

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Petition)	Docket No. DR21-72
Of)	
Kenneth S. Church and Joan)	KENNETH S. CHURCH's AND
E. Hildal)	JOAN E. HILDAL's
)	
For Review Of;)	Memorandum FOR MOTION FOR
Boundary Reclassification,)	RECONSIDERATION OF ORDER
Boundary Interpretation,)	DENYING PETITION DR21-72
LUC State Land Use Boundary)	
Map H-65,)	
Reimbursement of Filing Fees)	
for Petition A18-805,)	
Reimbursement of Filing Fees)	
for Petition DR21-72,)	
_____)	

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION
(the "Motion")
CHAPTER 1

As a first preliminary matter HRS 91-14 states.....

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

Source, State Library (emphasis added)

and HAR 15-15-84 states.....

§15-15-84 Reconsideration of decision. (a) A motion for reconsideration shall be filed with the commission within seven calendar days after issuance of the commission's written decision and order. The motion for reconsideration shall clearly specify that the motion is for reconsideration.

With this Motion the Petitioners ask that the Commission grant an order, as part of this Motion, to suspend the date of the existing Commission's March 15, 2022 Final Decision and Order (the "**DO**") in a way that will not interfere with the Petitioners right to file this Request for Reconsideration by the Commission within the provided 7 day Rule and subsequently file an appeal in Court within the State's 30 day rule.

The Commissions Decision and Order to Deny Petition DR21-72 is dated March 15, 2021, however that date was extended to March 21, 2021 due to missing pages in the original Decision and Order that were mailed by USPS to the Petitioners. The existing situation provides a catch 22 that effectively denies the Petitioners' right to fair treatment.

If the Commission cannot allow this suspension of the date then the Petitioners request that this Motion be heard in its entirety and a final decision be issued in writing to the Petitioners on or before April 12, 2021 which would still provide 3 days for a Court filing.

As a further consideration by the Commission the Petitioners ask that the Commission consider that US law provides that

According to the Model State Administrative Procedure Act, the parties must be provided with prompt notice of the final order or decision which includes a statement of the available procedures and time limits

to seek reconsideration or other administrative relief. Notice of any decision must be served either personally or by mail.

The Petitioners have noted that Hawaii's HRS CHAPTER 91 – HAWAII ADMINISTRATIVE PROCEDURES ACT does not mirror the federal requirement of "*a statement of the available procedures and time limits to seek reconsideration or other administrative relief*" be outlined in the Commission's Decision and Order for DR21-72. The Petitioners request that the Commission's Decision and Order be amended to include the above described information.

Furthermore the Petitioners have also requested that the Commission's Decision and Order for DR21-72, which is dated March 15, 2022, be vacated in its entirety as the Petitioners were not provided due process according to HRS 91-8 through -10. This is described in detail in Memorandum Chapter 1 B in a separate file to this Motion Memorandum first file.

I. INTRODUCTION

On September 8, 2021 the LUC (variably the "**LUC**" or "**Commission**") held a hearing (the "**Hearing**") for Petition DR21-72 (the "**Petition**") that the Commission hear the Petition and issue a Declaratory Order and a new boundary interpretation for the area of the Property. The Petitioners do not ask that the entire area of map H-65 be amended. The Petitioners ask that a new boundary interpretation be issued for the Property showing the Coastal "ridge top" be the district boundary based on the ***factual situation*** that existed in 1969 which was described in the Petition and now more fully in this Motion and its Memorandums. The Commissioners voted unanimously to deny the Petition at the LUC's

September 8, 2021 Hearing and the LUC issued its written Decision and Order which is dated March 15, 2022. It is noted that the Decision and Order that was mailed by USPS was a "**copy**" and not an original and it was missing two pages which were subsequently provided by the LUC's staff several days later.

The Petitioners have found several new Hard Evidence documents which are Exhibited with this Motion that more clearly establishes that the 1969 Commission never intended to overlay the Conservation District on to Coastal lands on Hawaii Island that were in agricultural production in 1969. This new Hard Evidence further supports the existing Evidence that was submitted as the Petition's exhibit 1, the 1969 Commission's consultant Report, and which Report, is also Exhibited to this Motion as Exhibit 32. The new Hard Evidence is listed a few paragraphs down herein.

This Motion for Reconsideration requests that the Commission vacate its Decision and Order which denied Petition DR21-72, which is dated March 15, 2022. The Petitioners request that the Commission conduct a contested case hearing to hear this Motion for Reconsideration unless another way is provided by the Commission for cross-examination of "**parties**" to the September 8, 2021 Hearing and to the Hearing for this Motion according to HRS 91-10 (3).

The Petitioners request that a contested case hearing be held, if cross-examination of "parties" is not allowed, because.....

- cross examination of "**parties**", ref., HRS 91-10 (3), to the Petition DR21-72 was not allowed by the Commission even though the

Commission applied HRS 91-10 (5) as a State Law and applied that Law to the Petition Hearing and the Declaratory Order. HRS 91-10 is described to be applicable to **Contested Case** hearings and the State's Law provides for cross-examination of "**parties**" in HRS 91-10 (3), and

- new evidence supporting this Petition has been discovered and is Exhibited to this Motion and the true discovery of the intent of the 1969 commission's redistricting of land can only be discovered through cross-examination of "**parties**" to the Hearing with the Commissioners hearing the Petition and applying "**impartial decisions**" as is described in the State's 1975 Act 193 which established the Commission in its current format (see text copy next below). The Hearing format that the Commissioners applied was the Commissioners cross-examining the "**parties**".

The September 8, 2021 Hearing format appeared to take the form of the Petitioners defending their Petition against a panel of Commissioners that did not focus and apply sufficiently on the "**factual situation**" that existed in 1969 which was what the Petition requested. Instead the Commission's applied format for the Hearing appeared to the Petitioners that the panel of Commissioners took the approach to defend the Commission's Executive Officer's 1992 boundary interpretation 92-48 against any of the "**parties**" statements and exhibits and filings to the Commission. Therefore, in part, the denial of the petition did not appear to be an "**impartial decision**".

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.

SECTION 2. Section 205-1, Hawaii Revised Statutes, is amended to read:

"Sec. 205-1 Establishment of the commission. There shall be a state land use commission, hereinafter called the commission.....

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

HRS 91-8 Declaratory Rulings describes.....

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

next the Commission's '**adopted rule**'.....

§15-15-34 Quasi-judicial proceedings; waiver or suspension of rules. (a) The intent and purpose of chapter 205, HRS, is to establish quasi-judicial procedures which would ensure the effective application of established state land use policies through an adversarial process in a hearing in which diverse interests will have an opportunity to present their views in an open and orderly manner. Accordingly, the commission expects all persons and parties to comply with this subchapter and chapter 91, HRS, so that the commission will have a full and complete record upon which it can render its decision.

An "**adversarial process**" was not provided. Instead the two adversaries appeared to be the Commissioners on one side and the Petitioners and the State Office of Planning "**parties**" on the other side. The Petitioners were not allowed cross-examination of "**parties**" which is provided for in the State's Law HRS 91-10 (3).

Nothing in HAR 15-15 Subchapter 14 DECLARATORY ORDERS describes specifically a clear '**procedure for the consideration**' of a petition for a Declaratory Order that is a stipulated **mandatory** requirement of the State's Law HRS 91-8 (above). The Petition met the "**form and contents**" requirement for a Declaratory Order and a Hearing.

§15-15-103 Declaratory orders; request for hearing. The commission may, but shall not be required to, conduct a hearing on a petition for declaratory order. Any petitioner or party in interest who desires a hearing on a petition for a declaratory order shall set forth in detail in the request the reasons why the matters alleged in the petition, together with supporting affidavits or other written briefs or memoranda of legal authorities, will not permit the fair and expeditious disposition of the petition, and to the extent that the request for a hearing is dependent upon factual assertion, shall accompany the request by affidavit establishing those facts. [Eff 10/27/86; am and comp 8/16/97; comp

The Petitioners believed that the Petition met the requirements of the Commission's 15-15-103 HAR Request for a Hearing. The Petitioners requested a hearing and a Hearing was held on September 8, 2021. The Petitioners expected to be allowed to cross examine "**parties**" to the Hearing. The Commission denied that the Petitioners be allowed cross-examination of "**parties**" which is a statutory provision in the State's Law HRS 91-10 (3). The DO's page 4 describes in 2. "*On September 1, 2021, the Commission mailed an agenda and hearing notice for a meeting on September 8-9, 2019 to the Petitioner; and, the Statewide, email, and Hawai'i County and Maui County mailing lists.*"

The Petitioners believe that if they are allowed "**cross-examination**" of "**parties**" to the September 8, 2021 Hearing the Commissioners would have gained a more complete and balanced understanding of the facts and rule more favorably regarding the Petition. The Commissioners appeared satisfied that the State Office of Planning's AG representative found the text record of the Report vs. the Commission's 1974 SLUD map H-65 were confusing resulting in uncertainty. The Petitioners believe that had they been given the opportunity to cross-examine Kato or

the other OP testifiers and "**drill down**" (as Commission Chair Scheuer described his questioning of Kato) Kato's stated '**uncertainty and confusion**' may have been averted. Final rebuttal could not respond to the insufficiently described '**uncertainty and confusion**' that Kato described without cross-examination of Kato and the other OP "**parties**". The Petitioners request that the Commission vacate their Decision and Order and provide a Hearing for the Motion to reconsider the Petition in a format which we have described herein that the State's Laws provide for.

The new Hard Evidence(s) that particularly apply regarding this Motion are as follows.....

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

The Hard Evidence and State's Law and the Commission's Rules that existed when the Commission heard the Petition, on September 8, 2021, that is particularly relevant regarding the agricultural use of the Property in 1969 are as follows....

(Note: for ease of reference the following Exhibit list shows the Motion's Exhibit numbers that have been applied to the earlier Petition's exhibits.)

- Exhibit 32, the Report,
- Exhibit 10, John Cross, field manager letter,
- Exhibit 15, 1953 aerial picture of cane fields on the Property,
- Exhibit 16, Field map F31-B,
- Exhibit 22, 1905 Field map,
- HRS 91-10 (3) - (5),
- State Law HRS 205-2 (a) (3),
- State Law HRS 205-4 (h),
- Commission's Rules HAR 15-15-19 (1).

