

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
P.O. Box 2359
Honolulu, Hawaii 96804-2359

May 22, 2020

**Subject: Request for a *Boundary "Determination"* by the
"Commission" (the *"Request"*), ref., HAR 15-15-22 (f), for TMK
LOTS 3-2-9-003 029, 060 (the *"Property"*)**

Dear Commissioners,

Kenneth Stanley Church and Joan Evelyn Hildal (variably "**We**" and "**Us**"), the joint owners of the Property, have **also** submitted with this **Request** for a Boundary Determination, a proposed FONSI in support of Petition A18 805. We ask that this **Request** be dealt with first by the Commissioners as a **Determination** in regard to this **Request** is preemptive to all other matters which we have proceeding before the Land Use Commission (the "**LUC**").

On-the-other-hand, if time is limited due to scheduling, we have no objection that the LUC determine the appropriate order of scheduling our matters as we understand that there also exists a 30 day time limit for the Proposed FONSI to be published on the State's Office of Environmental Quality Control web site from its accepted date of submission to the LUC.

Note:

- While it is not specified in HAR 15-15, an electronic copy of this **Request** has been given to both the State's and County's Offices of Planning in order that they may be prepared to provide input, if requested by the LUC, as both offices of planning are also parties to the proposed FONSI which is scheduled to be heard around the end of June 2020.
- In **1992** the LUC's Executive Officer issued Boundary Interpretation #92-48, ref., exhibit 18, (the "**Interpretation**"), which included a map ("**Map #1**") of the Property, which interpreted ("**Interpreted**") the SLU District boundary in the

area of the subdivision (the "**Subdivision**") in which the Property is located and certified that Map #1 ed showed that the State Land Use ("**SLU**") Boundary separating the SLU Agricultural District lay mauka of three TMK(s) (3) 2-9-003, 013, 029 and 060, and the SLU Conservation District lay makai.

- TMK Lots 2-9-003, 013, 029 and 060 were parcels of 2 legal lots of record each, *ref., exhibit 45, 1993 County approved map.*
- The remaining 4 TMK Lots in the Subdivision were Interpreted to lie in the SLU Agricultural District, *ref., Map #1.*
- We purchased TMK(s) (3) 2-9-003, 013, 029 and 060 in **2014**.
- We combined and re-subdivided the above described three TMK parcels of two legal lots of record each, into three legal lots of record which are now described as TMK (3) 2-9-003, 013, 029 and 060 in **2015**, *ref., exhibit 10, 2015, County approved, SUB-15-0015, subdivision map.*
- Subsequently We sold TMK Lot013 to a party that is unrelated to Us in 2017.
- This **Request** is for the remaining two TMK lots029 and060.
- The LUC's administrative office has described to Us that the 2015 County signed Subdivision map, *ref., exhibit 10*, is slightly in conflict with Map #1. The apparent error (the "**Difference**") remains unresolved and appears to have resulted from two different surveyor's maps, separated by some 23 years, resulted in two small slivers of land exist, comprising a few sq. ft. each, along the Property's mauka boundary.
- The Difference does not concern Us as both Map #1 and the County signed subdivision map, *ref., exhibit 10*, show all of the Property to lie in the SLU Conservation District and the cost to remedy the difference is believed to be substantial.

- It is noted by Us that HAR 15-15-22 **first** provides that the LUC's Executive Officer may make a Boundary Interpretation. However HAR 15-15-22(f) **also** provides that **if uncertainty remains** the "**commission**" may make a **final** "**Determination**" regarding the correct location of a Boundary line if an "**applicant**" files a "**request**" with the "**commission**".
- HAR 15-15-22(f) only describes that an "**applicant**" may "**request**" further consideration by the "**commission**" and does not describe that the "**request**" be in any particular form, ie. a petition, a motion etc. nor does an "**application**" to the "**commission**", filed according to HAR 15-15-22 (f), appear to be limed in time following the Executive Officer's Boundary Interpretation.
- This **Request** asks that the **Commission** issue a new Boundary **Determination**, *ref., HAR 15-15-22(f)*, describing that the Property's makai boundary (the top of the State owned ocean-side bluff property), *ref., exhibit(s) 10 and exhibit 9, a meets and bounds description of exhibit 10*, be certified to be the dividing line between the SLU Agricultural District and the SLU Conservation District instead of the Property's mauka boundary as is shown on Map #1 as we state that "**uncertainty remains**" regarding the **correct location** of the Boundary line.
- While this **Request** may appear to be critical of the LUC regarding its interpretation of HAR 15-15 and its administration. That is not Our intention. While good intentions were obviously always practiced by the State and the County and their administrative bodies We describe that the resulting various State's Statutes and Rules regarding land zoning, regulation of land use, the administration of regulations, zoning of land etc. have created a confusing web of instructions that have confounded legal experts, the BLNR, the Commission, the State and County and their mutual administrative staffs and

particularly property owners, communities and their professional advisers. It does not surprise Us that everyone, may be/are **confused!**

- Today the 3.4 acre Property is a fully developed agricultural use Property with approximately 100 grafted orchard species plantings, a long row of mature dragon fruit species, a large pineapple cultivated field area with approx. 100 mature pineapple plants (and another 50 developing to be ready for planting, in pots), 20 coconut palms (Samoan variety), a small ornamental potted plant nursery, a large overhead pergola/trellis with passion fruit, a personal use garden area, a 720 sq. ft. agricultural use storage and processing structure, with a washroom, registered septic system, a processing area, tool storage etc. We also have a Kubota farm tractor with a front loader, a backhoe and a roto-tiller attachment, a farm wagon, a chemical sprayer, a zero turn 50" mower, various small ag. use implements and tools. A small shade house exists and another small area is developed as a potted plant nursery with a weed barrier ground sheet. We also have a residence on the Property. The 720 sq. ft. storage and processing structure is equipped with 30 large solar panels and a large battery bank, a charging system, an inverter etc. which has proved more than adequate to be the sole source of electricity for both the ag. structure and the residence (the Property is off grid electrically and a County water supply exists). Finally an access road traverses across the mauka border of the Property. Effectively the Property's area is substantially developed for agricultural use and uses incidental and accessory to agriculture.
- An index to documents submitted with this **Request**, can be found on the last page of this Request.

Introduction

As stated earlier the State's Constitution and its various laws and resulting administrative rules have created a **confusing** web which guide land owners and

the State and County's administrative bodies regarding *land* zoning and *land use*. We believe that this **Request** will demonstrate that sometimes mistakes are made. It is a fact that vigorous enforcement of often unintended wrongful use of Conservation Districted land that may be subsequently found by the DLNR to be illegal has resulted in large fines and resultingly and generally land owners are afraid to use the land for anything.

We are aware that a land owner, in our area, was afraid to put up a fence to divide their large coastal property into two areas in order to more efficiently use their land for livestock grazing as the property owner believed that the property was SLU Conservation zoned. The land owner had contacted the DLNR and had been told that if they put up their planned fence, without a permit, it would be a violation of HAR 13-5 and would result in a fine being applied. The DLNR described a process by which that land owner may secure a permit for the fence. The DLNR told the land owner would have to hire professionals to.....

