 1969**. Therefore interpretation and deference to the **law** must also be applied by the Commission.

HRS §205-2 is reflected in the LUC's HAR 15-15-19 (1).....

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

The word "**shall**" is a mandatory instruction to the Commission and the instruction and the law was the same in **1969** just as much as it is today.

If any *uncertainty* exists regarding the Report's ***text record*** of the Commission's ***actions*** regarding redistricting of land in **1969** and the 1969 transcript, *Exhibit 43*, the Commission must also interpret, consider and give deference to the ***mandatory*** guidance of *HRS §205-2 Districting and classification of lands Law*,

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

APPLICABLE LEGAL AUTHORITIES

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

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

While both Kato and the Commissioners appear to have found the Report vs. the Commission's **1974** SLUD maps **confusing** and **unclear** that was not the case regarding the Commission in **1999**. The **1999** Commission directly quoted the text of the Report as an "**APPLICABLE LEGAL AUTHORITIES**" in DR99-21 (Stengle).....

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

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

Source DR99-21, exhibit 1 (emphasis added)

Particularly the 1969 Commission did not describe District Map H-59 or any other district map to be an APPLICABLE LEGAL AUTHORITY in the above quote. The above referenced "**APPLICABLE LEGAL AUTHORITIES**", that was applied by the 1999 Commission in DR99-21 (Stengle), very clearly recognized the Report as an "**APPLICABLE LEGAL AUTHORITY**" and that the redistricted land not just be the area of map H-59 but rather "**include the pali lands of the Hamakua Coast, using the ridge top as a boundary line**".

The **text record** of the 1969 Commission's Report, and the Commission's redistricting hearing transcripts and hearing minutes made it even clearer and beyond further interpretation being required that "**Areas in agricultural use**" that lay along the "**Hamakua Coast**" **'were not redistricted'** in 1969. The language of the Commission's 1969 Report and hearing transcripts and hearing minutes are....

- succinct,
- clear,

- without exception noted, and
- they complied with the State's Law HRS 205-2 (a) (3) and the Commissions HAR 15-15-19 (1).

The **1969** Commission's intended goal was to redistrict a band of land around the Island of Hawaii Conservation, *ref., Report, page 85*. Where agricultural land use existed on Coastal lands the **1969** Commission only intended to redistrict the "**pali**" land that lay makai of the Coastal "**ridge top**". Effectively this was **reaffirmed** by the **1999** Commission (*in DR99-21 Stengle*) that "**Areas in agricultural use were excluded**" because to do otherwise either in **1969**, **1999** or even **today** would go against the State's **Law** HRS 205-2 (a) (3), HRS 205-4 (h) and the Commission's HARule 15-15-19 (1) because a reasonable alternative existed, *ie. Coastal pali land*.....

IV. CRITERIA USED FOR RECOMMENDING REVISIONS TO THE CONSERVATION DISTRICT BOUNDARIES

In our analysis of areas to be considered for inclusion into the Conservation Districts we closely followed the provisions of the Law. Maps were drawn for each island showing areas of more than 20 percent slope, potential tsunami inundation zones, existing and proposed parks, sandy and seasonably sandy beaches and generalized scenic areas and sites. In addition to these criteria, information was received from appropriate State agencies relative to areas of special historic importance, wildlife habitats and endemic plant zones. The shoreline boundaries to be described later were made a part of the recommendations. The Conservation District boundaries adopted in 1964, as modified through subsequent years, were compared with the above information and where conflicts occurred, additional studies including field investigations were made.

The final boundaries are the Land Use Commission's judgement 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.

Source, Exhibit 32, Report page 85 (emphasis added)

Very clearly the consultants stated that in the development of the district lines on maps they "***closely followed the provisions of the Law***". State Law HRS 205-2 required that.....

"In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation;"

(emphasis added)

Hamakua Coastal land had "a high **capacity** for intensive cultivation;". **Capacity** is a characteristic of land and not a past, present or future land use.

While the beginning of the above text copy describes how the consultants first developed "**recommended**" maps, the last paragraph describes that "**final boundaries**" were established in order that the **final maps** reflect "**information received at the public hearings**". Exhibits 43 to 45, the **1969** Commission's hearing transcripts and hearing minutes describe "**public**" concerns about the "**recommended**" district lines on "**recommended**" maps, *ref., Exhibits 37-39 and 46 maps* that resulted in "**final maps**" that were adopted by the **1969** Commission and which maps bore a date mark "**July 18, 1969**", *ref., hearing transcript.....*

COMMISSIONER:

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

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

The Report's next page 86 describes.....