Out of respect for the Commissioners' volunteer time the Petitioners are prepared to present the Motion first on the basis that the 1969 Commission never intended to redistrict lands that were in agricultural use on Hawaii Island supported on the above list of Evidence. In the event that and Commissioner becomes of the belief that the new Evidence and the original Petition Evidence now comprise a compelling preponderance of Evidence that supports that the Petition be allowed any Commissioner may introduce a motion to vacate the DO and order that a new boundary interpretation **for the area of the Property** be issued identifying the Coastal "***ridge top***" to be the district line separating the Agricultural District, mauka, from the Conservation District, makai, for the area of the Property, at any time during the hearing.

In the event that such a motion is not made or is made but does not pass a majority vote during the Hearing the Petitioners will continue to advance this Motion in its entirety. Thereafter the ultimate legal outcome of the

Petition, whether at the Commission level or at the level of the State's Courts, may result that the district line on the entire area of Coastal lands on map H-65 may be adjusted or indeed all of the LUC's district maps for all of the Islands of Hawaii may come legally into question instead of just the determination of the district boundary to be the Coastal "**ridge top**" in the area of the Property.

As stated previously the Petitioners also intend to request that they be allowed to cross-examine "**parties**" that are or have, in the past, present(ed) information and/or testimony to the Commission for the Petition and/or this Motion according to HRS 91-10 (3).....

- (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;
- (4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and
- (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. [L 1961, c 103, §10; Supp, §6C-10; HRS §91-10; am L 1978, c 76, §1; am L 2003, c 76, §3]

Source HRS 91-10, LUC web site (emphasis added)

The Petitioners request that the Commission "**take notice**" of the following "**judicially recognizable facts**" AND "**generally recognized technical facts**", *ref., HRS 91-10 (4)* (shown above), that are referenced

hereafter in numerical point form followed by the phrase "**It is a fact that**",

1. **It is a fact that** when the present Commission denied the Petition the Commissioners cited that the Petitioners had not met the burden of the preponderance of evidence and burden of persuasion, ref., Exhibit 5 Hearing transcript.
2. **It is a fact that** in **1969** the Commission hired the firm *Eckbo, Dean, Austin & Williams* to, among other things, conduct a review of the State's Land use Boundaries in order to establish a '*band of land around each of the Hawaii Islands to be Conservation Districted*' and submit to the Commission redistricting ***recommendations*** (the "**Report**") ref., *Exhibit 32 the Report*.
3. **It is a fact that** the Report is an "***applicable commission record***" to the Petition, ref., *HAR 15-15-22 (d)*.
4. **It is a fact that** in **1969** the Commission held "***redistricting***" community hearings on Hawaii Island on the following 1969 dates April 25 & 26 and July 18, 1969 for the community's and land owners consideration of the Commission's consultants discussion of their redistricting recommendations and ***recommended*** redistricting maps, ref., Exhibits 43-45 hearing transcripts and minutes.

5. **It is a fact that** the above described transcripts and minutes are "***applicable commission records***" to the Petition, *ref., HAR 15-15-22 (d)*,
6. **It is a fact that** in **1969** the Commission's final redistricting hearing on Hawaii Island was July 18, *ref., Exhibit 43*.
7. **It is a fact that** in **1969** the Commission adopted 73 final district maps for Hawaii Island at the Commission's final redistricting hearing on July 18, *ref., Exhibit 43*.
8. **It is a fact that** one of the 73 maps was map H-65, which map area, is where the Property is located.
9. **It is a fact that** the Exhibit 43, hearing transcript, page 8, evidences that Commission's Executive Officer, Mr. Duran, introduced the final agenda item, the consideration and adoption of the 73 final district maps for Hawaii Island, wherein the text record, on page 8 of the transcript of the hearing describes that Mr. Duran advised the Commissioners.....
- "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".***
10. **It is a fact that** the ***undefined*** district boundary ***reference line*** on map H-65 appeared to overlay the Conservation District on to the area of the Property, which Property was in "***agricultural use***" in 1969.
11. **It is a fact that** Exhibit 44, hearing transcript, evidences that the ***undefined*** district boundary ***reference lines*** on the 73 maps were

intended by the 1969 Commission to be "**flexible**" and not "**rigid**" in "**the same manner as all district boundaries**" maps are generally treated by regulating authorities "**upon application**"....

"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.", (emphasis added)

ref., Exhibit 44, page 11, testimony of Consultant Degenhardt to the Commissioners, land owners and the Community.

12. **It is a fact that** a SLUD boundary is not final until it is '**applied**' (see above word "**application**") to a final boundary determination on a legal survey map.

13. **It is a fact that** 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 (emphasis added)

14. **It is a fact that** Exhibit 43, final redistricting hearing transcript, evidences that the 1969 Commission intended that the ***undefined*** district boundary ***reference*** line on the 73 maps would not be interpreted to overlay the Conservation District on to the area of the Property that was in agricultural use in 1969.

15. **It is a fact that** the transcripts and minutes of the 1969 Commission's April 25 & 26 and July 18 hearing transcripts and the minutes ***text records*** have several sections of testimony by the Commission's consultants where the consultants assured the **Commissioners**, the **County Planning Committee**, the **land owners** and the **community** that the redistricting of lands would not include Coastal lands that were in agricultural use in 1969, ref., Exhibits 43-45 which specific relevant text copies that Evidence this are provided in Appendix 1 **and particularly** ref., **Fact 11** above.
16. **It is a fact that** 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).
17. **It is a fact that** the Report's page 36, Chapter 5, "**Conservation Districts**" "**Section C**", began a description of the Report's "***recommended***" and the 1969 Commission's "***approved***" Hawaii Island redistricting "***actions***" regarding **5 blocks of coastal lands** beginning at "***east Kohala***", near the northern point of Hawaii Island and referencing various blocks of land clockwise around the Island until, effectively, arriving back at "***east Kohala***", **also** ref., Exhibit 9 quadrangle map.
18. **It is a fact that** the starting and end points of each of the **5 blocks of coastal lands** referenced on the Report's page 36 do not

appear to be easily referenced on the LUC's quadrangle map page, ref., Exhibit 9.

19. **It is a fact that** the starting and end points of each of the **5 blocks of coastal lands** referenced seemingly precise land marks in one location and vaguely in another on the Report's page 36, the Report's page 36 describes these as follows,

- **1st block of coastal land** - starts at "***east Kohala***" extending southward "***to include the pali lands of the Hamakua Coast***", no terminating point is described however the starting point for the **2nd block** of coastal land begins at "***Hilo***" so it is reasonable to presume that "***Hilo***" was the terminating point for the **1st block** of coastal land, furthermore "***east Kohala***" (above) does not appear to be an easily defined point however since the terminus of the ***5th block of coastal land*** is described to be Pololu Valley, it is safe to assume that is the beginning of the 1st block of coastal land,
- **2nd block of coastal land** - extends from "***Hilo to Kapoho***",
- **3rd block of coastal land** - extends from "***Kapoho to Southpoint***",
- **4th block of coastal land** - is described without firm reference points but it appears to begin at "***Southpoint***" because that is where the ***4th block of coastal land ended***, thereafter it appears to extend to ***Kawaaihae*** because that is where the ***5th block of coastal land*** is described to begin,

- **5th block of coastal land** - extends from "***Kawaiahae to Pololo Valley***" (probably misspelled s/b Pololu), the western flank of Pololu Valley is demarked by the terminus of Highway 270 in **County District "North Kohala"** which is sometimes commonly referred to as two areas '***east Kohala and west Kohala***', ref., Exhibit 32 Report.

20. **It is a fact that** the Report's map page 41 has text point descriptions for most of the starting and end points for each of the 5 blocks of coastal land, i.e. Kohala, Hilo, Kapoho, Kualanui, Lalamilo, Kawaihae, (South Point is not exhibited in text), Ref., last page Exhibit 6.

21. **It is a fact that** , the above referenced **5 blocks of coastal lands did not** clearly reference **County Districts** but rather generally identifiable **coastal land points** and areas, ref., Exhibit 9 and Exhibit 32.

22. **It is a fact that** the *text record* of the Report's **Chapter 4**, page 36 describes the **1st block of land** that was "***recommended***" for redistricting Conservation and the Commission's "***Partially Approved***" redistricting action.....

*"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)

23. **It is a fact that** "*east Kohala*" and "*Hilo*" are not County Districts, ref., Exhibit 9.
24. **It is a fact that** the **1st block of land** specifically identifies that the extension of the Conservation District in this area is to include "**lands of the Hamakua Coast, using the ridge top as a boundary line**".
25. **It is a fact that** no **quadrangle map** for Hawaii Island exists that is titled "*Kohala*" or "*east Kohala*", ref., Exhibit 9.
26. **It is a fact that** North Kohala and South Kohala are **County Districts**, ref., Exhibit 9.
27. **It is a fact that** a LUC **quadrangle map** H-66 exists and it is titled "*Hilo*", ref., Exhibit 9.
28. **It is a fact that** the land leading southward from the **City of Hilo** does not lie in an area that is generally described as the "**Hamakua Coast**".
29. **It is a fact that** the southern portion of the **County's South Hilo District** leading southward from the **City of Hilo** is not located in an area that is generally described as the "**Hamakua Coast**".
30. **It is a fact that** the **1st block of land** area includes the "**Hamakua Coast**", ref., Exhibit 9 and Exhibit 32, page 36.

31. **It is a fact that** Stengle's land and Muragin's land are depicted on the LUC's quadrangle map H-59 which map area is part of **County District "North Hilo"**.
32. **It is a fact that** the Petitioned Property area is depicted on the LUC's quadrangle map H-65 which map area is part of **County District "South Hilo"**.
33. **It is a fact that** the **City of Hilo** is not located on the Coastal area that is generally known to be the **"Hamakua Coast"**.
34. **It is a fact that** a sign exists on the Coastal Highway a short distance north of the Wailuku River, immediately north of the **City of Hilo** which states **"Welcome to the Hamakua Coast"**.
35. **It is a fact that** the Petitioned Property lies 14 miles north of the above described **"Welcome to the Hamakua Coast"** sign.
36. **It is a fact that** Stengle's land lies 19 miles north of the above described **"Welcome to the Hamakua Coast"** sign.
37. **It is a fact that** DR99-21 Stengle Commission Decision and Order, Applicable Legal Authorities, page 7, recognized and applied that Stengle's land was located on the **"Hamakua Coast"** even though it is located in the **County District "north Hilo"**.
38. **It is a fact that** Muragin's land lies 18 1/2 miles north of the above described **"Welcome to the Hamakua Coast"** sign.