- provide a current survey of the property with a line on it describing the fence and its location,
- provide an archaeological assesment of the property,
- provide a botanical assessment of the property,
- file an environmental assessment and thereafter, if approved by the DLNR, a proposed FONSI,
- apply for a Conservation District Use Permit,
- provide a detailed agricultural use management plan,
- pay a considerable filing fee,

As We have heard is often the case the land owner suspended the planned

fence project for several years.

In another case that we are aware of another local land owner of former agricultural use land, that is located in the SLU Conservation District, inquired at the OCCL's Honolulu Office in January of 2020 whether they may resume the agricultural use of their property as a grandfathered nonconforming use. The land owner described that the OCCL staff stated that, because the agricultural use had been paused for a period greater than one year, the agricultural use could not be resumed and generally all of the above bulleted items would have to be complied with. This contrasts significantly with what this **Request** describes that HRS 183C and **HAR 13-5** provides that such use is *Allowed* which is quite different from what **the LUC's HAR 15-15** rules state. That land owner suspended the planned agricultural use believing that the cost of securing a DLNR permit was not cost effective.

The State has designated in HRS 205-2 (3) that the LUC, provide that the designation of **Agricultural District** boundaries be given the **"greatest possible"** zoning priority to *land* with a **"high capacity for intensive cultivation"**. This did not always happen when the *Land Use District Boundaries Map, dated December 20, 1974 ("The 1974 Map")* was developed and adopted by the LUC sometimes without any explanation regarding the depiction of the boundary line on The 1974 Map, that appears to conflict particularly with HRS 205-2 (3), *ref., designation of agricultural district boundaries*, in the **"applicable commission records"**, *ref., HAR 15-15-22 (d)*.

Resultingly the State and County's administrative agencies have often struggled to balance other guiding priorities of the State, and sometimes have confused the State's desire to protect certain land through SLU Conservation Districting over the **preemptive requirement**, which is described in HRS 205-2 (3), that *land* with a **"high capacity for intensive cultivation"** effectively be SLU District

zoned Agricultural.

This **Request** describes that there exists an apparent conflict between HRS 205-2 (3) and the apparent LUC's administration of *HAR 15-15-22, Interpretation of District Boundaries*, which effectively promulgates from HRS 205-2 (3) and has resulted in "**uncertainty**", *ref., HAR 15-15-22(f)* regarding the correct location of the SLU District Boundary, in the area of the Property, between the SLU Agricultural District and the SLU Conservation District.

It is likely that in the State and County's haste to establish the boundaries separating the various SLU Districts, sometimes properties were shown on The 1974 Map to seemingly first **appear** to lie within the SLU Conservation District. This was because the time and resources to evaluate properties on a case-by-case basis were not sufficiently provided when The 1974 Map was first adopted by the LUC.

Rather sometimes lines were drawn on The 1974 Map that were generally believed to comply with HRS 205. We believe that this is the case for the Property and we base our belief, in part, that this is confirmed in "**applicable commission records**", *ref., HAR 15-15-22 (d)* which **records** also include the 1977 ALISH map and now also according to testimony to the Commission during petition A05 757 hearings which will be described in more detail with specific references to official LUC testimony documents later in this **Request** which we believe are "**applicable commission records**", *ref., HAR 15-15-22 (d)*.

HRS 205 and HAR 15-15 provided guidance and remedies for **subsequent** Interpretation of The 1974 Map by the Executive Officer of the LUC **or, thereafter**, to be "**determined**" by the Commission, if "**uncertainty**" remains, *ref., HAR 15-15-22 (d)*, on a case-by-case basis. This **Request** asks that the Commission resolve the continuing **uncertainty**.

We describe that when We purchased the Property We believed that We had

purchased **Prime** agricultural land, which had a **capacity for "intense cultivation"** of agricultural crops, *ref., HRS 205 2 (3)* and the ALISH designation of the Property to be "**Prime**" class C, *ref., exhibit 85, ALISH map* and the ALISH definition of *Prime*, *ref., exhibit 83 ALISH text notes*, which Property had been used for the *intense cultivation* of agricultural crops for over 150 years. The Property's general appearance in 2014 was an open field of grasses that were regularly mowed, a row of bamboo, a **cultivated area** comprising a squash crop, and various banana, ginger and coconut species in several locations.

We were aware of the 1992 Boundary Interpretation, *ref., exhibit 18*, that appeared to show the Property to lie in the SLU Conservation District. We were also aware that **Allowed** nonconforming agricultural use, the **intense cultivation**, *ref., HRS 205 2 (3)* of agricultural crops had continued, without interruption or regulations applied by the State, the LUC, the DLNR, or the County, *ref., HAR 13-5-7 Nonconforming use rule*. None-the-less We suffered through years of delayed use and **uncertainty**, that We may develop uses our Property for agriculture and uses incidental and accessory to agriculture, due to the DLNR's administration of the *land uses* and fear that we may be fined by the DLNR for an unpermitted use. We found the DLNR's administrative processes for **Allowing** or **Permitting** of *land uses*, particularly agricultural uses, including commercial agricultural, has been exceedingly difficult to achieve with certainty for a period now measured in years.

Agricultural use of **Prime** agricultural *land* is clearly described throughout the State's Constitution and its laws and rules to generally be desirable and to be **Allowed** as a preemptive zoning priority, *ref., HRS 205-2.....*

"(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;" We understand that the word "**shall**" is a "mandatory" requirement placed on the LUC.

We have found that the Interpreted SLU Conservation District zoning of the Property, resulting from the 1992 Interpretation, *ref., exhibit 18*, **did not protect** the ***Prime*** agricultural resources of the Property for agricultural use and the Property's **high capacity for intensive cultivation** and by extension the Interpreted Conservation District zoning did not ease the Property's use for agriculture but rather resulted in.....

- delayed use,
- increased difficulty in securing agricultural use,
- decreased the **intensive cultivation** of agricultural crops,
- increased uncertainty of use,
- increased the cost of agricultural use,
- Our request that a "*farm dwelling*", *ref., exhibit 62, DLNR letter*, be allowed was denied by the DLNR, rather a single family residence was subsequently permitted after the hundreds of pages of the CDUA and supporting draft EA were redrafted, and re-submitted to the DLNR for approval,
- increased the administrative tedium of seeking approval of agricultural use, for a period measured in several years,
- resulted in the loss of investment income,
- resulted in the loss of security of our investments and
- burdened, We, the *land* owners with a regulatory framework of *land use* that would not have occurred had the right to use the Property for agriculture clearly resulted from its SLU Agricultural District zoning.

Effectively, the Interpreted, SLU Conservation District zoning did not **protect** the most outstanding resource of the Property, its **Prime** agricultural resources, for agricultural use as was intended in HRS-2 (3) nor HAR 15-15-19 (1) which is the administrative rule that is intended to implement HRS 205-2 (3).....

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

and HAR 15-15-4 Grammatical Usage rule (c) states.....

*"(c) The word "**shall**" is always mandatory."*

Furthermore HAR 15-15; -19 and -20, (SLU Agricultural Districting and Conservation Districting), gives guidance to the LUC to assists in the **determining** the relevant characteristics of land measured against a SLU District Boundary and by extension **interpreting** the correct location of a District Boundary.

