

**BRIEF, MOTION TO RECONSIDER**  
**DENIAL OF PETITION DR 21-72**  
**CHAPTER**  
**DECLARATORY ORDER**



The Declaratory order states.....

**CONCLUSIONS OF LAW**

Jurisdiction

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

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

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

The Commission's Declaratory Order for Petition DR21-72 erred in the above 7., 8. & 9 as described below....

**Why the Commission made a legal error,**

The Petitioners believe that the Staff Memorandum prejudiced the Commissioners against the Petition. This seemed even more apparent when we read the Decision and Order that denied the Petition because some areas of the misleading information was re-described in the Staff

Memorandum was repeated in the Decision and Order as supporting reasoning.

The Staff Memorandum also did not introduce the Commissioners to one of the key APPLICABLE LAWS that the Petition cited..... HRS 205-2 (a) (3).....

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

The Petitioners were not given a copy of the Staff Memorandum in advance of the Sept. 2021 Petition Hearing in order that the Petitioners could have given rebuttal to the errors and omissions.

**How the error impacted the decision,**

The Petitioners believe the Staff Memorandum prejudiced the Commission against the Petitioners in an unfair way which resulted, substantially and in part, that the Commissioners denied the Petition.

**What could be corrected OR reversed in the DO,**

The Petitioners believe that the Petition must be reheard in its entirety with cross-examination of "parties" to the Sept. 2021 Petition Hearing allowed **OR** the Commission should introduce its own Motion to simply issue the Petitioned boundary interpretation to reflect that the top of the Coastal pali be the State Land Use Boundary separating the Conservation District makai and the Agricultural District Mauka.

**Why the DO should be reversed OR vacated,**

The Petitioners believe .....

1. that the Staff Memorandum prejudiced the Commissioners against the Petition,
2. proper consideration of the **factual situation** that existed in 1969 was contaminated by the Commissioners apparent preoccupation with the Petitioners and the current situation of the Property,
3. cross-examination of "**parties**" would have assisted the Commissioners in gaining a better understanding of the text record of the Report regarding text references from the Report's Chapter 8, pages 85 and 86 (which were the basis for "recommended" redistricting analysis) vs. the Report's Chapter 5, page 36, (which recorded the Commission's redistricting "actions"),

The DO cited HRS 91-10 (5) **as an applicable legal authority...**

*HRS 91-10 first states.....*

**From the DO's CONCLUSIONS OF LAW clause "7."**

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

**The petitioners state**

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

*(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;*

***(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 Petitioners requested that they be allowed cross-examination of "parties". The request was denied. The Commission cannot apply **HRS§91-10 Rules of evidence *In contested cases*: AND THEN DENY** the Petitioners right to cross examine "parties" to the Hearing.

4. the Commissioners did not appear to have a proper working understanding that case Law has established that **PERPETUATION OF A ZONING ERROR** is not a decision making criteria,
5. the Commissioner's DO cited in its CONCLUSIONS OF LAW section, clause "8." a mistaken belief that allowing the Petition would somehow "*adversely affect the interest of the State*"

**8. HAR §15-15-100(a)(1)(C) provides that the Commission can deny the petition where "the issuance of the declaratory order may adversely affect the interest of the State, the commission, or any of the officers or employees in any litigation which is pending or may be reasonably expected to arise ... "**

The Staff Memorandum informed the Commissioners that ...

**3) *The issuance of the declaratory order may affect the interests of the Commission in a litigation that is pending or may reasonably be expected to arise.***

#### STAFF COMMENT

***At this time, the Commission is not involved in any pending docket or litigation involving this particular issue.***

#### **Regarding the potential for litigation.....**

First in this regard the State's tort laws only allow litigation for a period spanning 2 years back. The Staff Memorandum correctly states that the likelihood of litigation does not exist. In order to be eligible to litigate a land owner would first have to go through the same process that the Petitioners have gone through here first. If the Commission denied such a petition and a court overturned the denial then a land owner would

have the right to sue the State for damages. That is the current situation with the Petitioners' Petition. During the last 2 years the LUC's web site does not show any Petitions for a Declaratory Order that is similar to the Petition. Therefore the likelihood of litigation going back does not exist.

**Regarding the interest of the State.....**

The *interest of the State* of the State is clearly described in a cascade of authorities.....

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**;*

6. the Commissioner's DO cited in its CONCLUSIONS OF LAW section, clause "9." .....

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

### **The Petitioners respond**

Several sections that are described in the DO applied fact situations that were not discovered during the Hearing.

Several sections that are described in the DO were not included in the submitted Evidence.

Several sections that are described in the DO had to do with fact situations that did not exist in 1969.

7. One of the purposes of the State when it reconstituted the Commission as a quasi-judicial body was to prevent urban spread on to the State's very limited Prime agricultural lands. The effect of the apparent Conservation District on the Property results that it is much easier to develop the two remaining Property lots with residences than for agricultural use.
8. The Petitioners were not able to present the Petition in the video format which they had planned in an equal and fair way due to the Zoom Hearing format.
9. The 1969 Report's page 36 clearly describes that the Property is located in an area that is described as the Hamakua Coast **AND** Hamakua Coastal lands that were in agricultural use in 1969 were not to be interpreted subsequently to have been redistricted into the Conservation District.....

**FIRST paragraph**

*"The Hamakua Coast has an annual rainfall of between 100 inches and 200 inches per year. The result of such a high rainfall is a landscape frequently dissected by steepwalled scenic valleys. The major valleys, Kaawalii, Laupahoehoe, Mavla, Waikau-malo, Nanue, Hakalau, Kolekole, Kawainue, Honolii, and Wailuku, are of such significance to the landscape that they should be placed within the Conservation District." (emphasis added)*

**SECOND paragraph**

***"C. The Shoreline***

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

*Commission Action: Partially Approved.*

**Areas in agricultural use were excluded."**

**THIRD paragraph**

*"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."

It is **Patently Obvious** that the Property lies in the area that the **FIRST** and **SECOND** paragraphs **DEFINE** and **DESCRIBE** the "**Hamakua Coast**" to be.

10. Finally the Petitioners have provided new Evidence, the 1969 Commission's redistricting hearing transcripts and minutes (ref., Motion Exhibits 43, 44 & 45) which clearly and repeatedly describe that the 1969 Commission did not intend their redistricting actions to overlay the Conservation District on to the Hamakua Coasts Prime Agricultural lands.