39. **It is a fact that** the Report's page 36 described that portions of the Coastal land properties that are described and located in the **1st block of land** and that were in agricultural use in 1969 were not intended by the 1969 Commission to be redistricted in 1969, ref., Exhibit 32 Report, page 36.

40. **It is a fact that** the starting and end ***text description of points*** of the 5 blocks of land that are defined on the Report's page 36 are not specific references to the starting or end points of the County's Districts or are defined on maps in the Report.

41. **It is a fact that** the next paragraph in the Report's page 36 following the Report's description of the **1st block of land** i.e. **Fact 4** (above) described the **2nd block of land** that was "***recommended***" for redistricting Conservation and the Commission's "***Approved***" redistricting action....

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

Commission Action: Approved. ", ref., Exhibit 32 Report, page 36.*

42. **It is a fact that** "***Hilo***" and "***Kapoho***" are not **County Districts**, ref., Exhibit 9.

43. **It is a fact that** the land area leading southward from **the City of Hilo** "***is rocky with only occasional beaches such as at haena***".

44. It is a fact that the land area leading northward from **the City of Hilo** is generally all Prime Agricultural land, ref., Exhibit 35 soils maps, that was in agricultural use in 1969,

45. It is a fact that the Hard Evidence and the physical characteristics of the land reasonably establish that the **1st block of land** ended at the Wailuku River on the northern edge of the City of Hilo or as it is recorded in the Report's page 36 "***Hilo***".

46. **It is a fact that** "Wikipedia" describes.....

*"The Wailuku River is a 28.0-mile-long (45.1 km) water course on the Island of Hawai'i in the Hawaiian Islands. It is the longest river in Hawai'i and its course lies mostly along **the divide** between the lava flows of ***Mauna Kea*** and those of ***Mauna Loa*** to the south."*

(emphasis added)

47. **It is a fact that** "***Hilo***" and "***Kapoho***" are also specific **quadrangle map** areas, "***Hilo***" map is **quadrangle map** H-73 wherein the **City of Hilo** is located and "***Kapoho***" is quadrangle map H-66 wherein the eastern most **point of land** on Hawaii Island exists.

48. **It is a fact that** the agriculturally suitability of lands for the **first block of land** is Prime Agricultural land Class C, which does not comprise "***recent lava flows running directly into the sea.***", ref., Exhibit 35, soils maps.

49. **It is a fact that** the agriculturally suitability of lands for the **second block of land** is "***Marginal Class E***" with "***severe limitations***" comprising "***recent lava flows running directly into the sea.***", ref., Exhibit 35.

50. **It is a fact that** portions of.....

- the Property,
- Stengel's land, and
- Muragin's land

that lay mauka of the Coastal pali, "***ridge top***" were all in agricultural use in 1969 and all 3 properties land areas mauka of the Coastal "***ridge top***" are Prime Agricultural lands, ref., Exhibits 1, 2, 29, 32 & 35.

51. **It is a fact that** the Commission has issued boundary interpretations for Stengle's land and Muragin's land that identified the Coastal "***ridge top***" to be the district boundary, ref., Exhibits 1 & 2.

52. **It is a fact that** the Commission first issued boundary interpretations for Stengle's land that interpreted the boundary to be mauka of the Coastal "***ridge top***" by a maximum distance of approximately 200 ft. and which district line was located at the approximate mid-point on Stengle's land between the Coastal "***ridge top***" and a former railroad which crossed Stengle's land, ref., last page & map of Exhibit 1.

53. **It is a fact that** Stengle appealed the first 2 boundary interpretations to the Commission which first 2 boundary interpretations interpreted a portion of Stengle's agricultural land to lie in the State's Conservation District, resultingly the Commission issued a Declaratory Order correcting the boundary to be the Coastal "***ridge top***" and the Commission ordered district map H-59 be corrected to

reflect that the Coastal "**ridge top**" be the boundary for the entire map, ref., Exhibit 1.

54. **It is a fact that** several years following the Stengle DR99-21 the Commission applied the **undefined** district **reference** line on Map H-59 to Muragin's Boundary Interpretation 07-19, ref., Exhibit 2.
55. **It is a fact that** the Commission has issued a boundary interpretation for an area which included the Property that identified the mauka boundary of a former railroad which **bisected the agricultural use field** to be the district boundary and not the Coastal "**ridge top**", ref., Exhibit 3, 10, 16, 29 which former railroad lay between 150 and 200 ft. mauka of the Coastal "**ridge top**".
- 56.** **It is a fact that** the Commission has issued a boundary interpretation for Muragin's land that identified the Coastal "**ridge top**" to be the district boundary which "**ridge top**" lay makai of a former railroad which bisected the agricultural use field on Muragin's land and which railroad lay between 200 and 300 ft. of the Coastal "**ridge top**", ref., Exhibit 2.
57. **It is a fact that** in the area of Stengle's land, Muragin's land and the Property are located in a Coastal area that is commonly referred to as the "**Hamakua Coast**", ref., Exhibit 30.
58. **It is a fact that** the "**Hamakua Coast**" is not a **County District**, is not a **point of land**, is not a **City or town**, but rather a historically referred to **Coastal area**.

59. **It is a fact that** in the area of Stengle's land, Muragin's land and the Property the "***shoreline is bounded by steep cliffs or a pali***" where a distinct "***ridge top***" topographical land feature exists, ref., Exhibit 32, page 36 and Exhibits 7, 16, 19, 29, 31, 36.
60. **It is a fact that** the Report's page 36 described that the Coastal "***ridge top***" be the district boundary, ref., Exhibit 32, page 36.
61. **It is a fact that** the Report's page 36 described that the 1969 Commission only "***Partially Approved***" the consultants recommended redistricting of lands for the **1st block of land**, ref., Exhibit 32, Report page 36.
62. **It is a fact that** the Report's page 86 described the method, ***i.e. the 4 criteria***, that the Commission's consultants applied when the consultants developed "***recommended***" redistricting maps for the Commission and the community to consider, ref., Exhibit 32, page 86.
63. **It is a fact** that the Report's page 86, criteria #1 described..." ***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 Agricultural and Conservation Districts.***" (emphasis added), ref., Exhibit 32.
64. **It is a fact that** the Report's page 86, criteria #3 described..."***In cases where the shoreline is bounded by steep cliffs or a pali, the top of the ridge was used.***", ref., Exhibit 32.

65. **It is a fact that** a former railroad, which in 1969 was a field road, bisected the agricultural field on the Property, Stengel's land and Muragin's land, ref., Exhibits 1, 2, 3, 10, 16, 29.

66. **It is a fact that** a former railroad, which in 1969 was a field road, bisected the agricultural field on the Property, Stengel's land and Muragin's land and the Commission applied Criteria #3 to Stengel's and Muragin's land and Criteria #1 or 4 to the Property, ref., Exhibits 1, 2, 3, 10, 16, 29.

67. **It is a fact that** the boundary interpretation for the Property, Exhibit 3, is inconsistent with....

- State Law HRS 205-2 (a) (3),
- State Law HRS 205-4 (h),
- Commission Rule HAR 15-15-19 (1),
- Muragin's boundary interpretation Exhibit 2,
- Stengel's boundary interpretation, Exhibit 1,
- the text record of Exhibit 32 Report's page 3, 36, 85-86,
- the 1969 Commission redistricting hearing transcripts and minutes, ref., Exhibits ref., 43, 44 and 45, and
- local news reports, ref., Exhibits 27 & 28.

68. **It is a fact that** the Report's **Chapter 8**, page 85 describes in its ***Section IV. CRITERIA USED FOR RECOMMENDING REVISIONS TO THE CONSERVATION DISTRICT BOUNDARIES.*** that the Commission's consultants identified "**we closely followed the provisions of the Law.**"

69. **It is a fact that** the State's land use Law is HRS 205 which includes HRS 205-2.

70. **It is a fact that** the Report's **Chapter 8**, page 85 describes in its **Section IV. CRITERIA USED FOR RECOMMENDING REVISIONS TO THE CONSERVATION DISTRICT BOUNDARIES.**

"The final boundaries are the Land Use Commission's judgment as a result of considerable input of information from studies, site inspections, information received at the public hearings, talks with landowners and the Commissioners' own personal knowledge and experience".

71. **It is a fact that** the Report's 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 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,"*

72. **It is a fact that** Fact 69, (above), is in the Report's **Chapter 8**.

73. **It is a fact that** Fact 69 (above), in regards to the Property, **appears to be in conflict** with the Report's **Chapter 5**, page 36, **1st block of land**, description of the 1969 Commission's **final approved rezoning and** Fact 69 is also in conflict with the **text records** of the 1969 Commission's redistricting transcript hearings and minutes, ref., Exhibits 43-45, **but** the Report's page 3 text, described in Fact 70, (above) clearly states that the Report's Chapter 8 **text record** is subordinate to the Report's Chapter 5, page 36, .

74. **It is a fact that** the Property lies 14.75 miles north of the **City of Hilo** and Stengel's land and Muragin's land begins around 19 miles north of the **City of Hilo**, which, in all 3 cases, is a **Coastal area** that is commonly referred to as the "***Hamakua Coast***", ref., Exhibits 1, 2, 3.
75. **It is a fact that** the State Office of Planning's AG representative during the Commission Hearing on September 8, 2021 for the Petition was Alison Kato ("***Kato***"), ref., Exhibit 5.
76. **It is a fact that** the ***text record*** of the Hearing, *Exhibit 5, Hearing transcript, page 107*, evidences that Commission Chair Scheuer and Kato ***agreed*** that the district line on the Commission's **1974** SLUD maps for Hawaii Island were "***drawn based on the report***".
77. **It is a fact that** Kato described to the Commissioners that she found the ***text record*** of the Report "***confusing***" because the ***text record*** of the Report and district map H-65 appeared to be in conflict **IF** the specific location of the ***undefined reference*** district line on map H-65, was interpreted to be along the mauka boundary of a former railroad which ***bisected the agricultural field***, is held to a higher authority than the ***text record*** of the Report, Ref., all of Exhibit 5, transcript.
78. **It is a fact that** Exhibit 3 boundary interpretation 92-48, which was for an area which included the Property, does not correctly reflect the ***text records*** of Exhibit 32, Report's page 36, and the text records

of Exhibits 43, 44 and 45 transcripts and minutes of the 1969 Commission's approved redistricting actions.