Thereafter the authority to regulate SLU Conservation District *land uses* passes to the DLNR, *ref., HAR §15-15-26 Permissible uses within the "C" conservation district*. Effectively the LUC's proper zoning of land has to first occur.

If the LUC **determines** that another HAR 15-15 **rule** is believed to preemptively provide that the Property be zoned in the SLU Conservation District, rather than the SLU Agricultural District, a State Supreme Court decision states that any **rule** which conflicts with the Statute from which it is promulgated from **is invalid**, *ref.,*

"Stop H-3 Association et al. v. State of Hawaii Department of Transportation et al., Hawaii Reports, v. 68, 1985, p. 161."

and HRS 205 2 (3) clearly states that when designating the boundaries for the SLU Agricultural district, and by extension the interpretation of district boundaries.....

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

Generally all of the above is the basis for this **Request**, which is expanded upon herein, that the "**commission**" consider the described "**uncertainty**", which We state exists, regarding the correct location of the boundary line separating the SLU Agricultural District from the SLU Conservation District in the area of the Property.

This **Request** does not ask that the LUC **Determine** if a Rule or Rules found in HAR 15-15 are invalid. Rather this is a **Request** that the *Commission* remove **uncertainty, ref., HAR 15-15-22 (f)** regarding the correct SLU District Boundary line in the area of the Property according to its existing rules found in HAR 15-15 because the 1992 Boundary Interpretation does not appear to be in compliance with HRS 205-2 and various administrative Rules that already exist in HAR 15-15.

It is an established fact that a favourable *Determination* regarding this *Request* does not bind the LUC by precedence regarding proceedings before it.

DESCRIPTION OF THE Request

1. In **1992** the LUC's Executive Officer issued a Boundary Interpretation, which included Map #1, *ref., exhibit 18*, which effectively interpreted that the *land* area between former railroad ("**R.R.**") right of way lot(s) mauka boundary, which R.R. crossed the 7 TMK lot subdivision in which the Property is located, and the ocean makai, was located in the SLU Conservation District, effectively the entire area of the Property, **which presently includes** the former R.R. lots, and the **State owned ocean-side Pali/bluff property** were all interpreted to lie in the SLU Consecration District. We describe that the Property is not legally ocean-front and therefore the State's desire to preserve an ocean-front strip of land, as State owned, is preserved and

commonly exists on other comparable properties, *ref., exhibit 17, Ninole Boundary Interpretation.*

2. The Property is comprised of *land* that has **Prime** agricultural resources, *ref., exhibit 85, ALISH map*, as defined in the ALISH classification system, *ref., exhibit 83*, and not only did the *land* have a "*high capacity for intensive cultivation*" but the *land* was also currently utilized for the **intense cultivation** of agricultural crops when the Interpretation was issued in 1992.

3. Recorded testimony during LUC petition hearing A05 757, which comprise "**applicable Commission records**", but, which transcript of testimony, is not exhibited to this **Request**, *due to its size*, described that no record exists at either the State or County's Departments of Planning, as to why the Property was zoned SLU Conservation, rather it was described that a lot of zoning decisions were made without looking at property's resources on a case-by-case basis. This will be described in more detail, with reference, subsequently, later herein.

4. It appears that the **Interpretation** did not properly balance the Property's physical resources for SLU Agriculture vs. SLU Conservation Districting, measured against all of the LUC's HAR 15-15 rules which ought to have been considered.....
 - the Property's **existing, 1992, 'high capacity' and existing** use for '**intense agricultural production**';
 - the Property's historical use for continuous '**intense agricultural production**' dating since the 1850's,

- the 'applicable Commission records' which included the 1977 ALISH classification of the Property's resources as *Prime, ref., HAR 15-15-22 (d)*.....

"The executive officer may use all applicable Commission records in determining district boundaries."

- nor did the LUC's Executive Officer fully consider the Property's resources when interpreting the boundary line separating the SLU Agricultural District from the SLU Conservation District as is required in various parts of HAR 15-15 and HRS 205.

5. It appears that generally the main consideration, when considering the Interpretation, was primarily The 1974 Map which adoption of the 1974 Map by the LUC in 1974, and which 1974 Map, apparently also did not result from consideration of relevant bulleted facts listed above but rather provided guidance to the LUC's Executive Officer in issuing subsequent boundary interpretations, which among other guidance found in HAR 15-15, is to be measured against HAR 15-15-17 (d) which states.....

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

6. Specifically it appears to Us that **textual interpretation** of HRS 205 and HAR 15-15 was not fully applied by the **Executive Officer** of the LUC when the 1992 Interpretation was made. As a result We believe that the Interpretation is incorrect and '**uncertainty**' as to the correct SLU District zoning for the Property remains and We now **Request** that the **Commission** consider and **determine** the correct SLU zoning of the Property which **Request**, We

describe herein, is particularly supported in HAR 15-15-22 (f) which is quoted for reference below.

7. We believe that it is important to apply HAR 15-15-22 *Interpretation of District Boundaries* which **states first** in (a).....

"Except as otherwise provided in this chapter:"

which we believe particularly points back to HAR 15-15-17 (a), which in turn points back to HRS 205-2 (3)

and later in HAR 15-15-22.....

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

8. This ***Request*** is intended to be our **written application** that **the Commission resolve the continuing uncertainty** and '**determine** the correct *location of the district line*'.
9. We will later describe in more detail that while if, in the first case, the LUC believes that HAR 15-15-17's first reference to the *Land Use District Boundaries map, dated December 20, 1974* be preemptive to other Boundary ***Determination*** considerations, then the rule is not valid because HRS 205-2 (3) preemptively states.....

"(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:"

10. Neither HRS 205 nor HAR 15-15 describe any other method that a **land** owner may effectively appeal a SLU boundary interpretation issued by the Executive Officer of the LUC other than what is shown in HAR 15-15-22 (f) which is shown above and (f) is substantially the legal basis of this **Request** that **'the Commission, upon this written Application or upon its own motion, determine the location of the district line'**.
11. While we have noted that LUC petition rulings are time limited in the registering of an appeal to a limiting duration of 30 days, HAR 15-15 does not appear to us to have a time limiting rule regarding boundary interpretations by the LUC's Executive Officer.
12. All official boundary lines for properties are recorded in meets and bounds and are an official record that may be subsequently referred to. They are not undescribed lines on a map.
13. Furthermore the area of the Property and its boundaries have been reconfigured in 2015.
14. We describe that if the existing 1992 Interpretation is first held to be correct by the Commission, based on HAR 15-15-17, then the Interpretation is incorrect because whatever rule or rules found in HAR 15-15, is/are/were relied upon by the LUC's Executive Officer when issuing the 1992 Interpretation or regarding this **Request**, is/are invalid, as applied to the Interpretation or this **Request**, because the rule or rules conflict with HRS 205-2 (3), which is preemptive to HAR 15-15, and which clearly 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;"

and HAR 15-15, Subchapter 2 Interpretation of District Boundaries, **first** Rule HAR 15-15-17 states (and particularly for consideration, this Rule is not prefaced with the guidance "**Except as otherwise provided in this chapter**" as is the guidance preface in many of the subsequent Rules found in Subchapter 2)

HAR 15-15-17(a) **In order to effectuate the purposes of chapter 205, HRS**, all the lands in the State shall be divided and placed into one of the four land use districts: (1) "U" urban district; (2) "A" agricultural district; (3) "C" conservation district; or (4) · "R" rural district. (b) The boundaries of land use districts are shown on the maps entitled "Land Use District Boundaries, dated December 20, 1974," as amended, maintained and under the custody of the commission. Not all ocean areas and offshore and outlying islands of the State in the conservation district are shown when deemed unnecessary to do so."