Recognition that the shoreline is a zone rather than a line has been the basis for **recommending** that the designation of the Conservation District be inland from the "line of wave action" at varying distances relating to topography and other use factors. A number of criteria have been developed as the result of a search for physical boundaries that more easily and better designate shoreline conditions from adjacent agricultural uses and districts. Similar

Source, Exhibit 32, Report page 86 (emphasis added)

Very clearly the Hamakua Coast has a steep pali area that is defined mauka by a "ridge top" where the agricultural use portion of Coastal lots began (criteria #3, Report page 86). Where such a "ridge top" existed it was supposed to be used to "***designate shoreline conditions from adjacent agricultural uses***".

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

Source, Exhibit 32, Report page 86

The **1969** Commission's Executive Officer, Duran, clearly described to the Commissioners that the final redistricting maps that were set before them on July 18, 1969 did not reflect Coastal district lines to have been overlaid on agricultural use land.....

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

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

Note above:

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

In 1969 the Petitioned Property was in agricultural use but a steep coastal *pali* area existed as part of the makai side of the Property which *pali* area was not in agricultural use.

Clearly an administrative error occurred. While other Hamakua Coastal maps had been amended, to reflect the "**ridge top**" to be the district boundary, map H-65 had not.

Two different dated Commissions have cited the **text record** of the Report directly for....

As was described earlier herein it would have been **illegal** to redistrict the Property's Prime agricultural land in **1969** and even more-so when a reasonable alternative existed to accomplish the State's goal to redistrict a band of land around the Islands of Hawaii into the Conservation District. This appears to have been accomplished on the other Coastal maps between the area of east Kohala, to the north, and the City of Hilo, to the south **with the exception of one map, H-65.**

There is nothing in either the Report, *ref., Exhibit 32 Report*, of the **1969** Commission hearing transcripts and minutes that describes that the Commission intended to treat the Coastal area of map H-65 any different than the other maps. The transcript of the Commission's final redistricting hearing, *ref., Exhibit 43, transcript page 7*, is **Hard Evidence** that Duran specifically advised the Commissioners that the maps that they were set before them to adopt **did not redistrict land that was in agricultural use**.....

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

As described earlier herein the Commission has variably also recognized the **text record** of such 5 year boundary review reports as an authority over the Commission's **1969** and subsequent **1974** SLUD Maps, *ref., DR96-19 (Castle Foundation), exhibit 25*. In this regard the Commission's **1991**, 5 year boundary review report's "**INTRODUCTION**" section described.....

*"As indicated by the land use inconsistencies shown on the accompanying maps, many small inconsistency areas appear to be the result of **mapping error** or other factors not clearly identifiable by mapping techniques alone."*

Source Commission 1991, 5 year boundary review and redistricting report (emphasis added)

The State's Law HRS 205-2 (a) (3) is clear.....

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

(emphasis added),

The Property is described in the ALISH and LSB land productivity mapping system as **Prime** Agricultural Land Class "C",

The ALISH definition of Prime Classes A-C is.....

"Land which has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed according to modern farming methods."

(emphasis added)

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

The Property has a high capacity for intensive cultivation .

Hamakua Coastal Area lands generally are all described in the State's ALISH and LSB classification system as **Prime** land. Generally the **1969** agricultural use fields areas of the **Hamakua Coastal Area** all extended to the **'top of the coastal cliff'**.

The Report's page 41 map depicts the land area between Hakalau, to the north, and Kolekole gulch, to the south, which area is located in the northern extension of Map H-65.....

The Report's page 41 Map legend shows (note dashed blue line for "Proposed & Adopted" for Conservation).....

LAND USE DISTRICT BOUNDARIES

	Existing	Proposed & Adopted	Proposed	Adopted
Urban	Yellow square	Vertical lines	Green vertical lines	Black dot
Rural	Red square			
Agriculture	Green square			
Conservation	Teal square	Vertical lines		
Judicial District Boundary				

On the next few pages the Report's page 41 map is shown at varying degrees of magnification. The magnifications were done on the Hilo Public Library photo copier. The first page is not magnified.