79. **It is a fact that** 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 depicted location of the ***undefined reference*** district line on the Commission's **1974** map H-65, *ref., Exhibit 11, 1974 map H-65 and Exhibit 46 map and Maps*. This is because the transcript describes how the ***undefined reference*** district line, that is depicted on the Commission's Maps, was to be interpreted and the ***text record*** is an "***applicable commission record***" that may be applied to the Petition, *ref., HAR 15-15-22 (d)*.

80. **It is a fact that** 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*, 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)*.

81. **It is a fact that** the Commission has corrected its **1974** SLUD map errors in the past, *ref., Exhibit 1, Stengle and Exhibit 25 Castle Foundation*.

82. **It is a fact that** both Stengle and Castle Foundation lands first appeared on the Commission's **1974** SLUD maps to have been redistricted conservation, ref., Exhibits 1 & 25.
83. **It is a fact that** in 1999 the Commission ordered that the district line on the Commission's **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, and that the Commission's Executive Officer issue a new boundary interpretation for Stengle's land reflecting the Coastal "**ridge top**" be the define boundary, ref., Exhibit 1.
84. **It is a fact that** in 1996 the Commission ordered that the district line on the Commission's **1974** SLUD map for the Castle Foundation's land be corrected to reflect that the land remained in the Urban District, ref., Exhibit 25.
85. **It is a fact that** 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.
86. **It is a fact that** 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.

87. **It is a fact that** 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**.
88. **It is a fact that** 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.
89. **It is a fact that** 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, *ref., also Appendix 1*.
90. **It is a fact that** the State's Law HRS 205-2 (a) (3) Evidences 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).

91. **It is a fact that** the word "**capacity**", that is found in HRS 205-2 (a) (3) is a characteristic of land and not a land use.
92. **It is a fact that** the word "**greatest**" that is found, is a **succinct** stipulation, in HRS 205-2 (a) (3). It 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**, 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*.
93. **It is a fact that** the Commission's HAR 15-15-19 (1)'s ***mandatory*** stipulation that the Commission apply that the Agricultural District (1) *It **shall include** lands with a **high capacity for agricultural production**; (emphasis added).*
94. **It is a fact 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.
95. **It is a fact that** Exhibit 32, the Report, the **Hard Evidence** of the ***factual situation*** of the Report's Chapter 8, **page 85** 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" (emphasis added)
 when the consultants developed "***recommended***" maps for the Commission to ***approve***.

96. **It is a fact that** the Law, that the Report's Chapter 8, page 85 referred to, would have been and/or included the State's Law HRS 205-2 (a) (3)..

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

97. **It is a fact that** the present Commission has taken an oath of office to **uphold the law.**

98. **It is a fact that** 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, HRS 205-4 (h) **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)

99. **It is a fact that** each Commissioner has taken an oath of office to uphold the laws of the State. It is the responsibility of the State's Auditor General to enforce the Laws of the State. Each Commissioner has a Legal responsibility to apply, among other State Laws the mandatory State Laws HRS 205-2 (a) (3) and HRS 205-4 (h).

(the following is a text copy from the Attorney General's web page).....

Personally or through deputy attorneys general, the Attorney General (1) (2) investigates violations of state laws, and initiates civil and criminal actions to enforce the laws or prosecute persons who violate them; .

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

101. **It is a fact that** HAR 15-15-100 (a) and HAR 15-15-100 (a) (1) (C) state.....

§15-15-100 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) T
 - (B) T
 - (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

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

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

Attorney General Opinions

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

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

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

103. **It is a fact that** the Commission's HAR 15-15-22 (f) provides that a land owner apply to the Commission to reconsider a boundary interpretation by the Commission's Executive Officer if the land owner believes that the boundary interpretation is incorrect.

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

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

- Hard Evidence that the Property was in agricultural use in 1969,
- Hard Evidence that a former railroad bisected the agricultural field in 1969 and did not *"lie at the edge of the agricultural use"*,
- Hard Evidence that the Property lies in an area between east Kohala and the City of Hilo, which Property lies 14.5 miles north of the City of Hilo which is a Coastal area that is generally known to be the ***"Hamakua Coast"***, and which Property lies in an area north of **quadrangle map H-66 Hilo**, which area(s) the Report and the 1969 Commission's redistricting transcripts and minutes describe areas ***in agricultural use were not to be determined to have been redistricted'***,

- Hard Evidence that a steep Coastal pali and "**ridge top**" exist at the makai side of the Property,
- Hard Evidence that a railroad bisected the agricultural use field areas of Stengle's land, Muragin's land and the Property in 1969,
- Hard Evidence that the 1999 Commission issued a DO that a new boundary interpretation be issued for Stengle's land which DO specifically identified in its APPLICABLE LEGAL AUTHORITIES section the Reports description that the Coastal "**ridge top**" be applied as the district boundary for the "**Hamakua Coast**" directly citing the text record of the Report's page 36 as authoritative,
- Hard Evidence that the 2007 LUC boundary interpretation 07-19 (Muragin) applied the district boundary to be the Coastal "**ridge top**".

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

The LUC's web site has a list of all of the Declaratory Orders that have been issued by the Commission for the last 2 years, where the Commission has denied a petition, and none of the LUC's DO's for the

last 2 years meet the above described criteria. Therefore the described **liability** according to **§662-4 Statute of limitations begins when this Petition is denied by the Commission.**

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

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

107. **It is a fact that** 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".

108. **It is a fact that** 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.

109. **It is a fact that** the **Hard Evidence** of the ***factual situation*** is that the Commission's July 18, **1969 approved** SLUD map H-59 shows generally that the district line was moved makai to the 200 ft. topographical elevation line and the district line on Map H-65 remained unchanged generally 300 ft. inland.
110. **It is a fact that** a former railroad crossed Stengle's land, Muragin's land and the Petitioners Property, *ref., Exhibits 1, 2 and 3 map pages.*
111. **It is a fact that** 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 the SLUD map for that area also shows the district line to be 300 ft. mauka of the "***high water mark***" and the Commission "***approved***" of that district map.
112. **It is a fact that** 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 the Report's page 36 describes 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.*

113. **It is a fact that** Exhibit 32, the text record of the Report's Chapter 5, page 36, describes 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 remained 300 ft. inland of the wash of the waves.
114. **It is a fact that** a big portion of the Coastal land area south of the City of Hilo was first redistricted from the Agricultural District in 1969 into the Conservation District, and was subsequently redistricted back to the Agricultural District in the 1970's and one final 1/2 acre Coastal land area, i.e. the Barry Trust land, was considered by the LUC in 2021 and was also redistricted back into the State's Agricultural District even though the Barry's land had very little agricultural potential
115. **It is a fact that** 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** .

116. **It is a fact that** Exhibit 32, the Report's Chapter 8, page 86, describes 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".

117. **It is a fact that** the Hard Evidence of the Commission's **1974** SLUD map H-65 conflicts with the text record of the.....

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

if the Commission does not also apply the applicable Commission records in its interpretation of the defined location of the district boundary.

118. **It is a fact that** Exhibit 32, the Report's Chapter 8, page 86, Criteria #4. describes 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.",

119. **It is a fact that** Exhibit 1 describes that 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,

120. **It is a fact that** the Commission is constituted to be a quasi-judicial body that is mandated to make **impartial decisions based on proven facts and established policies**.....

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)

121. **It is a fact that** the cascade leading from the State's Constitution all of the way down through the State's Laws and the Commission's Rules has always required that the State and its administrative bodies apply Agricultural Districting to land that has a ***high capacity for agricultural production*** to be applied with the "***greatest***" districting priority, **even greater than Conservation Districting of land**.....

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.

122. **It is a fact that** HAR 15-15-22 (d) and (f) would not be provided if the State intended that the Commission apply the district lines on the LUC's Official 1974 District Maps as final and not subject to

interpretation based on applicable commission records, ref., HAR 15-15-22 (d).

Through the form of this Motion the Petitioners ask that they be allowed to cross-examine a State County representative, presenting before the Commissioners, in order to establish the above Facts to be true and correct. In this way the Petitioners believe that this Motion and it's Exhibits will be found by the Commission to have met the Commission's described burden of the ***preponderance of evidence*** and the ***burden of persuasion***, ref., Exhibit 5 Hearing transcript.

Request a hearing

The Commission has recorded in the text record of the Commission's Denial of Petition DR21-72 (the "DO") that the Petition was heard, among other things, as provided for in HRS 91 which State Law provides for a contested case hearing and the Commission sent out a notice of Hearing schedule.....

FINDINGS OF FACT

Procedural Matters

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

Source, the Commission DO, page 4, Findings of Fact (emphasis added)

The DO cites that the Commission did not hold a "**Hearing pursuant to HAR 15-15-103**" in a section of the DO because the Petitioners did not request a hearing pursuant to HAR 15-15-103.....

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

Source, page 14 of the DO, (emphasis added)

§15-15-103 Declaratory orders; request for hearing. The commission may, but shall not be required to, conduct a hearing on a petition for declaratory order. Any petitioner or party in interest who desires a hearing on a petition for a declaratory order shall set forth in detail in the request the reasons why the matters alleged in the petition, together with supporting affidavits or other written briefs or memoranda of legal authorities, will not permit the fair and expeditious disposition of the petition, and to the extent that the request for a hearing is dependent upon factual assertion, shall accompany the request by affidavit establishing those facts. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp (Auth: HRS §§91-8, 205-1, 205-7) (Imp: HRS §§91-2, 91-8)]

(emphasis added)

DR21-72 Church-Hildal Petition for Declaratory Order

A Petition for Declaratory Order was filed on June 17, 2021 by Kenneth S. Church and Joan E. Hildal (“Petitioners”), which was accompanied by the specified **sworn affidavit** and a check for \$1,000, which the

Petitioners believed that the Petition requested that the Commission conduct a "**Hearing**" to review a State Land Use District boundary interpretation 92-78, the 1974 State Land Use District Boundary USGS quadrangle map H-65, and for reimbursement of filing fees for a district boundary amendment, this Petition for declaratory order, and associated court reporter fees. The Petitioners believed that the Petition met the requirements of HAR 15-15-103 for a Hearing.