(HAR 15-15-22 (1) further instructs the use of the referenced 1974 map and the discussion regarding this is found later herein).

15. HAR 15-15-22 (1) does appear to give the LUC the authority to 'amend' SLU District boundaries subsequent to 1974 but that would have to be through the process of a District Boundary amendment, which would have been supported by substantial reasoning, which has not occurred for the Property and again, if the 1974 Map is first held to be valid and required that the Property be *Interpreted/Determined* to lie in the SLU Conservation District then HAR 15-15-17 would then appear to be an invalid rule as it conflicts with the preemptive HRS 205-2 (3) described above.
16. Again, if it is first held that HAR 15-15-17 (a) reference to the 1974 Map be preemptive then the rule conflicts with HRS 205-2 (3), which is preemptive to HAR 15-15, and which clearly 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;"

and therefore HAR 15-15-17 is an invalid rule as it conflicts with the Statute which first effectively requires that 'land with a high capacity for intensive cultivation' be zoned in the SLU Agricultural District.

HAR 15-15-17 (a), shown above, clearly points that HAR 15-15 Subchapter 2 is to **effectuate the purposes of Chapter 205, HRS** and then subsequently HAR 15-15-19 Agricultural District rule is prefixed with the term "**Except as otherwise provided in this chapter**" which is not the case for the first rule HAR 15-15-17(1) (shown above) and HAR 15-15-19's Agricultural District rule goes on to state.....

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

which rule, HAR 15-15-19 (1), appears to **effectuate the purposes of Chapter 205, HRS's -2 (3)** which appears to be preemptive of HRS's guidance regarding SLU Conservation Districting which is not described to require that the **greatest possible protection be given to those lands that have resources more suitable to Conservation Districting**.

HAR 15-15-4 Grammatical Usage rule (c) states.....

*"(c) The word "**shall**" is **always mandatory**."*

HRS 205-2 (3) clearly requires that the LUC consider the Agricultural resources of *land* preemptively when interpreting or determining SLU District boundaries and its agricultural resources are, Prime, to be given a priority over all considerations regarding the districting of *land* and by extension the interpretation of District Boundaries. If the *land* has a '**capacity for intense agricultural use**', its districting (and by extension the Interpretation of the

correct location of the district boundary) in the SLU Agricultural District is to be given a **greater** priority than interpreting that the land be located in the SLU Conservation District, particularly without recorded reasoning or a District Boundary amendment.

This is contrary to a general **incorrect belief** held by many that Conservation Districting and resulting administration of **land use** is of the highest priority and highly restricted. HRS 205 and HAR 15-15 clearly prioritize SLU Agricultural Districting to be a **greater** priority than SLU Conservation Districting.

Particularly both SLU Agricultural and SLU Conservation Districting considerations, found in HAR 15-15, Subchapter 2, are prefaced with the term **"Except as otherwise provided in this chapter"** and effectively both point back to HAR 15-15-17, in part, which is not prefaced with the term **"Except as otherwise provided in this chapter"** and which, in turn, **which specifically points back to HRS 205-2(3)** which clearly prioritizes the Agricultural suitability of *land* be considered **first** and if found to meet the HRS 205-2 standard.....

*"(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;**"*

then resultingly SLU Agricultural zoning is to be applied or interpreted by the LUC's Executive Officer or "**determined**" to apply by the "**commission**".

Even HAR §15-15-22 *Interpretation of district boundaries* first states.....

"(a) Except as otherwise provided in this chapter:" followed by.....

"(1) A district name or letter appearing on the land use district map applies

throughout the whole area bounded by the district boundary lines;"

Again even the requirement, that when considering the correct position of the SLU District line, the whole area bounded by the district boundary lines shown on The 1974 Map , is subordinate to HRS 205-2(3),. which requires that.....

"(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;"

be applied first.

17. The Property has a "high capacity for intensive cultivation;".

18. As described in HRS 205-2(3) the word "Capacity" is a characteristic of *land* and not a current, past or planned future "*land use*".

19. As described earlier herein HAR 15-15-17 (d) also states.....

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

which is a discretionary ("may") rule and the ALISH map, *ref., exhibit 85* is an applicable commission record, however HAR 15-15-17 and its referral back to HRS 205-2(3) remains pre-emptive and not subject to interpretation nor of an equal or lower priority.

20. As it regards this **Request** there now exists considerable **applicable commission records**. There exists the ALISH map for the area of the Property which shows the Property to be **Prime** agricultural land and there exists transcripts of testimony to the LUC during petition hearing A05 757 for

an area of land which includes the Property.

21. In 2005, the Director of the State Office of Planning, Laura Thielen, testified to the LUC in a hearing for the reclassification for land which included the Property from the SLU Conservation District to the SLU Agricultural District, which petition was filed with the LUC by the former owners of the Property, the McCully(s), ref., *petition A05-757*. A transcript of that testimony is an **"applicable commission record"** to this **Request**, ref., *McCully(s) Petition A05 757 hearing testimony, August 11, 2005, beginning on page 113, testimony of Laura Thielen*. On page 120, lines 6-10 Ms. Thielen testified that when SLU Conservation Districting of land occurred, in the area of the Property, the resources of individual properties were not assessed when The 1974 Map was developed and adopted by the LUC.....

"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."

22. Subsequently following Thielen's testimony, on August 12, 2005, the County Office of Planning representative, Norman Hayashi, who had worked for the County Planning Department since 1969, testified that the County also did not assess the resources of this *physical property* when it described the Property, in its General Plan, to be "Open". He described that the County's "Open" description of the Property was determined simply because The 1974 Map already appeared to show the Property to lie in the SLU Conservation District. He further described that agriculture is allowed by the County on land described as "Open" in its General Plan and that the Property is zoned A20a by the County in its functional plan.

23. A transcript of Mr. Hayashi's testimony is also an "**applicable commission record**" to this **Request**, *ref., McCully(s) Petition A05 757 hearing testimony, August 12, 2005.*

24. We find it to be very unfortunate that the LUC has relied so heavily on The 1974 Map when making SLU District boundary interpretations without considering all of HAR 15-15-17 and -20's guidance. HAR 15-15-20 provided more guidance than just The 1974 Map for further interpretation and consideration of property's physical resources on a case-by-case basis which did not occur when The 1974 Map was created nor has occurred to this day.

This becomes even more unfortunate that when the State and County Offices of Planning and the DLNR have not fully considered their own administrations Rules nor have they pointed land owners nor the Commission back to grandfathered uses of land being **Allowed** and considered in official requests, applications and proceedings. All three administrative authorities have always been very well aware, or ought to have been aware, that the Property.....

