



**FROM THE STAFF MEMORANDUM PREFACE**

*The Petition for declaratory order before the Commission, DR21-72 Church and Hilda! ("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 primary request is that a new boundary interpretation be issued for the Property that shows the Coastal pali "ridge top" to be the SLUD boundary separating the Conservation District makai from the Agricultural District mauka. The Petitioners do not particularly care whether *Official Map H-65 be amended to reflect that.*

**Continuing here with the Staff Memorandum**

*The Petitioners also seek the refund of filing fees of \$5,000.00 for OBA Petition A 18-805 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 waved.*

*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 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.*

**Petitioners Comment**

The applicable sections of HRS **205-2 (a)** are.....

***(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; and***

***(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 Hawaii 1957, shall constitute the boundaries of the conservation districts; provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission.*

The Petitioners point to the mandatory requirement in the LAND USE LAW..... "*the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation.*"

The Property has "*a high capacity for intensive cultivation*". It is classified in the State's LSB and ALISH systems as PRIME agricultural land Class "C".

Nothing in HRS 205-2 (a) (4) Conservation District prescribes such a *mandatory* and strong requirement that Conservation Districting of land is of a higher priority than Agricultural Districting if the land has a *high capacity for agricultural cultivation*.

The words "*greatest*" AND "*possible*" are further emphasized when put together in the phrase "*greatest possible*" in HRS 205-2 (a) (3). This can only mean that Agricultural Districting of land, like the Property, is never to be redistricted without highly compelling and recorded reasoning being applied.

*Greatest possible* can only mean, in regards to the redistricting of the Property, that **IF** a reasonably "*possible*" alternative exists that it should be applied. In the case of the Property a "*possible*" and

reasonably applied alternative did exist just like it did for Coastal lands leading northward up the Hamakua Coast where HRS 205-2 (a) (3) and (a) (4) was also applied. In those cases it was only the unused Coastal pali portion of the land that lay below the Coastal ridge top that was redistricted and not the prime agricultural land that lay mauka of the Coastal ridge top that was in agricultural use in 1969.

The Staff Memorandum totally ignored an analysis of HRS 205-2 (a) (3)'s applicability to the Commissioners consideration of the Petition despite the fact that the Petition cited it as an APPLICABLE LEGAL AUTHORITY and the Petitioners repeatedly referenced it.

**Further in regards to** whether it would have been illegal for the 1969 Commission approve redistricting of the State's Prime Agricultural land we point to the 1969 Commission's own Rule.....

In 1969 the Commission had Rules that provided guidance for the Commissioners when considering District Boundary Amendments. The LUC's Rule had a test to be applied for redistricting of land during the 1969 redistricting process. ....

### **2.30 Test to be Applied**

which stated, in part.....

The Commission shall not approve any amendments to the district boundaries that would be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations.

The LAND USE LAW 205-2 (a) (3) stated, in Regards to its application to redistricting the Hamakua Coastal land area, including the Property that .....

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

**Finally in regards to** whether it would have been illegal for the 1969 Commission approve redistricting of the State's Prime Agricultural land we point to the form and content of the State's LAND USE LAW "ACT 205" which existed in 1969, *ref., Exhibit J.....*

*"Section 98H-4. Amendments to district boundaries. Any department or agency of the State or county, or any property owner or lessee may petition the commission for a change in the boundary of any district, interim or permanent. Within 5 days of receipt the commission shall forward a copy of the petition to the planning commission of the county wherein the land is located. Within 90 days after receipt of the petition the county planning commission shall forward the petition, together with its comments and recommendations, to the commission. The commission may also initiate changes in a district boundary which shall be submitted to the appropriate county planning agency for comments and recommendations in the same manner as any other request for a boundary change.*

*After 100 days but within 210 days of the original receipt of a petition **the commission shall advertise a public hearing** to be held on the appropriate island in accordance with the requirements of*

*section 98H-3. The commission shall **notify such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.** Within a period of not more than 90 days and not less than 45 days after such hearing the commission shall act upon the petition for change. The commission may approve the change with six affirmative votes. **No change shall be approved unless** the petitioner has submitted proof that the area is needed for a use other than that for which the district in which it is situated is classified and **either of the following requirements has been fulfilled: (a) the petitioner has submitted proof that the land is usable and adaptable for the use it is proposed to be classified, or (b) conditions and trends of development have so changed since the adoption of the present classification, that the proposed classification is reasonable.***

The Petitioners searched the land owners files, which are held at the Edmund C. Olson Trust No. 2, Papaikou, Hawaii Office, for the period beginning in 1967 through 1975. The files were extensive and appeared to be a complete record of correspondence with the State Government during that period. No record exists that "*The commission shall **notify such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.***"

The Petitioners also emailed the LUC's administrative office inquiring whether the LUC's records included any such notice. None was provided.

