

# **DOCKET NO. DR21-72**

## **Church and Hildal**

### **PETITION FOR DECLARATORY ORDER**

### ***STAFF REPORT***

Hearing  
September 8, 2021



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Executive Officer

Submitted: September 4, 2021

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## PREFACE

The Petition for declaratory order before the Commission, DR21-72 Church and Hildal ("Petitioners" or "Church") seeks to clarify and correct LUC Boundary Interpretation No. 92-48 to reflect that the Property lies in the State Agricultural ("Ag.") District and that the Official Map H-65 be amended to reflect that, based on their interpretation of information from the 1969 and 1974 State Land Use District Boundary Reviews.

The Petitioners also seek the refund of filing fees of \$5,000.00 for DBA Petition A18-805 and the filing fee of \$1,000.00 for this Petition for a Declaratory Order and that any Court Reporter fees, for this proceeding, be waived.

The substance of the Petition asks the Commission to render an interpretation of Hawai'i Revised Statutes ("HRS") Chapter 205: specifically, §§205-2(a), 205-3, 205-3.1(a), 205-4(a), 205-4.1, 205-7, 205-8; the 1969<sup>1</sup> and 1974 State Land Use District Boundary Reviews; and, the land use district boundary interpretation process under HAR §15-15-22. Therefore, the Commission clearly has jurisdiction in the matter.

The issue for the Commission is whether the staff has correctly and appropriately applied the criteria in issuing a land use boundary interpretation under HAR §15-15-22; which includes the use of any pertinent historical information, in particularly the 1969 and 1974 Boundary Reviews. Some questions to focus on with regard to interpreting HRS Chapter 205 and HAR §15-15-22 are:

1. Whether or not, there is a lack of clarity with respect to the State Land Use District Boundary as identified in LUC boundary interpretation No. 92-48;
2. Whether the properties in question are located within the Hamakua District or Hilo District of the island of Hawai'i; or,
3. Whether the landowner at the time of redistricting in 1969 or 1974 filed objections to the reclassification of those properties from the State Agricultural to the State Conservation District.

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<sup>1</sup> State of Hawai'i Land Use Districts and Regulations Review: Prepared for the State of Hawai'i Land Use Commission by Eckbo, Dean, Austin and Williams; August 15, 1969. Referred to as the "1969 Report" or "Eckbo, et.al."

## 1. BACKGROUND

Chapter 205 establishes LUC, provides for districting and classification of lands, sets initial Conservation District boundaries pursuant to section 205-2(a)(4) as of July 11, 1961.

Original, permanent boundaries set by LUC on August 23, 1964. At that time, the properties in question were placed in the State Agricultural District. Reference to official LUC 1964 maps, USGS 1:62,500 scale map H-H.

During the 1969 Five Year District Boundary Review process, the properties in question were reclassified into the State Conservation District. The LUC approved the reclassification at a scheduled hearing on July 18, 1969 on the island of Hawai'i. There was no registered opposition by the landowner at that time. The reclassification was delineated on official LUC 1969 maps, USGS 1:24,000 scale map, H-65.

During the 1974 Five Year District Boundary Review there were no district boundary changes to the properties in question. Chapter 205 was amended to include section 205-3 that provided an opportunity for landowners to challenge the classification of lands that were part of the 1974 periodic boundary review; after that the classification would become permanent as of June 2, 1975.

In November 1992, Mr. McCully requests a boundary interpretation as part of completing a petition for reclassification. Staff based its determination of the parcels' land use designation on an enlargement of the Commission's State Land Use District Boundaries Map, HH and H-65 (Papaikou quadrangle), which represented the Agricultural and Conservation District boundary as following the railroad ROW, and upon review of the "State of Hawaii Land Use Districts and Regulations Review" prepared by Eckbo, Dean, Austin and Williams to document the recommendations and actions in the 1969 Five-Year Boundary Review. The Executive Officer issued a boundary interpretation in December 1992 (No. 92-48) based on a metes and bounds survey and a review of historical information. The landowner accepted the LUC determination and used it as part of his subsequent district boundary amendment request in 2005. The mauka boundary between the State Agricultural and State Conservation Districts was set along the makai edge of an existing railroad right-of-way that was surveyed and described. The County of Hawai'i used these boundaries in processing a subdivision application by McCully.

In 2005, the landowner at that time, Mr. McCully, petitioned to reclassify the properties in question<sup>2</sup>. The petition acknowledges that the subject properties are in the State Conservation District. The LUC considered and ultimately denied McCully's petition in 2006, due to a lack of sufficient information provided on planned agricultural uses for the entire petition area. The Petitioner filed a motion to reconsider that was also denied.