The Commission heard the matter on September 8, 2021 via Zoom video conferencing technology.

16. The Petitioner is responsible for fees pursuant to HRS §15-15-45.1. This administrative rule provides that: "(a) Unless otherwise provided herein, **... a motion for declaratory order, ...** by any person other than a state or county department or agency shall be accompanied by a filing fee by cashier's check, for \$1,000,...
- (b) A petition for an amendment to a district filed by any person other than a state or county department or agency shall be accompanied by a filing fee by cashier's check for \$5,000, ...

Source, the Commission's DO for the Petition, its page 30
(emphasis added)

The Petitioners believed that they had filed a "**Petition for a Declaratory Order**". A filing fee of \$5000 is required for '**an amendment to a district boundary**'. The Petition was not for '**an amendment to a district boundary**'.

The final DO for the Commission's Hearing for the Petition described that the Petitioners did not request a "**contested case hearing**".

The following are text copies from Exhibit 5, Hearing transcript.....

25 | **MR. CHURCH:** I believe so. Am I allowed to

1 | ask the state OP questions relating to whatever they
2 | have to say?

3 | **COMMISSIONER SCHEUER:** Let me ask Mr.
4 | Orodanker and Ms. China. But I believe as a party,
5 | that would be allowed.

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.

Exhibit 5, Page 18, (underline added and emphasis added)

Confusingly, Commission Chair subsequently called ***parties*** from the State Office of Planning, Lorraine Maki ("**Maki**") and Rodney Funakoshi ("**Funakoshi**") later in the Hearing to give testimony. Commission Chair Scheuer swore them in. The Petitioners were not allowed to cross-examine either Maki or Funakoshi.

It became even more confusing when Commissioner Okuda and Commission Chair Scheuer cited the Rules of Evidence requirement that the Petitioners needed to provide a "***preponderance of evidence***" and the Petitioners needed to meet the "***burden of persuasion***" requirements in the State's Law Statute HRS 91-10 which is for a "***contested case hearing***" (see Exhibit 5, Hearing transcript pages 39, 40, 123, 124, 125, 132). The evidence is that the Commissioners were administering the Petition as a "***contested case hearing***" in one way and denying the Petitioners the right to cross-examine "***parties***" to the Hearing in another way.....

HRS.....

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

During the Hearing the Commissioners cited **HRS 91-10 (5)** as an applicable law that applied to the Petition at the Hearing and this same Law was cited in the DO on its page 16 to also be applicable,

(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.

The Evidence of the transcript of the Hearing, ref., Exhibit 5, is that the Hearing was being conducted as a "**contested case**" Hearing. Therefore cross-examination of "**parties**" to the Hearing should have been allowed by the Commission. The Commission erred in Law by not allowing cross-examination of "**parties**".

HRS 91-10 (3) states.....

*"**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)

HRS 91-10 (3) does not refer to cross-examination of **witnesses** but rather cross-examination of "**parties**" to the Commission Hearing.

HRS 91-1 defines a "**party**" to be.....

- (3) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.

The Petitioners and the State Office of Planning, that were present at the Hearing, were "**parties**" to the Hearing. The term "**Every party**" does not appear to imply cross-examination of the parties by the Commission but rather the Commission is to sit as an "**open minded**" quasi-judicial body hearing and considering the information provided and then rendering a decision. It is not the primary role of the Commission to conduct all of the cross-examination of "**parties**", effectively the Commission **defending** the Commission's own boundary interpretation against a Petitioner and denying the Petitioners any right to cross-examine parties in order to sort out conflicting statements and testimony.

It is unreasonable for the Commission to apply HRS 91-10 (5) as an applicable legal authority under the State's Law for a "**contested case hearing**" and then deny the Petitioners their right to cross-examine "**parties**" to the Hearing that provided written or verbal information to the Commissioners and particularly sworn testimony to the Commissioners according to HRS 91-10 (3). HRS 91-10 (3) is a **mandatory stipulation** in the State's Law. Furthermore HRS 91-10 (3) does not narrow the Laws mandatory stipulation that cross-examination be only witnesses.

Further the Hearing did not appear to have been properly constituted according to the State's Act 193 as a "**quasi-judicial**" hearing.....

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)

Note the title reference the "**Purpose**" of ACT 193.

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 is stipulated in HRS 91-10 (3) as a **mandatory requirement** to provide cross-examination of "***parties***" before it. The Commission did not conduct the Hearing for the Petition DR21-72 "***through an adversary process***" with cross-examination of verbal and written "***parties***" submissions, statements, advice, opinions and testimony allowed.

Furthermore the Commission did not appear to the Petitioners that the Commissioners were ***open minded*** and the Commission's denial of Petition DR21-72 did not appear to be an "***impartial decision based on proven facts***", *ref., Act 193*.

The format and the Commissioner's questions and discussion, during the Hearing, appeared to the Petitioners to be the Petitioners questioning the correctness of the existing McCully boundary interpretation 92-48 and the Commissioners themselves defending the boundary interpretation. Shamefully the Hearing did not appear to have been conducted in an "***open minded***" and "***impartial***" discovery process. Generally the State Office of Planning's "***parties***" repeatedly reminded the Commissioners that the Petition appeared to meet the ***text record*** of the Commission's Report that the Coastal "***ridge top***" appeared to be the correct location of the district boundary for the Property and furthermore the OP "***parties***" agreed that the Evidence supported that the Property appeared to have been in Agricultural use in 1969 and the former railroad bisected the field area in 1969.

Particularly the Commissioners relied heavily on the Kato's statements that she found the Report ***vs.*** the LUC's 1974 State Land Use District

("SLUD") map H-65 "**unclear**" and "**confusing**". The Commissioners did not **flesh out** Kato's stated belief that the Report vs. map H-65 was "**unclear**" nor did the Commission allow the Petitioners to cross-examine Kato. It appears to the Petitioners that Kato's reference in the following text copy was referring to the Report's "**recommended**" SLUD boundary, *ref., Report page 86*, but not the final "**adopted**" boundary *ref., Report page 36*.

Had cross-examination of the "**parties**" to the Hearing been allowed the Petitioners would have been able to **flesh out** Kato's testimony, among other things, more clearly and offer rebuttal testimony in order to remove the "**uncertainty**" that she described.

1 **COMMISSIONER SCHEUER:** Okay. Thank you,
2 Ms. Kato. I guess I have one last question. If --
3 if -- and -- and hearing the way you responded to
4 Commissioner Chang in saying basically it's a
5 kanalua kind of situation -- we could go either way,
6 right?

7 What compelling facts are presented in
8 this case that would cause us to interpret what the
9 boundary should properly have been, that -- that
10 this -- well, to -- actually, to trying, if I can,
11 state the Churches' case that the boundary has
12 always been mauka of the pali rather than mauka of
13 the railroad line, what compelling information or
14 facts do we have here that indicate that is the
15 case?

16 **MS. KATO:** Well, I don't believe that
17 we're saying that there are compelling facts because
18 we're saying that if we're -- we're not clear on
19 which -- which is the correct boundary location, so
20 --

21 **COMMISSIONER SCHEUER:** So wouldn't you
22 turn to the map?

23 **MS. KATO:** So it's -- it's on a set --
24 well, our position --

25 **COMMISSIONER SCHEUER:** As part of the

Source Exhibit 5, Hearing transcript, page 105, emphasis added

1 record?

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 --

18 **COMMISSIONER SCHEUER:** But "was used" or

Source Exhibit 5, Hearing transcript, page 106, emphasis added

During the Petition Hearing Commission Chair Scheuer and Kato ended up agreeing that the ***undefined reference*** district line, that is depicted on the Commission's 1974 Official SLUD map H-65, was drawn "***based on the report***"

9 | MS. KATO: The maps that were later drawn
10 | based on the report.
11 | COMMISSIONER SCHEUER: Yeah. You're
12 | correct. I have nothing further.

Exhibit 5, Hearing transcript, page 107 (emphasis added)

and from page 100 of Exhibit 5, Hearing transcript.....

15 | COMMISSIONER SCHEUER: So but my question
16 | is here the question is not -- if I understood the
17 | Office of Planning's argument correctly as
18 | represented by your counsel, it was, hey, you've
19 | done this before. And what I'm trying to say is I
20 | think I see a difference. When we've done it before,
21 | it's been about where the top of the pali is, not
22 | where the railway line is.
23 | MS. MAKI: I disagree with that.

Had cross examination of Kato and the other OP testifiers been allowed the Petitioners could have brought out clearly what pages of the Report they were referring to and specifically the basis for Maki's statement "***I disagree with that***".

Page 86 of the Report described how the consultants arrived at "***recommended***" maps based on 4 criteria. Page 36 described that the 1969 Commission ***approved*** the Hamakua Coast redistricting to use the

Coastal pali "**ridge top**" as the boundary and "**Areas in agricultural use were excluded**". Confusingly the Commission's 1974 map H-65 shows the **undefined** district **reference** line to be generally 300 ft. mauka of the high wash of the waves. It is not a legal defined boundary until it is found to be so based on official **text records**.

By the form of this Motion the Petitioners request the Commission set the format for a Hearing in such a way that the Petitioners be allowed to cross examine the previously existing "**parties**" to the Hearing or vacate the DO in its entirety and order a new Hearing to be conducted. The Petitioners believe that such a format, at the Commissioners discretion, may be a "**contested case hearing**" wherein parties before the Commission would cross examine statements and evidence made and/or presented by "**parties**" to the Hearing.

Referring back here to the DO stating on its page 14, HAR 15-15-103

"Any petitioner or party in interest who desires a hearing on a petition for a declaratory order shall set forth in detail in the request the reasons why the matters alleged in the petition, together with supporting affidavits or other written briefs or memoranda of legal authorities, will not permit the fair and expeditious disposition of the petition,"

By the Commissioners citing HRS 99-10 (5) during the Hearing and the DO citing HRS 99-10 (5) also the Hearing appears to have been a "Contested Case Hearing" whether that was what the Petitioners requested or not. Either way the Petitioners believe that they should have been allowed cross-examination of "**parties**" to the Hearing.

This Motion's Memorandum describes why, unless cross-examination of "**parties**" to the Hearing is allowed, the Hearing "*will not permit the fair and expeditious disposition of the petition*".