- has a "**high capacity for intensive cultivation**"
- was in agricultural use since the 1850's to 1964 when the Property appeared to have been zoned in the SLU Conservation District, and the **Prime** agricultural resources of the Property ends makai, at the top of the steep, oceanside bluff/pali, which makai boundary is where the historical agricultural *intense* use of the Property ended, *ref., Sam Lemmo testimony, petition A05 757..May 4th, 2006, page 69, lines 11-18*
"COMMISSIONER KANUHA:*But the others, the two that you've cited your office has approved has CDU applications for plus this Petition that's on the docket now, by and large those properties were*

primarily in agricultural use at sometime before the Conservation District was overlaid on them. Is that a correct statement?

THE WITNESS: I'm sure they were in ag use, yeah and then the conservation zoning occurred in '64 I believe. So, yeah."

the Witness was Sam Lemmo, Administrator OCCL,

- continued to have a "*high **capacity** for intensive cultivation*" after it appeared on The 1974 Map,
- the Property continued in '*intense production of agricultural crops*' after it first appeared on The 1974 Map to have been placed makai of the SLU District line which appeared to separate the SLU Conservation District from the SLU Agricultural District,
- was classified as **Prime** agricultural land in 1978, *ref., exhibit 85, ALISH map, and*
- agricultural use was grandfathered as **Allowed** in the various Statutes and Rules, or at a minimum the '*growing of sugar cane*' was *Allowed*", *ref., exhibit 52, OCCL letter, 2015 and exhibit 76, OCCL letter.*

25. The **Prime** agricultural resources of the Property ends makai, at the top of the steep, oceanside bluff/pali, and not the mauka border of the Property. The top of the steep, oceanside bluff/pali, is where the historical agricultural *intense* use of the Property ended, *ref., Sam Lemmo testimony, petition A05 757..May 4th, 2006, page 69, lines 11-18*

*"COMMISSIONER KANUHA:But the others, the two that you've cited your office has approved has CDU applications for **plus this Petition** that's on the docket now, by and large those properties were*

primarily in agricultural use at sometime before the Conservation District was overlaid on them. Is that a correct statement?

THE WITNESS: I'm sure they were in ag use, yeah and then the conservation zoning occurred in '64 I believe. So, yeah."

- the Witness was Sam Lemmo, Administrator OCCL,

26. For comparison two boundary interpretations are exhibited with this **Request**, one of which is for the Property and another for a property that lies to the north of the Property, *ref., exhibit 18, a 1992 Boundary Interpretation for the Property and exhibit 17, a more recent Boundary Interpretation for a property located a short distance to the north of the Property and ref., exhibit 102, Quadrangle map.*

27. When examining the two referenced boundary interpretations it appears that Commission records were considered for the Ninole property but the Interpretation for the Property did not state that Commission records were considered, *ref., exhibit 17, Ninole Boundary Interpretation.....*

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

28. Particularly, the McCully's boundary interpretation clearly refers that the McCully(s) intended that the Property be used and zoned SLU Agricultural, *ref. exhibit 18, Boundary Interpretation.*

29. Testimony during LUC petition A05 757 hearings for the McCully(s) described that no record existed describing why the Property appeared on The 1974 Map to be located in the SLU Conservation District. While petition A05 757 was denied by the LUC in 2006, the testimony is now also an **"applicable commission record"**, *ref., HAR 15-15-22 (f)* which **"applicable**

commission record" now also supports this **Request** which was not the case when the 1992 Interpretation was issued by the LUC.

30. The official AISH map was adopted by the LUC in 1977 and was, in 1992, and now also is, an "**applicable commission record**" of the LUC. **The ALISH description** of the Property and **the ALISH map** defines the **land** area including all of the Property to be "**Prime**" agricultural **land**. The ALISH definition of "**Prime**" is...

*"Land which has the soil quality, growing season, and moisture supply needed to produce **sustained high yields of crops** economically when treated and managed according to modern farming methods.", ref., ALISH definition, exhibit 83 and ALISH map, exhibit 85.*

31. No evidence exists that the **Prime** agricultural resources of the Property were ever considered when The 1974 Map was adopted by the LUC nor when the 1992 Interpretation was issued nor during the McCully LUC petition A05 757 was denied. In 1974 through 1992 the Property was in *intense agricultural production* and '**sustaining high yields of crops**' immediately preceding the Interpretation in 1992 and had been in agricultural use for a period exceeding 100 years there before.

32. The term "**greatest possible**" which is found in HRS 205-2 (3) is succinct and clause (3) can only be interpreted to mean that no other SLU District zoning be applied or *interpreted* to be applied to **land**, by the Commission or the Executive Officer of the LUC or a *determination* by the Commissioners and by extension '*interpretation of a District boundary*' (which '*establishes the legal location of the boundary of the agricultural district*' as it regards the Property) other than the SLU Agricultural district zoning, is to be applied to **land** if has "*a high capacity for intensive cultivation;*", **not even SLU**

Conservation District zoning .

33. The word "**capacity**", found in HRS 205-2 (3), **distinctly refers to a characteristic of land** and not a use and the word "**shall**" found in Hawaii's Statutes and Rules, is "**mandatory**" and is described to not be subject to interpretation.
34. We think that it is unlikely that the Statute's intention was to preemptively preclude all other SLU Districting considerations on a go-forward basis beginning in 1974. However, in the case of the Property, no Conservation Districting stipulated characteristics or resources or State or County planned uses have ever been identified regarding the Property since it appeared on The 1974 Map , nor when the 1992 Interpretation was issued, nor during the 2005 LUC petition A05 757 hearings, to exist of a high priority to the State or County than its **Prime** agricultural resources. For the LUC's reference the earlier referred Laura Thielen's testimony to the LUC in 2005 described that the State Office's of Planning analysis of the physical resources of the Property, as it may regard either SLU Conservation or Agricultural District zoning. never occurred.
35. The Property's use for Agriculture is grandfathered as **Allowed** in HAR 13-5-7's Nonconforming use rule. Erosion concerns or scenic values or the location of structures on the Property either never were or no longer apply to the Property as it is now a fully permitted/developed agricultural use Property, including accessory structures.
36. The **Prime** agricultural resources of the Property ends makai, at the top of the steep, oceanside bluff/pali, and not the mauka border of the Property. The top of the steep, oceanside bluff/pali, is where the historical agricultural *intense* use of the Property ended, *ref., Sam Lemmo testimony, petition A05 757..May 4th, 2006, page 69, lines 11-18*

*“COMMISSIONER KANUHA:But the others, the two that you’ve cited your office has approved has CDU applications for **plus this Petition** that’s on the docket now, by and large those properties were primarily in agricultural use at sometime before the Conservation District was overlaid on them. Is that a correct statement?*

THE WITNESS: I’m sure they were in ag use, yeah and then the conservation zoning occurred in ’64 I believe. So, yeah.”

the Witness was Sam Lemmo, Administrator OCCL,

and the original overlay of a line on a map, showed the Property to **not** be located in the Conservation District in the **1960's**, ref., transcript of LUC petition A05 757 hearing proceedings, dated May 4, 2006, page 88, lines 15-19, during closing arguments regarding the Property....

"It's our belief and as indicated on the record that the guideline for identifying the Conservation District mauka boundary was the tree line on the bluffs. This has been taken from the records of the LUC at the time that they established the district boundaries.