In 2009, McCully brought a second petition for district boundary amendment<sup>3</sup>. At that time, OP filed testimony in opposition. In 2010, the Petitioner withdrew that request prior to hearings being scheduled.

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<sup>2</sup> A05-757 McCully

<sup>3</sup> A09-783 McCully



Church purchased the properties of concern in this petition, from McCully. Church filed for and received permits from DLNR acknowledging the properties are within the State Conservation District.

Church filed with Hawai'i County for consolidation and resubdivision of properties based on a new metes and bounds surveys. The County accepted these metes and bounds descriptions strictly for the purpose of subdivision.<sup>4</sup>

In July 2018, Church sought a district boundary amendment similar in nature to the 2009 McCully petition, augmented by voluminous documents related to his disputes with the State Department of Land and Natural Resources ("DLNR"). Church requested a boundary interpretation from the LUC and was provided with LUC Boundary Interpretation No. 92-48 previously done for McCully.

In August 2020, the LUC issued a letter deeming the petition incomplete based on several factors that included the need to satisfy HRS Chapter 343 requirements and provide accurate acreage figures reflecting the consolidation and resubdivision of previous parcels in relation to State Land Use District boundaries.

Church disputes the existing McCully boundary interpretation (No. 92-48). Church wanted the LUC to use his subdivision metes and bounds description that differed from those used in the LUC boundary interpretation of metes and bounds. Church's surveyor appeared to utilize different control points. The LUC requested an explanation by letter from Church for the deviation of survey metes and bounds from those in the existing official LUC boundary interpretation. No response with explanation has been received to date.

In November 2020, the LUC accepted Petitioner's Final Environmental Assessment and issued a Finding of No Significant Impact ("FONSI").

On June 17, 2021, Church filed a Motion for Declaratory Ruling requesting to resolve his dispute of official LUC district boundaries.

On September 1, 2021, The State Office of Planning and Sustainable Development ("OP") filed OP's Statement of Position for Petition for Declaratory Order and Exhibits 1-4 ("OP Position").

## 2. PROCEDURE FOR DECLARATORY ORDER ANALYSIS

Pursuant to HAR §15-15-98(a), the Land Use Commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the LUC to a specific factual situation on petition of an interested person.

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<sup>4</sup> The LUC district boundaries are based on the official maps and as augmented by LUC-approved metes and bounds descriptions when available. The County of Hawai'i property tax map key ("TMK") boundaries are determined by surveyed metes and bounds descriptions. However, such boundaries are not dependent on LUC district boundaries; at the same time LUC district boundaries are not dependent upon TMK boundaries. There are times when those boundaries do coincide: such as when boundaries are tied to specific features like an existing roadway boundary.

The Commission has three options in a Petition for Declaratory Ruling:

HAR §15-15-100(a), provides the alternative actions required of the Commission for processing a petition for declaratory order. Paraphrasing that subsection:

*The Commission, within ninety days after submission of a petition for declaratory order, shall **deny the petition in writing, or issue a declaratory order** on the matters contained in the petition, **or set the matter for hearing**, as provided in §15-15-103, HAR, provided that if the matter is set for hearing, the Commission shall render its findings and decision within one hundred twenty days after the close of the hearing.*

The Commission is required to decide at this time: (1) whether it will deny the Petition; (2) issue a declaratory order; or (3) set the matter for hearing.

The issue before the commission is the applicability of §§205-2(a), 205-3, 205-3.1(a), 205-4(a), 205-4.1, 205-7, 205-8; the 1969 and 1974 State Land Use District Boundary Reviews; and, the land use district boundary interpretation process under HAR §15-15-22.

#### Alternative Action 1: Dismiss or Deny Declaratory Ruling request

Pursuant to HAR §15-15-101, the Commission may dismiss the DR Petition, without notice or hearing, if it deems that the Petition fails in material respect to comply with the declaratory order requirements of HAR subchapter 14.

Pursuant to HAR §15-15-100(a), the Commission, for good cause, may also deny the Petition and refuse to issue a declaratory order under four circumstances. Based on review of the Petition for Declaratory Order, staff has made the following assessment of the relevant criteria:

- 1) **The question is speculative or purely hypothetical and does not involve existing facts, or facts that can be expected to exist in the near future.**

Church's filings refer to and incorporate existing documents and records from the 1969 and 1974 State Land Use District Boundary Review, a district boundary interpretation issued by the Commission (No. 92-48), HRS §§205-2(a), 205-3, 205-3.1(a), 205-4(a), 205-4.1, 205-7, 205-8; and, the land use district boundary interpretation process under HAR §15-15-22.