While it appears that the LUC has always had the authority to redistrict land, the various versions of the State's Land Use Law, since Statehood, have always required that **lands with a high capacity for agricultural production** be Agricultural Districted **unless highly compelling reasoning** can be applied by the Commission that establishes that all possible alternatives have first been considered and applied.

If such **highly compelling reasoning** existed there would exist **text records** that evidence such reasoning, not just a map with **undefined** district **reference** lines on it that are subject to further interpretation based on "*applicable commission records*", ref., HAR 15-15-22 (f). In the case of the Petitioned Property no such **text records** exist that evidence that the Property was redistricted in 1969.

Text records that Evidence the opposite exist. Just because the Commission describes its maps to be "**boundary maps**" does not mean that the *undescribed* boundary *reference* lines on the maps are to be interpreted as final defined boundaries. In the Cases of Stengle, *ref.*, *exhibit 1*, and Castle Foundation, *ref.*, *Exhibit 25*, the Commission applied **text records** and not just its boundary maps to be authoritative resulting that new boundary interpretations were issued by the LUC favorable to the Petitioners.

During the Commission's September 8, 2021 hearing (the "**Hearing**") for Petition DR21-72 (the "**Petition**") the Commission pointed to the **undefined reference line** on its 1974 Map H-65 as Hard Evidence that the Property was redistricted in 1969. **It is a fact** that the Coastal district line on map H-65 is an **undefined reference line** and not a **defined district boundary line**. When challenged the Commission has to reference a **text record** of some sort in order to interpret a **defined district boundary line** and not just apply the **undefined reference line** on its map as a **defined district boundary**.

In the case of the 1969 Commission's redistricting of land **actions**, on Hawaii Island, a reasonable alternative to accomplish the State's goal to develop a band of Coastal land around Hawaii Island in the Conservation District existed in the area of the **Hamakua Coast**. The Hard Evidence is that the 1969 Commission generally applied that the steep pali Hamakua Coastal land that lay makai of the Coastal "**ridge top**" was not suitable for agricultural production and therefore was intended to be redistricted Conservation in 1969.

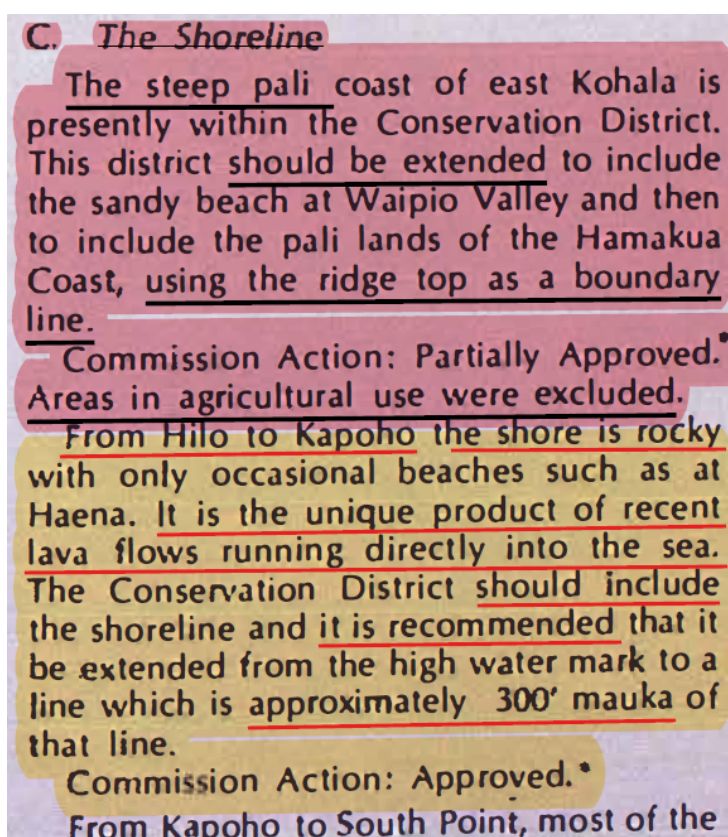
It is a fact that **both** the **text records** of the Hard Evidence of **the Report** and the 1969 Commission redistricting **hearing transcripts** very clearly describe that the 1969 Commission did not intend to redistrict **Hamakua Coastal** land, that was....

- mauka of the Coastal "**ridge top**", and
- in agricultural production in 1969

into the Conservation District irrespective of what the **undefined districting reference line** on the Commission's **adopted** maps

indicated. **The more recent Commission's boundary interpretations of both Stengle's land and Muragin's land are Hard Evidence of this.**

Both of the ***text records*** of the **Report** and the 1969 Commission redistricting **hearing transcripts** are Hard Evidence that, very clearly describe, the 1969 Commission found that Coastal land from East Kohala, to the north, and Kapoho, to the south contained **two highly different land characteristics** in regards to the lands suitability for the ***intense production of agricultural crops***. The protection of lands, that have high capacity for the ***intense production of agricultural crops***, is a **mandatory Statute protected** district zoning requirement.



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

The ***Hamakua Coastal*** land leading southward from east Kohala to the **City of Hilo** had ***a high capacity for agricultural production***. The Coastal land area leading southward from the City of Hilo to Kapoho

point (the "**Poor Land**") was comprised of recent bare lava flows that were not suitable for the *intense production of agricultural crops*.

The Report's page 86 described that the 1969 Commission's consultants **first** developed "*recommended*" redistricting *undefined* lines on maps, for consideration by the Commission and the community, that generally appeared to show **a band of land 300 ft. mauka** of the high wash of the waves **surrounding the entire Hawaii Island** to be redistricted Conservation. Following community hearings the consultants **revised** all but one of the redistricting maps for the Hamakua Coastal land area, showing the amended "*recommended*" district line to be generally variably inland of the area of the Coastal pali "*ridge top*" without explanation in any text record.

The **revised** maps left the mauka portions of such Hamakua Coastal lands, that were in agricultural use, in the agricultural district **except** land areas that were depicted on map H-65. Subsequent, sometimes variable, boundary interpretations by the Commission reflect the contradiction between *the text record* of the 1969 Commission's **Report** and the *text record* of the **transcript** of the 1969 Commission's final redistricting hearing(s) vs. the LUC's 1974 SLUD maps H-59 and H-65 and the LUC's boundary interpretations.

This has resulted in *uncertainty and confusion* and

- a waste of land owners time and financial resources,
- a loss of meaningful agricultural use of their land,
- a waste of the Government resources, and
- a waste of the volunteer time of the LUC's Commissioners **ever since**.

Denying Petition DR21-72 will not fix this problem. The historical record is recorded in existing historical **text records**. Therefore **such facts are facts**, the **record is the record**. History cannot be denied against such Hard Evidence. The LUC's maps do not show **defined** boundaries. The lines on the maps are **reference lines** to be applied against historical **text records**. The Petitioners believe that by the Commissioners ignoring the Hard Evidence exposes the State, the LUC, the LUC's administrative staff, the LUC's Executive Officer, and the Commissioners to legal liability.

By the Commission's ignoring the **record**, it continues to result in **uncertainty** and **confusion**. The result is the root of the problem because the Hard Evidence is clear and this Motion again sets this matter before this Commission and if not this Commission likely the Court, if the Commission does not recognize and apply the Hard Evidence of the Hard Evidenced text record of the **factual situation** that existed in 1969 that is Exhibited herein and the States Law HRS 305-2 (a) (3).

Unnecessarily forcing this matter before the Courts, when the Hard Evidence is so clear, will result in the further waste of the Petitioner's, the Commission's and the Courts resources and more importantly the viable use of the Property for commercial agricultural production. **Deference**, favorable to the Commission, is unlikely to be applied by the Court when the Hard Evidence and the States Laws are so clear. The **text record** of the **present** Commission's Hearing transcript, ref., Exhibit 5, for the Petition clearly shows that the Commission is distracted by the current situation and not the **factual situation** that existed in 1969.

The "**recommended**" district map area that is depicted on the LUC's map H-65 and the **Poor Land** map(s) areas, leading southward from the City of Hilo, were **adopted** as final maps by the 1969 Commission. These maps generally depicted the district boundary 300 ft. mauka of the high wash of the waves.

No text record exists that can explain why district map H-65 was not similarly **revised** following the consultants community hearings. The Petitioners believe this was an administrative error because no explanation exists in the **text records** and it would have been a violation of HRS 205-2 (a) (3) and the Commission's own HARule 15-15-19 (1) to have redistricted the Prime Agricultural Hamakua Coastal land area on Map H-65. All of the historical Hard Evidence of the **text records** confirms the 1969 Commission's intention that the Hamakua Coastal lands, that were in agricultural use, were not to be redistricted in 1965 including areas depicted on Map H-65.

The simplest way to resolve this is to issue a new boundary interpretation for the Property showing the Coastal "ridge top" to be the SLUD boundary.

If district map H-65 is not found to be an administrative error **the Commission must then still consider and apply.....**

- the Hard **text record** Evidence that is provided in the Petition and this Motion, and
- the States Law HRS 205-2 (a) (3) and HRS 205-4 (h)

to a new boundary interpretation for the Property. The Hard Evidence clearly shows that the area of the Property mauka of the Coastal "**ridge top**" was in agricultural use in 1969 and a railroad bisected that large field. The Petitioners ask that the Commission issue a boundary interpretation for the Property showing the Coastal "**ridge top**" to be the **defined** district boundary in the area of the Property.

Church-Hildal (the "**Petitioners**") submit this Motion For Reconsideration of Petition DR21-72 (the "**Motion**") to vacate the Commissions DO (the "**Denial**") of Petition DR21-72 and request that the Commission issue a new boundary interpretation for the Property following grounds:

- The area of the Property mauka of the Coastal "**ridge top**" was in agricultural use in 1969,
- The Hard **text record** Evidence of the Report and the 1969 Commission's final redistricting hearing transcripts and minutes all Evidence that areas in agricultural use were intended by the 1969 Commission to be excluded from redistricting Conservation.
- The States Laws HRS 205-2 (a) (3) and HRS 205-4 (h) are applicable.
- The Commission's HAR 15-15-19 (1) and HAR 15-15-22 (d) and (f) are applicable.
- The Hearing was conducted **on-line** using the Commission's adopted Zoom video Hearing format wherein the Commissioners, the Petitioners, the State Office of Planning Attorney General

representative, LUC administrative staff and other meeting attendees were generally all in separate locations that were linked together through the Zoom meeting format over the internet.