We don't know why the Conservation District boundary was extended to the old right-of-way. There is nothing that really explains that in any way. But it's clear that this is not a high resource land area, and it is clear that it was used for agriculture."

(note: We do not have a copy of the "**record**" referred to above)

and, ref., exhibit 22 Field map and exhibit 107, 1905 field map.

37. We met with the LUC's administrative staff at the LUC's Honolulu office during the period shortly after We purchased the Property in 2014 in order to

inquire regarding the 1992 Interpretation. We state that during that meeting the LUC staff advised us that The 1974 Map and a surveyors map that was supplied by the former property owners, the McCully(s), in 1992 was substantially relied upon by the LUC's administrative office in issuing the 1992 Interpretation.

38. HAR §15-15-22 *Interpretation of district boundaries* first states.....

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

followed by.....

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

however that rule is subordinated by.....*Except as otherwise provided in this chapter* and it is clear that it is *otherwise provided in the chapter*.

39. We also describe in this **Request**, that any HARule(s) which is/are in conflict with the HRStatute from which the rule promulgates is/are **"not valid"** with reference to a State Supreme Court case, *ref.*,

"Stop H-3 Association et al. v. State of Hawaii Department of Transportation et al., Hawaii Reports, v. 68, 1985, p. 161."

40. We state that the words **"shall"** and **"mandatory"** found in HAR 15-15-04 and the term **"greatest possible"** found in HRS 205-2 (3) are **"succinct"** and are not subject to interpretation by any administrative authority nor is HAR 15-15-04 prefixed with the term **"Except as otherwise provided in this chapter"** however, confusingly, the word **"shall"** is found in **HAR§15-15-19** which is first prefixed with the term **"Except as otherwise provided in this chapter"** and followed with the subclause Rule (1) **"It shall include lands with a high capacity for agricultural production;"** and therefore the preemptive relevance of HRS 205-2 (3) particularly applies which uses the term

"greatest possible protection" when applied to agricultural districting and by extension the interpretation of district boundaries.

41. HAR§15-15-20 *Standards for determining "C" conservation district boundaries* similarly is prefixed with the term.....

"Except as otherwise provided in this chapter".

42. We state that **if** The 1974 Map was intended to be the final interpretation of where a boundary lay, all of Subchapter 2, **with the exception of its first clause**, would not be prefaced with the term *"Except as otherwise provided in this chapter"* (in other words all of HAR 15-15 and not just Subchapter 2) which Subchapter 2 particularly contains the following clauses which specifically relate (but not exclusively) to Boundary Interpretations.....

(a)-(1),(2),(3),(4) (b) (c)-(1),(2), (d) (e)-(1),(2),(3) (f)

Clearly the Commission and the LUC's Executive Officer *are/may "use all applicable commission records in determining/interpreting district boundaries."* and not just The 1974 Map .

Particularly after considering all of Chapter HAR 15-15, ie. 15-15-19 (1) which states a '*mandatory*' requirement that the SLU Agricultural District.....

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

HAR 15-15-22 (c)-(2) allows that the Executive Officer may require that a surveyor.....

"prepare a map for interpretation"

and.....

HAR 15-15-22 (d) requires that the Executive Officer *may*.....

*'use **all applicable commission records** in determining district boundaries.'* (**ie. the ALISH map**) which is also a '*commission record*'

and.....

HAR 15-15-22 (f) provides that **if**.....

*"uncertainty concerning the location of any district line" that the **'Commission'** (and not the LUC's Administrator)..... "shall determine the location".....*

None-the-less HAR 15-15-17 requires that HRS 205-2 (3) is preemptive when determining a district boundary, whether today or in 1974, when The 1974 Map was adopted by the LUC.

43. We state that '*uncertainty concerning the location of the district line*' continues to exist and We request that the "*Commission*" "*determine the location*".

44. Once the Executive Officer has interpreted the SLU District boundary it is not clear in HAR 15-15 that the interpretation may be appealed except *HAR 15-15-22(f)* appears to state that an ***Applicant*** may ***Request*** that the ***Commission*** may "***determine*** the location".

45. We state that if only The 1974 Map was to be applied no boundary interpretation would otherwise be necessary.

46. We state that The 1974 Map is just an official map with an undefined **bold line** on it in order to provide **guidance** to the LUC in its **interpretation** of district boundaries but the official boundary was intended to be further determined by the ***applicable records*** of the LUC and HAR 15-15 rules and

particularly in accordance with the **mandatory** instruction found in HRS 205-2 (3).....

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

47. It is clear that when the 1974 Map was adopted by the LUC individual properties physical resources had not yet been considered by either the State nor the County as it respected the development and adoption of the 1974 Map. The 1974 Map narrowed guidance options that the LUC may or shall apply and HRS 205 and HAR 15-15 were provided to establish the final district boundary which could be resolved subsequently by the administrative authorities and with the participation of a property owner.

48. It is clear that The 1974 Map , which is described to be applied when making a Boundary interpretation, *ref.*, HAR §15-15-22 (a) first states **"Except as otherwise provided in this chapter"** and then goes on to state.....

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

did not establish the legal location of the Boundary line because HAR 15-15 does **"provided in this chapter"** that further consideration of the **"applicable commission records"** and HRS 205-2 (3) may be applied or the balance of HAR 15-15-22 would not describe further considerations, for example, *ref.*, HAR 15-15-22 (d)

"The executive officer may use all applicable commission records in determining district boundaries."

49. During petition hearings A05 757 it was established that the Property **first appeared to lay mauka** of the SLU Conservation District around **1964**.
50. The official transcripts of LUC hearings for petition A05 757, which included the area of the Property, are '*applicable commission records*' that are relevant to this **Request**, and clearly established that there existed no '*applicable commission records*' for the change shown, subsequent to 1964 on The 1974 Map , and that consideration was not always given to specific properties nor their existing agricultural suitability or use when The 1974 Map , was adopted by the LUC.
51. Also, as stated earlier, HAR 15-15-22 would not be prefaced with **"Except as otherwise provided in this chapter"** if The 1974 Map was final.
52. The LUC's website has a maps section which is prefaced with the following.....

"A variety of maps generated by our State Geographic Information System (GIS) showing State Land Use District boundaries for individual islands, selected district boundary amendments by docket, selected State Special Permits by docket, and Important Agricultural Lands (IAL) declaratory rulings by docket.

These maps were produced by the Land Use Commission (LUC) for informational purposes only. These map and all the information contained within shall not be used for Interpretation. The authoritative boundary lines between State Land Use District Boundaries are found on the official U.S.G.S. quadrangle maps currently filed at the LUC and may be further defined by officially-recognized LUC Boundary Interpretations supported by metes and bounds descriptions.

53. We state that similarly the County's General Plan map and SMA map have lines on them which **appear to be** the dividing lines between County planning and use districts but require a more refined/considered interpretation/determination in order to establish where a boundary **legally** lies according to the relevant Statutes and Rules of the State and County and their administrative bodies.

54. The County's functional plan map refers to TMK lots which are already identified on County approved official surveyor's maps for each property located therein which are also succinctly described in meets and bounds descriptions.