**AND further regarding ACT 205.....**

*"Section 98H-2. Districting and classification of lands. There shall be four major land use districts into which all lands in the State shall be placed: urban, rural, agricultural and conservation. The commission shall group contiguous land areas suitable for inclusion*

*in one of these four major districts. The commission shall set standards for determining the boundaries of each district, provided that (a) in the establishment of boundaries of urban districts those lands that are now in urban use and a sufficient reserve area for foreseeable urban growth shall be included; (b) in the establishment of boundaries for rural districts, areas of land composed primarily of small farms mixed with very low density residential lots, which may be shown by a minimum density of not more than one house per one-half acre and a minimum lot size of not less than one-half acre shall be included; (c) 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 (d) in the establishment of the boundaries of conservation districts, the 'forest and water reserve zones' provided in section 19-70, are hereby re-named 'conservation districts' and, effective as of July 11, 1961, the boundaries of the forest and water reserve zones theretofore established pursuant to section 19-70, shall constitute the boundaries of the conservation districts, provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission. In establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county.*

In this regard both the **master plan AND general plan of the county** both described that the Property was designated for agricultural use.

While the Commission did have the authority to redistrict land in 1969 in order to create a "**green belt**" around Hawaii Island that could have been accomplished by only redistricting the Coastal pali portion of land Conservation. This is what was generally done for the *Hamakua Coast*. No evidence exists that describes why Map H-65 was intended to be treated any different than the other Maps for the Hamakua

Coast. Generally all of the maps showed a District line that was inland of the Coastal Ridge top.

The 1969 Commission's Report and its redistricting Hearing transcripts and minutes **clearly AND repeatedly** describe that *'Hamakua Coastal lands that were in agricultural use were not to be redistricted Conservation mauka of the Coastal ridge top'*. There would have had to have been a compelling reason to do so and it would be reflected in these text records.

When the Petition was Heard there existed two records that reflected the 1969 Commission's redistricting intentions. One record was the District Map H-65 and the other record was the 1969 redistricting Report. The DO cited that a 'preponderance of evidence did not exist' and it was, in part, the stated reasoning for denying the Petition. The DO stated.....

*54. The Petitioners relied on their own interpretations of information that had previously been the basis for Commission decisions. **They did not provide the Commission with any new information.***

(emphasis added)

**AND.....**

*56. The Commission finds that **neither of these interpretations rise to the standard required the preponderance of the evidence for changing the district boundaries on LUC Official Map No. H65 Papaikou to reflect a top of ridge orientation and issuance of a new Boundary Interpretation map for the affected properties.***



**FIRST** the "*preponderance of the evidence*" is a standard that is applied in "Contested Case" Hearings according to HRS 91-10 (5) which the DO denied the Petition Hearing was. HRS 91-10 (3), which provides for cross-examination of "parties" to the Hearing is also applied in "Contested Case" Hearings. The Petitioners requested but were denied to be allowed cross-examination of "parties" to the Hearing.

## **SECOND**

None-the-less regarding "*preponderance of the evidence*" **AND** the referenced DO "54." reference that the Petitioners did not "*provide the Commission with any new information*" the Petitioners have now also *provided* the Commission with the transcripts and minutes of the 1969 Commission's redistricting hearings.

## **Continuing here with the Staff Memorandum**

*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.

### Petitioners Comments

Regarding..... 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

The Staff Memorandum should have also pointed the Commission to..

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 Commission's pertinent historical information should have included the LSB and ALISH land classifications systems **AND** the Commission's historical 1969 Commission's redistricting Hearing transcripts and minutes. **BOTH** the 1969 Report **AND** the transcripts and minutes all described repeatedly that "**lands in agricultural use were excluded**" from redistricting.

The Petition did Evidence that the Property .....

- was in agricultural use in 1969
- was Prime Class A/B in 1969
- qualified under HRS 205-2 (a) (3)'s mandatory Law that it remain in the Agricultural District.

Regarding-(as a reminder the apparent question that the aqua colored text below asks is a copy of the Staff Memorandum text)

2. Whether the properties in question are located within the Hamakua District or Hilo District of the island of Hawai' i;



## CHAPTER 5 / RECOMMENDATIONS FOR LAND USE BOUNDARY CHANGES—HAWAII COUNTY

subject.