Immediately following the beginning of the Hearing the Petitioners **wi-fi** data transmission rate was determined by the Commission's Chair Scheuer to be too low to support a video presentation by the Petitioners which is the normal format for the Commission's hearings.

Commission Chair Scheuer required that the Petitioners turn off the video feed on their computer leaving only an audio feed available for the Petitioners representation of the Petition and its Exhibits. The Chair did not recess the Hearing in order that the Petitioners may secure a high speed internet connection to the Hearing which the Petitioners have observed, during other Commission hearings, is often provided. In this way the Petitioners were unable to present their Petition in the format that they had prepared for the Hearing.

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. The Petitioners requested and the County of Hawaii has agreed to provide one of the County's meeting rooms and high speed video feed in order that the Petitioners may participate in a new hearing in a fair and equal way.

- The Petitioners believe that the Denial of the Petition infringed on the Petitioners right of **Equal Protection** which is provided for in the [Fourteenth Amendment to the United States Constitution](#). The **Equal**

Protection Clause (the "**Clause**") is part of the first section of the [Fourteenth Amendment to the United States Constitution](#). The Clause, which took effect in 1868, provides "***nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws***".

The Clause mandates that individuals in ***similar situations*** be treated equally by the law and its administrators. The Commission's Denial of the Petition resulted that the Petitioners were not treated ***equally*** to land owners whose lands were very similar, from a district zoning perspective, to the Petitioners land. The Petitioners land is described by the County of Hawaii as TMK(s) (3) 2-9-003; 029 and 060 (the "**Property**").

In 1999 the Commission issued a Declaratory Order DR99-21 (the "**Stengle**" Order) and a new State Land Use District ("**SLUD**") Boundary interpretation for Stengle's land and all of map H-59 be adjusted, which land is, from a zoning perspective, very similar land, when compared to the Property. The LUC's Stengle Order cited an APPLICABLE LEGAL AUTHORITY which should have also been applied to the Petitioner's Property.....

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).

3. Petitioners' topographical survey map of the Property prepared by a registered professional land surveyor delineates the top of the ridge or pali in metes and bounds.

Source, Exhibit 1, DR99-21 Final Decision and Order, page 6 & 7,
(emphasis added)

Nothing in the above cited Commission Report's **text record** states that land in any particular **Hamakua Coastal** district map area be treated any different than land in any other of the district maps areas. The Hamakua Coastal area is comprised of approximately 6 district map areas. The

Report's description of the redistricted area references the ***Hamakua Coast*** and does not reference any particular district map areas, rather the Report describes the area to be located between east Kohala, to the north, and the City of Hilo, to the south. The agricultural use characteristics of land north of the City of Hilo is Prime Agricultural Class C lands according to both the ALISH and LSB mapping systems. The land south of the City of Hilo is of marginal agricultural suitability Class E.

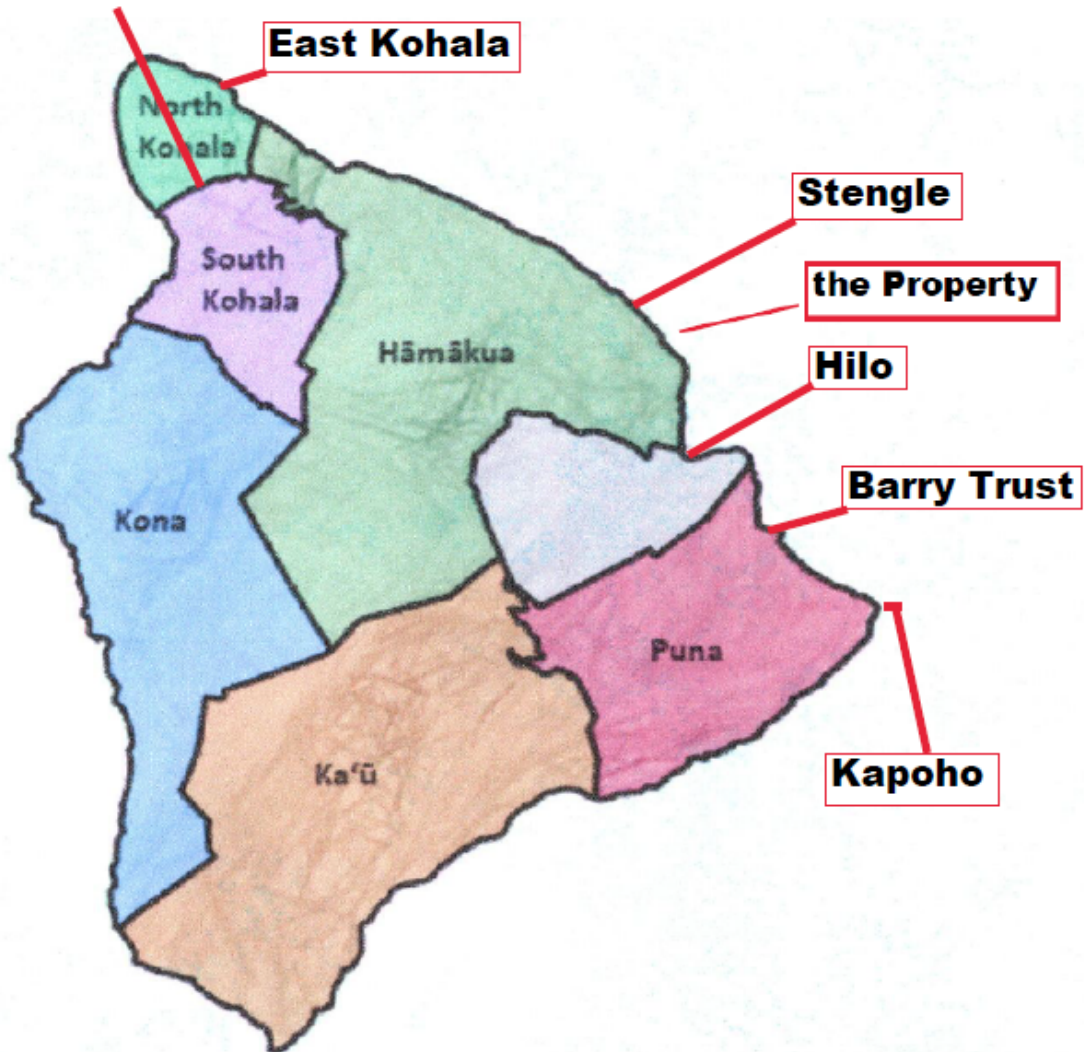
The **present** Commission erred by not **equally** applying (ref., 14th Amendment) the ***text record*** of the 1969 Commission's Report redistricting ***action***, which is copied above, to the Property. The above cited report (the "**Report**") is just as much an "**APPLICABLE LEGAL AUTHORITY**" regarding the correct location of the District Boundary in the area of the Property as it is for both Stengle's and Muragin's property(s). Muragin's district zoning situation is discussed later in the Motion.

If the present Commission does not vacate its Declaratory Order for Petition DR21-72, which denied the Petition, and now allow the Petition **the Commissioners** will now also.....

- ignore the new Hard Evidence submitted with this Motion, i.e. the **transcripts and minutes** of the 1969 Commission's final redistricting hearing,
- continue to ignore the Hard Evidence of the **text record** of the Report,

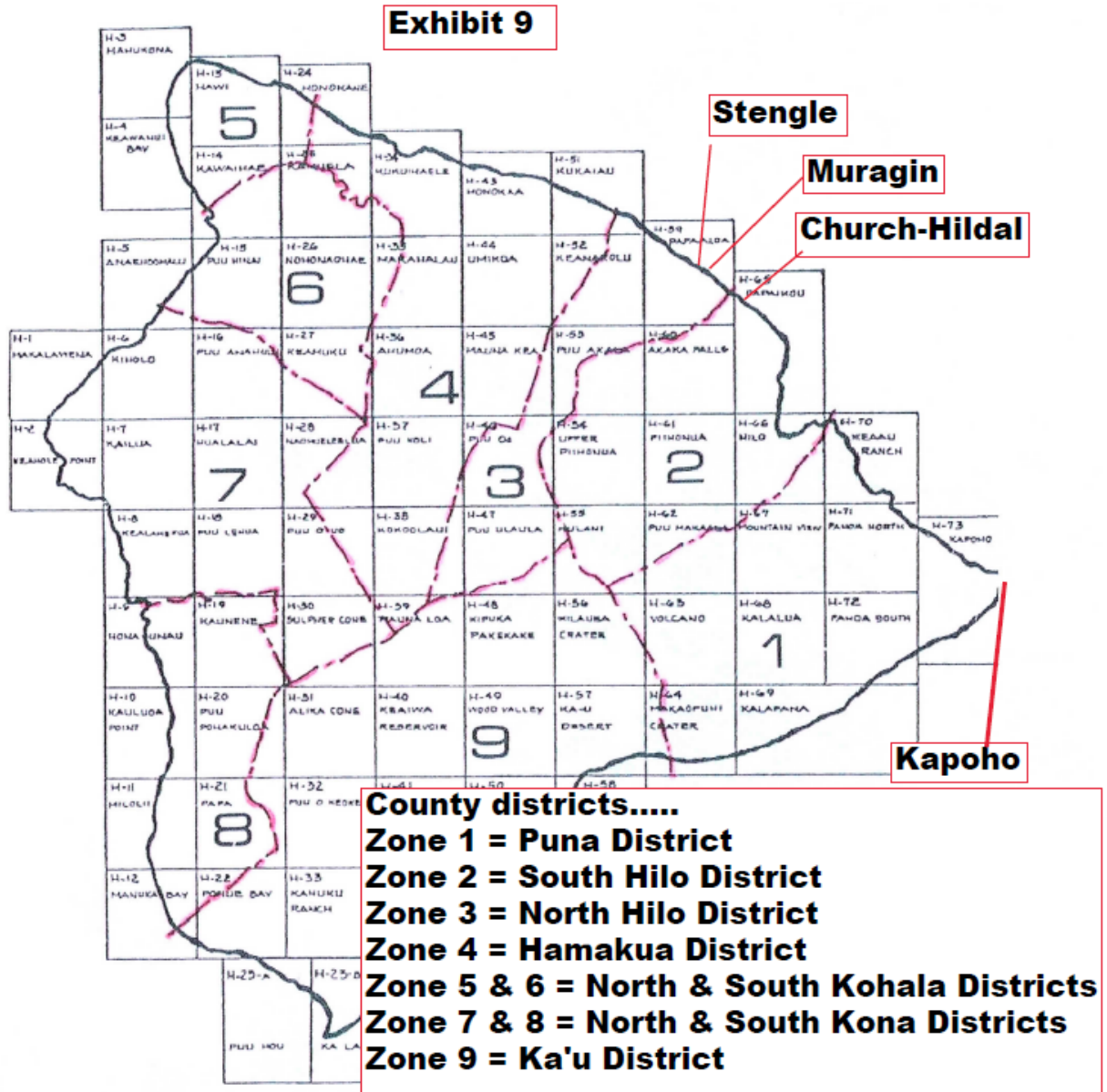
- continue to ignore the Hard Evidence that the area of the Property that lays mauka of the Coastal "**ridge top**" was in agricultural use in 1969,
- continue to ignore the Hard Evidence that the former railroad did not lie **at the edge** of the 1969 agricultural use area but rather **bisected** the field,
- continue to ignore the Petitioners' Equal Protection Rights, and
- violate each Commissioners personal **mandatory obligation** to apply Statute Law, that the Commissioners provide the "**greatest protection**", *i.e. greater than Conservation Districting*, to '**lands with a high capacity for the intense production of agricultural crops be Agricultural Districted**' when the Commissioners consider districting matters that are brought before it and by extension expose the Commissioners to review by the State's Attorney General's Legal obligation to enforce the State's Law HRS 205-2 (a) (3) which the Commissioners took an Oath of Office to uphold, and
- expose the State and its administrative bodies to litigation for damages.