55. By comparison the County's SMA map shows the entire area of the Subdivision's 7 lots are located in the SMA yet it subsequently Interpreted that only the 3 ocean-side lots (including the Property) are in the SMA, *ref., exhibit 109, County SMA determination.*

56. We discussed the issue of lines on maps with a senior County Planning Department representative who stated that except in the case that such lines were shown on officially recognized surveyor maps which are filed with the County and specified in meets and bounds the location of the boundaries on other maps remained undetermined and subject to interpretation.

57. We state that in the case of the Property **all of HAR 15-15** and particularly Subchapter 2, *Interpretation of District Boundaries*, has to also be considered by the LUC's Executive Officer and/or the Commission and not just the **bold** line on The 1974 Map , particularly because the prefix term exists generally in Subchapter 2's rules

*"Except as otherwise provided in this **chapter**".*

58. The original overlay of a line on a map, showed the Property to **not** be

located in the Conservation District in the **1960's**, ref., transcript of LUC petition A05 757 hearing proceedings, dated May 4, 2006, page 88, lines 15-19, during closing arguments regarding the Property which were also quoted earlier in this **Request**....

"It's our belief and as indicated on the record that the guideline for identifying the Conservation District mauka boundary was the tree line on the bluffs. This has been taken from the records of the LUC at the time that they established the district boundaries.

We don't know why the Conservation District boundary was extended to the old right-of-way. There is nothing that really explains that in any way. But it's clear that this is not a high resource land area, and it is clear that it was used for agriculture."

(note: We do not have a copy of the "**record**" referred to above)

and ref., **exhibit 3**, March 3, **2008**, LUC, Ninole Boundary interpretation, which property lies a short distance to the north of the Property which states.....

"For your information, the designation of the subject parcels was established on August 4, 1969, and in accordance to Hawaii Administrative Rules Subchapter 16, 15-15-111. As depicted on the official State Land Use (SLU) District Boundaries Map H-59. Papaaloa Quadrangle, the landward portion of the subject parcels was designated SLU Agricultural. any coastal lands from the "Top of Sea Pali" was deemed SLU Conservation District."

59. We state that a **1960's** first map which showed the Property to not be in the SLU Conservation District was followed by a subsequent *Land Use District Boundaries Map*, dated December 20, **1974** which was adopted by LUC showing the apparent boundary line, shown on the map, to have moved

considerably inland from the top of the coastal bluff (without an explanation existing in either the State's or County's record) and which showed the Property to appear to be located in the Conservation District.

60. A Legislative Bureau Document published by the University of Hawaii titled "PUBLIC LAND POLICY IN HAWAII: THE MULTIPLE USE APPROACH," states on its page bearing the #1.....

"Yet because this legislation was drafted and enacted within such a short period and under less than optimal conditions, even its stoutest proponents admit that it requires revision."

61. In the **1960's** the Property was in **intense Ag. production** of field crops when the Conservation District was established, *ref., transcript of LUC A05 757 petition hearing proceedings, dated May 4, 2006, page 69, lines 11-18, transcript, DLNR's OCCL's Administrator Sam Lemmo Testimony and the attached field maps dating back to 1905, ref., exhibits 107, 1905 field map and exhibit 22, field map.*

62. We state that the Property always had "**a high capacity for Ag. production**" and it had "**the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed according to modern farming methods**" (*ref., exhibit 85, ALISH map and exhibit 83, ALISH definition of Prime.*

63. The Property continued in **intense Ag. production'** of field crops until **1992** when sugar cane production on the Property ceased, *ref., transcript of LUC petition A05 757 hearing proceedings transcript, dated May 4, 2006, page 69, lines 11-18, DLNR's OCCL's Administrator Sam Lemmo Testimony and ref., exhibit 23, field manager, John Cross letter.*

64. The **ALISH map** adopted by the LUC in **1977** showed the area of the

Property to be located in an area which described that the Ag. characteristics of the Property to be "**Prime**".

65. The ALISH definition of "**Prime Agricultural Lands**, is...

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

66. We state that the characteristic of the Property to 'sustain high yields of agricultural crops' did not end in 1974 at the mauka border of the former R.R. lots which crossed the former field area which included the Property where The 1974 Map appears to show the SLU District Boundary to be nor did the 'capacity' of the Property to 'sustain high yields of agricultural crops' end in 1974 when The 1974 Map was created. The Property continued to 'sustain high yields of agricultural crops' throughout the entire period as it had since the 1850's when it was first cleared and used for Ag. crops, (HAR 15-15 does describe that the boundary is subject to further interpretation by the LUC) and continues presently.

The Executive Officer of the LUC **Interpreted** that the Property was located in the Conservation District in **1992** which appears to be in conflict with HRS 205-2 (3) and HAR 15-15-19 (1).

67. We state that a line on any map, without meets and bounds description, is just that, it is an undefined line, otherwise, if it was final, its location on The 1974 Map would not require interpretation subsequently, ie. *"Except as otherwise provided in this chapter"*.

68. As We have stated herein, the first Rule found in HAR 15-15's SUBCHAPTER 2 is HAR §15-15-17, which refers to districts and district maps. This first Rule in Subchapter 2 **is not prefixed** with the term *"Except*

as otherwise provided in this chapter" **but rather begins with the statement**.....

*"(a) In order to effectuate the **purposes of chapter 205, HRS**, all the lands in the State shall be divided and placed into one of the four land use districts: (1) "U" urban district; (2) "A" agricultural district; (3) "C" conservation district; or (4) · "R" rural district.*

(b) The boundaries of land use districts are shown on the maps entitled "Land Use District Boundaries, dated December 20, 1974," as amended, maintained and under the custody of the commission. Not all ocean areas and offshore and outlying islands of the State in the conservation district are shown when deemed unnecessary to do so."

HRS 205 Districting and classification of lands does not have a section describing its **purposes** however HRS 205-2 clearly states the following **purpose**

*(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;**"*

*"(4) In the establishment of the boundaries of **conservation** districts, the "forest and water reserve zones" provided in Act 234, section 2, Session Laws of Hawaii 1957, are renamed "conservation districts" and, effective as of July 11, 1961, the boundaries of the forest and water reserve zones theretofore established pursuant to Act 234, section 2, Session Laws of provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission."*

69. The term "**greatest possible**", found in HRS 205-2 (3) *Districting and Classification of lands* section, **is succinct** meaning that when the LUC **establishes** where a **boundary** lies **no** other zoning **boundary** definition priority can **possibly** be interpreted or determined other than what land is to be zoned as Agriculture, **not even when establishing the boundary of Conservation areas**, be given to land if an area has a *'high capacity for intense cultivation'*.
70. This ***Request*** and the exhibits to it clearly ***establish*** that the Property has a **"high capacity for agricultural production / intensive cultivation"** and has had that capacity **and** use since it was first cleared for Ag. use around 1850.
71. We state that the italicized term(s), **'high capacity for agricultural production / intensive cultivation'** are generally found in HRS, HAR and ALISH definition, which are all adopted by the LUC, and **capacity refers to a characteristic of land and not a use.**
72. We state that Mr. Cross stated to us that the Property has a history of ***intense cultivation*** producing ***sustained high yields of crops*** dating back to a period around 1850, *ref., exhibit 107, 1905 map* which is characteristic of former sugar cane land along the Hamakua coast.
73. We state that at the time that the ***Interpretation*** was issued by the LUC, the Property was in current ***'intense production of Ag. crops'*** (as was also the entire area of the Subdivision where the Property lay) as the last sugar cane crop had just been harvested and the land lay fallow (no new use of the land had yet occurred) and the Property continued to have a ***"high capacity for intense cultivation"*** as had always been the case.