Therefore, the question is not speculative or purely hypothetical, and does involve facts that exist on the record.

- 2) **The Petitioner's interest is not of the type that would give the Petitioner standing to maintain an action if the Petitioner were to seek judicial relief.**

Based on Petitioner's declarations and information contained in their petition; Petitioner's would appear to have standing in the event they sought judicial relief.<sup>5</sup>

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<sup>5</sup> We note also that Hawai'i courts have been generous in allowing persons having standing to bring suit.

- 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.**

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

- 4) **The matter is not within the jurisdiction of the Commission.**

The matter requests interpretation of statutory and administrative rules related to the setting of State land use district boundaries and the waiver of fees associated with filing and hearing expenses under HRS 205. The authority to set and interpret State land use district boundaries and waive associated filing and hearing fees is within the Commission's statutory jurisdiction.

**Therefore, the Commission does not have good cause to deny the declaratory ruling request due to a lack of jurisdiction.**

Alternative Action 2: Issue a Declaratory Ruling

On July 17, 2021, Church filed a petition for declaratory order.<sup>6</sup> Within the 90-day time period, the Commission must render a decision; then an order needs to be prepared and adopted by the Commission at a second meeting before October 15, 2021. HAR §15-15-100(a)(2) does not require a hearing before the Commission issues a declaratory order.

**The Commission should make a determination on the request for declaratory order.**

Alternative Action 3: Schedule the Matter for a Hearing

HAR §§15-15-100(a)(3) and 15-15-103 allow the Commission discretion to conduct a contested case hearing on a petition for declaratory order. A petitioner or party in interest must set forth in detail why the matters alleged in the petition can't be disposed of in a fair and expeditious manner.

**The Petitioner has not indicated that the petition can't be disposed of in a fair (non-prejudicial) and expedient manner. The Commission should exercise its discretion not to schedule the matter for a hearing pursuant to HAR §§15-15-100(a)(3) and 15-15-103.**

3. POSITION OF PETITIONER ("Church")

Petitioner seeks to clarify and correct LUC Boundary Interpretation 92-48 to reflect that the Property lies in the State Agricultural ("Ag.") District and that the Official Map H-65 be amended to reflect that the TOP OF SEA PALI, as shown on Petitioner's Exhibit 6 be the SLUD line separating the State Conservation and Agricultural Districts on LUC Map H-65. Additionally, the Petitioner requests the refund of filing fees of \$5,000.00 for Petition A18-805

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<sup>6</sup> The 90-day time period for the Commission to take action would therefore end on October 15, 2021.



and \$1,000.00 for this Petition for a Declaratory Order and that Court Reporter fees, for this proceeding, be waived.

Church argues that uncertainty exists with respect to the official boundary interpretation done by LUC staff in 1992 (No. 92-48) and that pursuant to LUC administrative rules a declaratory order is the avenue by which the Commission can remove that uncertainty. Church has provided argument and interpretation of official documents that he believes favors his interpretation and request. The following are some of the points raised by Church in his petition:

- The Commission has jurisdiction under HAR §15-15-22(f) HAR to issue a boundary determination if "uncertainty remains" to correct the LUC Executive Officer's previous boundary interpretation No. 92-48 (McCully).
- The Property was historically planted in sugar cane during the period beginning before 1905 through 1992
- The Property is contiguous to State Agriculturally zoned land which is located mauka of the Property and makai of the Hawai'i Belt Road
- The entire area of the Property appears on the 1974 Land Use District Boundaries Map H-65, Papaikou Quadrangle, to lie in the State Conservation District
- During a one-year period ending in August of 1969 (the "Review Period") the Land Use Commission (variably the "LUC" or the "Commission") commissioned the firm of Eckbo, Dean, Austin & Williams that a "Review of Land Use Regulations and District Boundaries" be conducted (the Review"), with recommendations to the LUC for consideration and adoption by the LUC during the Review Period
- The Review included USGS maps on to which State Land Use District ("SLUD") lines were to be drawn on incrementally "proposed" USGS Quadrangle maps separating Rural, Urban, Agriculture and Conservation Districts for progressive review, during the Review Period in consultation with the LUC, landowners and the communities of Hawai'i over the one-year Review Period and subsequent adoption by the LUC as State Land Use District ("SLUD") Maps
- The Review is described in a book, titled "STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW" (the "Report"), which was published on August 15, 1969, and is authored by Eckbo, Dean, Austin & Williams, which is an Official LUC document and record of its "Actions", which recommendations and LUC findings and boundary amendment changes that were "Adopted" were recorded in the Report and also were to be recorded on the incrementally submitted SLUD Maps, particularly the final SLUD Maps were to reflect what was finally "Approved" by the Commission
- The LUC held an "Action" meeting in the County of Hawaii on July 18, 1969 to consider a State District Boundary Amendment for an area, which included the Property.
- The July 18, 1969, Report's proposed SLUD Line shown on USGS Quadrangle Map H-65, in the coastal area of Papaikou Quadrangle, where the Property is located, generally did not show the 'top of the coastal cliff' to be the SLUD line separating the Conservation and Ag. Districts, rather the line generally followed a former railroad right of way's mauka boundary in the area of the Property
- Page 36, section C, of the Report, describes proposed zoning for coastal areas from Kohala down to Hilo, at that meeting the LUC approved a Boundary Amendment at that meeting which is described on page 36 of the Report; "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 land of the Hamakua Coast, using the ridge top as a boundary line" and "Areas in agricultural use were excluded".

- The SLUD line on the August 15th, 1969, Report's final USGS Quadrangle Map H-65, in the coastal area of Papaikou Quadrangle, generally remained unchanged from the Report's July 18, 1969 recommended SLUD Line location and thus does not reflect what the Commission "Approved" at its meeting in the County of Hawai'i on July 18, 1969, to show the 'top of the coastal cliff' to be the SLUD line separating the Conservation and Ag. Districts, rather the line generally followed a former railroad right of way's mauka boundary in the area of the Property as it also did on the Report's proposed July 18, 1969 USGS Quadrangle Map. The Petitioner's interpretation of §15-15-22 (a) and (a) (1) HAR is that the "land use district map" is not the final interpretive authority in determining a district line in the area of the Property.
  - The Property lays on the Hamakua Coast.
  - The Property lays mauka of the coastal pali ridge top and it was in agricultural production at that time
  - The area of the Property was not rezoned into the State's Conservation District by the LUC at its July 18, 1969 meeting in the County of Hawai'i.
  - The Official Map H-65 for the Papaikou quadrangle, wherein the Property is located, shows the Property to lie entirely within the State's Conservation District.
  - No further boundary amendment for the area of the Property was approved by the LUC during the period between July of 1969 until the adoption of the Official Map H-65.
  - The Official Map H-65 conflicts with what was "approved" by the LUC at the July 18, 1969 meeting in the County of Hawai'i
- In 1992 the Executive Officer of the LUC issued Boundary Interpretation No. 92-48 which interpretation showed the entire area of the Property to lie in the State Conservation District
- The Petitioner(s) believe that Boundary Interpretation No. 92-48 is incorrect resulting that "uncertainty remains" Petitioner(s) believe that the Report records, in print, on its page 36, what is correct and what was "Approved" by the LUC and that the 1969 USGS Papaikou Quadrangle Map H-65, which is referenced in an appendix to the Report, was not subsequently amended to reflect what was "Approved" by the LUC at its meeting in Hawai'i County on July 18, 1969
- The Petitioner(s) believe that the "uncertainty" regarding the correct SLUD zoning of the Property is the result of no fault of the Petitioner(s) but rather an error of the LUC
- The Executive Officer of the LUC relied on the Official Map H-65 for the Papaikou quadrangle for Boundary Interpretation 92-48 and the Executive Officer did not consider the Report which is another "Official Commission Record" as is provided for in §15-15-22 (d), HAR, "The executive officer may use all applicable commission records in determining district boundaries."
- The Commission has jurisdiction under 15-15-22(f) HAR to issue a boundary determination if "uncertainty remains" to correct the LUC's Executive Officer's previous boundary interpretation No. 92-48.
- The Commission has asserted its jurisdiction under a similar question in the past. LUC DR 99-21 is a very similar jurisdictional example.
- In 1999 the LUC considered Petition A99-21 for very similar land in the Papaaloa Quadrangle that lies approximately 5 miles to the north of the Petitioner(s) Property,

which Quadrangle map area is contiguous to the Papaikou Quadrangle map area where the Property is located