The Report's page 36, text reference to the "**Hamakua Coast**" is the same as the area depicted on the map below.



Source County maps (text boxes and lines added)

If the Commission believes that the Report's reference to the Hamakua Coast was rather to a specific County "Hamakua" District then the 1999 Commission should not have applied the Report's reference to the Hamakua Coast be applied in the cases of Stengle or Muragin. Both Stengle's and Muragin's land are located in the North Hilo District. Nothing on the Report's page 36 refers to County Districts.



Source LUC web site (text boxes added)

Stengle's first and second boundary interpretations showed the boundary to be 312 ft. inland of the high wash of the waves and 200 ft. inland of the top of the coastal pali "**ridge top**", *ref., last page map Exhibit 1.*

Muragin's boundary interpretation showed the boundary to be between 100 and 200 ft. mauka of the high wash of the waves , *ref., last page map Exhibit 2.*

In the case of the Property and Stengle's and Muragin's land a former railroad bisected the agricultural use field in the area of their properties.

McCully's boundary interpretation showed the boundary to be between 230 and 387 ft. mauka of the high wash of the waves and 200 ft. and 300 ft. mauka of the top of the coastal pali "**ridge top**" , *ref., last page map Exhibit 1.*

It is obvious that the text of the Report was finalized following the Commission's redistricting hearings for all 4 of the Islands of the State of Hawaii. It is **likely** therefore that the error on map H-65 was recognized subsequent to the final Maps adoption on July 18, 1969 by the 1969 Commission so the text of the Report's pages 3 and 36 was designed to correct the error in its language

*"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)*

and the text of the Report's page 3 was further designed to correct any subsequent confusion and/or uncertainty regarding the Commission's intended Coastal boundary on Map H-65.....

"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)

Subsequent boundary interpretations for map H-65 could correct the map error if a petitioner supplied evidence that a property was in agricultural use in 1969.

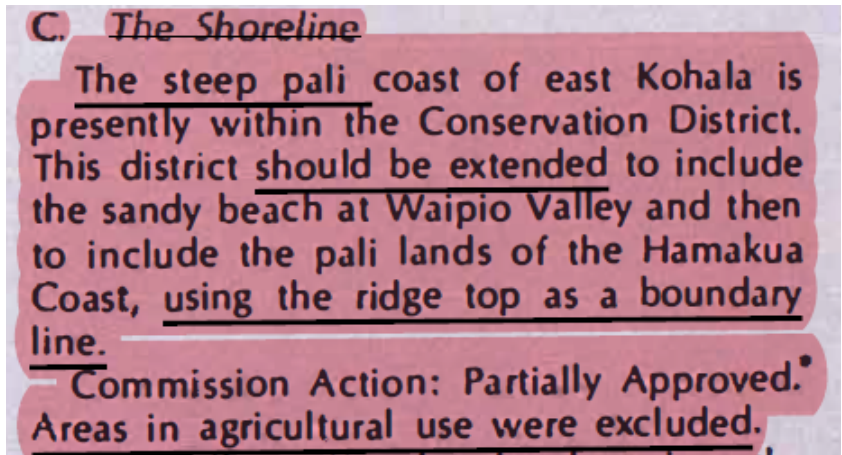
Nothing appears to exist in any text records to explain the contradiction between the Report and the redistricting hearing transcript (Exhibit 43) other than the text on pages 3 and 36 (quoted above) that both described that land that was in agricultural use in 1969 was not intended to be redistricted.

The July 18, 1969 final Commission Redistricting hearing, *ref., Exhibit 43, hearing transcript*, was advertised and held to redistrict ***proposed*** Coastal lands into the Conservation District. The Report and the text records of the 1969 Commission's redistricting hearings transcripts all Evidence the ***text record*** that the 1969 redistricting maps would not include lands that were in agricultural production. The Property was in agricultural production in 1969, *ref., Exhibit 10 John Cross letter, Exhibit*

16 field map, Exhibit 22 1905 picture, Exhibit 29 TMK map, 1965 picture.

The Property was not redistricted in 1969 but rather improperly in 1992 when the LUC issued boundary interpretation 92-48.

the Report page 36....



the Transcript.....

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)

- The Petitioners Exhibit new Hard Evidence with this Motion that clearly Evidences that the 1969 Commission did not intend to redistrict any land on Hawaii Island that was in **agricultural use** in 1969 to the Conservation District, *ref., Exhibits 43-45 and pages 36 and 41 of the Report*. Exhibit 43 is a transcript of the Commission's July 18, 1969 final redistricting hearing. Exhibits 44 and 45 are April 1969 transcript and minutes of 2 community hearings on Hawaii Island that led up to the final hearing Exhibit 43 transcript.
- The Petitioners also Exhibit more new Hard Evidence with this Motion that clearly Evidences that the State Office of Planning also believes that district lines on the LUC's 1974 district maps are not always correct. See Appendix 7 (Maps) and (OP Maki testimony).
- This Motion's Memorandum Chapter 1 B describe **factual situations that existed in 1969**, that are presented in the Petition and now further added to in this Motion for Reconsideration of the Petition are hereby requested by the Petitioners that the Commission **Determine** and apply to the Petition.

SUMMARY

Lawful remedies provided in the State's Laws HRS and the Commission's HARules if "***uncertainty remains***" concerning issuing boundary interpretations that are based on the undefined boundary reference lines of the LUC's 1974 Official SLUD maps:

- 1) Boundary Interpretation(s): HAR 15-15-22 provides that a land owner may request repeated boundary interpretations. There is no statute of limitations in HARules for boundary interpretations nor the number of boundary interpretations that may be requested for land if uncertainty remains.
- 2) HAR 15-15-22(f) provides that if uncertainty remains a land owner can ask for determination of a boundary interpretation through the LUC's Declaratory Order Petition process, ref., HAR 15-15-103 until a FINAL Declaratory Order is issued.
- 3) After a Final Declaratory Order for a boundary interpretation is issued a land owner has up to 30 days to file an appeal in Court.
- 4). HAR 15-15, Subchapter 6, beginning at HAR15-15-46 describes the process that a land owner may use to apply for a district boundary amendment to a district boundary.

If the undefined Boundary reference lines on a LUC final 1974 SLUD map were FINAL the LUC would not have provided HARule that a land owner may apply for a boundary interpretation by the Commission where other "***applicable commission records***" (besides the LUC'S Official 1974

SLUD map) may also be considered and result in the possibility for a correction to an existing boundary interpretation.

Examples of this exist.....

- 1) DR99-21, (Stengle)
- 2) DR96-19 (Castle Foundation)

Hawaii's Constitution XI sect. 11.3 states..... *The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.*

Hawaii State's law: HRS 205-2(a)(3) states "*In the establishment of the boundaries of AG districts, the **greatest** possible protection **shall** be given to those lands with a high capacity for intensive cultivation,*"

Greatest means that the LUC shall apply Agricultural Districting of land a higher priority than Conservation Districting.

The LUC's HAR 15-15-19 (1) provides a **mandatory** instruction to the Commission that Agricultural land, that has **a high capacity for agricultural production, shall** remain **agriculturally districted**.

HAR 15-15-22 (d) provides that the LUC may use ALL applicable commission records in determining district boundaries and not just the LUC's 1974 Official SLUD maps.

The 14th Amendment of the Constitution of the United States states...

“Nor shall any state deny to any person within its jurisdiction the equal protection of the laws.”

The Property and Stengles land are sufficiently comparable that the Petitioners have an equal right for *equal protection of the laws*.

Governor Ige’s own stated priority is to *“Double local food production by 2020; Provide loans for farmers and provide more land for agriculture.”*

The State's 1975 Act 193 provided that the Commission *“Through an **adversary process** in which all interests will have the opportunity to compete in an open and orderly manner”, the Commission is to “make impartial decisions based on proven facts and established policies”.*

The Petitioners purchased prime agricultural land in 2014 believing that they would be able to supplement their retirement income through the raising of orchard species and harvesting produce and sell the produce in the local farmers market. After purchasing the land the Petitioners invested over \$100,000.00 dollars in developing the Property for agricultural use over the last 8 years and going through the legal process to do so.

The DLNR's administrative processes have made it impossible that the Petitioners may continue the commercial use of their land for agriculture. The Petitioners then discovered, around 2021 that Hard Evidence exists that the Property was never zoned into the Conservation District in 1969.

The Petitioners presented a substantial volume of Hard Evidence, exceeding the evidenciary quality of Stengle's Petition, that the Property was not rezoned Conservation in 1969 to the LUC and requested a Declaratory Order that the Commission issue a new boundary interpretation for the Property. The Commission denied the Petition stating in its Declaratory Order that the Petitioners had not met the standard of Preponderance of Evidence.