74. We state that whatever **Rule** or **Rules** the LUC relied upon, or its own interpretation of the meaning of its **Rules** and now this ***Request***, is considered by the Commission, in issuing a new ***determination*** or considering the Interpretation, the proper location of the boundary ***remains uncertain*** because the 1992 Interpretation conflicts with HRS 205-2.

75. During the 2005, A05 757 LUC petition hearings for the Property the OCCL's administrator, Sam Lemmo, described three categories of "*conservation values*" which existed on the Property that supported his belief that because such *conservation values* existed on the Property it ought to remain in the Conservation District but he deferred that such a decision fell under the LUC's jurisdiction and not the DLNR's. Particularly he described '*soil erosion, **erosion** and scenic values*', ref., *Petition exhibit 17, Sam Lemmo testimony, page 61, lines 5-6* (the highlighted word **erosion** is believed by Us to refer to Bluff erosion by the action of waves at the shoreline) and the referenced *Petition exhibit 17* is also located in the LUC's records, it is large and is not exhibited hereto.....

"But I think I remember seeing under conservation criteria, a soil erosion, erosion, scenic area." (the reference by Mr. Lemmo is made to rules administered by the LUC ref. HAR 15-15 rules **and not DLNR** administered HAR 13-5 Rules)

76. Mr. Lemmo's concerns regarding erosion were also echoed by the dissenting LUC Commissioners that effectively resulted in the denial of petition A05 757, ref., *Petition exhibit 27, minutes of LUC meeting, its page 4* (and the referenced *Petition exhibit 17* is also located in the LUC's applicable records, it is large and is not exhibited hereto).....

"Commissioner Piltz stated that he is concerned about soil erosion."

77. We state that during the 2005, A05 757 LUC petition hearings, for an area which included the Property, it does not appear to have been understood by anyone that nonconforming agriculture was already *grandfathered* as an **Allowed** use of the Property, *ref., HAR 13-5-7's Nonconforming Use Rule*. Soil erosion that may result from the McCully(s) planned residence and greenhouse, with grass maintained everywhere else, would be substantially less than soil erosion that may result from the **Allowed** cultivation of the Property's soils right up to the top of the coastal Bluff as part of its existing **Allowed Ag.** use.

78. During the 2005, A05 757 LUC petition hearings for an area which included the Property it does not appear to have been understood that the Property qualified for nonconforming Ag. use and that the Property had a "*high capacity for agricultural production / intensive cultivation*" which are descriptions generally found in HRS 205 and HAR 15-15.

79. We also state that the official transcripts of Proceedings for petition A05 757 in their entirety describe Commissioner's concerns that erosion of the coastal Bluff, landslides etc. related to the placement of structures on the Property. If such concerns are now relied upon because it is believed that they continue to exist, they no longer apply to the Property as the DLNR and the County have already permitted the two structures that exist on the Property today and Ag. use of the Property is **Allowed** whether or not the Property is Interpreted to be in the SLU Conservation or Agricultural District or not.

80. We also state that "*scenic value*" concerns, if they exist regarding the Property, are not relevant, whether the requested boundary interpretation shows the Property to lie in the SLU Conservation or Agricultural Districts are also as no new land use is contemplated nor is likely as the Property is fully developed with DLNR and County permitted structures and **Allowed**

agricultural plantings, which agricultural uses and uses accessory to Ag. are consistent with the surrounding Hamakua agricultural area and are generally not considered to be visually detrimental, *ref., exhibit 108, Reed Travel tourism brochure.*

81. We state also state that if soil erosion and Bluff erosion were a concern regarding the Conservation zoning dating first from the 1960's or later in the 1970's similar properties that lie within one mile north of the Property and extending generally thereafter along the coastal Bluff would have been zoned Conservation instead of their current Agricultural zoning, *ref., exhibit 17, Ninole Interpretation*, which describes the '*top of the bluff*' to be the boundary between Conservation and Ag Districts and.....
82. Laura Thielen testimony to the LUC, *ref., McCully(s) Petition A05 757 hearing minutes, August 11, 2005, pages 113-126*, described the State Office of Planning's analysis of the physical characteristics/resources of the area, including the Property, measured against HAR 15-15-19 vs. -20. She described that the Property was not particularly subject to erosion nor did it have scenic values of concern to the State Office of Planning.
83. Even in the case of Conservation Districted land the State intended to reasonably maximize the beneficial use of land. The ***dual public purposes*** of preservation and conservation are apparent in the land use law and the forest and water reserve zones law. The land use law speaks of ***"protecting," "preserving," and "conserving"***; it also speaks of uses ***"not detrimental to a multiple use conservation concept"***. In multiple use, land is used for two or more purposes.....

ref., Hawaii, Legislative Reference Bureau, Public Land Policy in Hawaii: The Multiple-Use Approach, Report No. 1, 1965 (Rev. 1969), Honolulu, p.

17.

84. The State created its administrative agencies to also *assist land owners to ease their land use, so much as it is provided for in law*. It has been our experience that the DLNR does not prescribe to this.
85. We request that the LUC allow this **Request** *in order assist Us to ease our land use for agriculture, so much as it is reasonably provided for in law*.
86. It is an established fact that a favourable **Determination** regarding this **Request** does not bind the LUC by Precedence.
87. Finally, although this **Request** is not for a boundary ammendment, an EA was published by the OEQC that the Property be re-zoned from the SLU Conservation District into the SLU Agricultural District. No comments were received back.
88. If this **Request** is denied We request that the Commission's reasons be provided, in writing, in order that we may further consider our options.

List of documents submitted with this Request

exhibit 1 - DLNR letter-State owns the former r.r. right of way properties

exhibit 9 - Meets and bounds description of the Property and a contiguous lot

exhibit 10 - 2015 County signed subdivision map

exhibit 17 - Ninole Boundary Interpretation

exhibit 18 - 1992 Boundary Interpretation for the Property

exhibit 22 - Field map F31B covering the area of the Property

exhibit 23 - letter from former field manager to Us

exhibit 45 - 1993 County signed Subdivision map 6324

exhibit 52 - OCCL letter, prove ag. use is grandfathered

exhibit 62 - OCCL letter, farm dwelling not allowed

exhibit 72 - OCCL letter to Us stating that it "Approved" of nonconforming use

exhibit 76 - OCCL letter, grow sugar cane is grandfathered

exhibit 83 - ALISH text notes

exhibit 85 - ALISH map of the Property

exhibit 91 - contour map of the Property

exhibit 98 - TMK map of the Property

exhibit 102 - Quadrangle map

exhibit 107 - 1905 field map

exhibit 108 - tourist guide

exhibit 109 - County SMA letter

The official transcripts of the 2005, A05 757 LUC petition hearings are referred to in the **Request** but are not exhibited herein as they already exist as records on file with the LUC. Also the *Land Use District Boundaries, dated December 20, 1974* is not exhibited herein.