- Section 15-15-34(b), HAR provides that "[f]or good cause shown the commission may waive or suspend any rule. No rule relating to jurisdictional matters shall be waived or suspended by the commission."
- The no refund schedule requirement in Section 15-15-45.2 HAR is not jurisdictional. Therefore, the Commission is authorized to refund fees.
- The applicability of the Official Map H-65, Papaikou Quadrangle, as applied in 15-15-22(a) (1) HAR, is not jurisdictional. Therefore, the Commission is authorized to not apply the Official Map H-65, to a boundary interpretation and the LUC is authorized to correct errors on Official Map H-65.
- To be clear the Petitioner(s) were aware of the apparent Conservation District zoning when they purchased the land but they were also aware that a historic cane agribusiness had continued to use the land for agriculture following its apparent Conservation District zoning.

#### 4. SUMMARY OF POSITION OF THE OFFICE OF PLANNING

OP Statement of Position ("OP Position") Regarding Docket No. DR21-72

OP has no objection to the Commission granting Petitioner's request that the LUC issue a declaratory order to clarify LUC boundary interpretation No. 92-48.

OP has provided three examples of previous/similar LUC actions in the area based on the particular facts and circumstances. [OP Position, pg. 4-5; Exhibits 1, 3 and 4]

1. Docket No. A18-806 (Barry Trust) reclassification of coastal property from Conservation to Agricultural District;
2. DR99-21 (Stengle) request to correct boundary interpretation No. 98-50 to comport with 1969 "Top of Pali" guidance; and,
3. LUC Boundary Interpretation No. 07-19 (Muragin) that set the Conservation District to the "Top of Pali" for a property in Ninole, North Hilo. OP indicates the survey shows the railroad right-of-way.

OP's points of argument

- The final boundaries from the 1969 State Land Use District Boundary Review "...were the LUC's judgement as a result of considerable input from studies, site inspections, public hearings, talks with landowners, and the Commissioners' own personal knowledge and experience". [OP Position, pg. 6; Eckbo, Dean, Austin and Williams, 1969 pg. 85]
- The 1969 Review generally states that the pali lands of the Hamakua Coast should be included in the Conservation District using the ridge top as a boundary line and exclude areas in agricultural use. [OP Position, pgs. 6; Eckbo, et.al. pg. 36]
- The 1969 Review puts forward four major conditions used in identifying shoreline Conservation District boundaries. [OP Position, pg. 6-7; Eckbo, et.al. pg. 86]



- The guidelines and conditions from the 1969 Review generally indicated where the boundary should be located but the boundary was not mapped in detail so individual property boundaries are unclear. [OP Position, pg. 7]
- The Petition Area is located along the Hamakua Coast, includes a railroad right-of-way, and may have been in agricultural use at the time. [OP Position, pg. 8]

5. COUNTY OF HAWAII POSITION: The County has no position on the matter.

## 6. STAFF ANALYSIS

Statutory and Administrative Rules that may be pertinent to this request for declaratory ruling. References are followed by staff comments highlighted in blue.

- HRS §205-1 requires six affirmative votes for any boundary amendment.
- The existing land use district boundaries for the properties that are the subject of this request were voted on and approved at a meeting by the Commission on July 18, 1969<sup>7</sup>.
- Petitioner's Exhibit 17 SMA Letter from the County (2018) indicates that the property is located in South Hilo not the Hamakua District. Therefore, the language from the 1969 Report that applies is the description of the proposed/approved boundary amendments for the Hilo coastline rather than Hamakua. The Hawai'i County of Planning's General Plan and community plan maps also show the property to be in the South Hilo District rather than Hamakua District.
- The appropriate section of the Eckbo, et.al. report is found on page 36 as quoted below.
  - "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."
- LUC official map H-65 Papaikou clearly shows the district boundary line at this location following the railroad right-of-way as the demarcation line between the State Conservation and State Agricultural District.
- HRS §205-2(a) the LUC is authorized to place all lands in the state into one of the four state land use districts Conservation, Agricultural, Rural, and Urban; and set standards for determining the boundaries and districts.
- This provides the LUC with the statutory jurisdiction to establish the initial land use districts and to provide the standards and method for changing them.
- HRS §205-3 states that "...land use district boundaries established as of June 2, 1975 shall continue in full force and effect subject to amendment as provided in this chapter or order of court of competent jurisdiction based upon any litigation filed prior to July 1, 1975, or filed within thirty days after service of a certified copy of any final decision and order made as part of the commission's 1974 periodic boundary review, whichever occurs later."

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<sup>7</sup> Eckbo, et.al. pg. 36 and footnote showing approved.