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

### I. AGRICULTURE DISTRICTS

Hawaii, more than any other island, exhibits a variety and range of climate and geology. This variety in turn is reflected in a wide range of agricultural activities. The Hamakua Coast, characterized by high rainfall, is a major sugar cane producing area of the island with grazing at the higher elevations. Kohala or the North Point area is another region where sugar is grown. The soils are deep and more characteristic of those of the older islands. On the leeward side of the Kohala Mountains grazing is the dominant use.

The plateau between Mauna Kea and Mauna Loa, and the Waimea area exhibits varying conditions. The area includes the Parker Ranch and is mainly dry and flat, and primarily used for grazing. The lands west of Waimea and generally from Keamuku to Kona are much drier, often comprised of barren lava, but the area does support some marginal grazing. The Kona area itself is dry with stony soils on steeply sloping land. Agricultural uses are restricted to grazing and orchard production.

The Kau District is characterized by barren lava with occasional pockets of soil. The mixing of grazing, orchard and sugar production reflects these different soil conditions. Finally, in the Hilo area and Puna Coast area, characterized by high rainfall, the lands are mostly rocky lava flows. Sugar is grown in pockets, macadamia nuts and papayas near the coast and some areas are used for grazing.

The existing Agriculture District is extensive in the areas described and includes these agricultural uses. No instances were discovered where the existence of agricultural uses or agricultural potential warranted the addition of areas to the Agriculture District. This is not to say that agricultural uses are not expanding on Hawaii, for they are. Particularly the growing of macadamia nuts and the growing of sugar in the Mountain View-Keaau area. Present pro-

grams for expansion all occur within the existing Agriculture District. A number of areas recommended for transfer from the Agriculture District in to the Conservation District are discussed under the Conservation District heading.

### II. CONSERVATION DISTRICTS

#### A. General

Hawaii is the most recently formed of all the islands, and the evidence of volcanic activity dominates the landscape. Above the 7,000 foot elevation on the peaks of Mauna Kea and Mauna Loa, the land is generally dry and barren. Also, the recent lava flows, particularly in the dry areas of the island, are barren and unproductive. Seemingly the highest and best use would be as wilderness areas. These areas have been recognized and are for the most part within the existing Conservation District. Certain areas should be added to the Conservation District owing to their scenic qualities, wilderness or wildlife resources, steep topography and general conservation values.

#### B. River Valleys

The numerous valleys running to the east of the Kohala Mountains are already within the Conservation District. The extremely scenic Pololo Valley and the adjacent Kupahau Ridge are presently pockets of agricultural districting which should be included in the Conservation District. 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 steep-walled scenic valleys. The major valleys, Kaawalii, Laupahoehoe, Maula, 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.

#### 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.

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.\*

From Kapoho to South Point, most of the shoreline is presently within the Conserva-

tion District. The District should be extended to make it contiguous, particularly in the South Point area where there are numerous significant archaeological artifacts combined with a scenic and exciting coastline. North of South Point to Kailua most of the shoreline is in the Conservation District. The District should be expanded to include the rocky and scenic shore between Kauhako Bay and the South Kona Forest Reserve, and at Kealahou to include the steep topography behind the Bay and the scenic coast north of Kulanui Point.

Commission Action: Approved.\*

Adjacent to the existing Conservation District at Lalamilo is the second largest collection of petroglyphs in the State. The district should be expanded to ensure the preservation of these artifacts.

Commission Action: Approved.\*

The shoreline from Kawahae around North Point to Pololo Valley is marked by numerous historic artifacts such as King Kamehameha I's birthplace, and a variety of different conditions such as rocks, steep pali and occasional beaches. The lands should be recognized by inclusion in the Conservation District.

Commission Action: Approved.\*

### III. RURAL DISTRICTS

No expansion of the Rural Districts is recommended for the island.

### IV. URBAN DISTRICTS

#### A. General

The population for the Island of Hawaii at the time the district boundaries were drawn in 1963 was estimated to be approximately 60,700 people.<sup>1</sup> Current population to July 1, 1968 has been estimated by the Department of Planning and Economic Development<sup>2</sup> to be 65,700 people for an increase of 5,000 people or 8 percent for the five year interval. This estimated increase is about 9 percent over an interpolation of estimated population for 1968 as derived from the State of Hawaii General Plan Revision Program.<sup>3</sup> The estimated county total was apportioned by judicial district based on percentages of population distribution provided by the County of Hawaii Department of Economic Development. In estimating the anticipated growth

\* Approved recommendations adopted at the action meeting held in Hawaii County July 18, 1969.

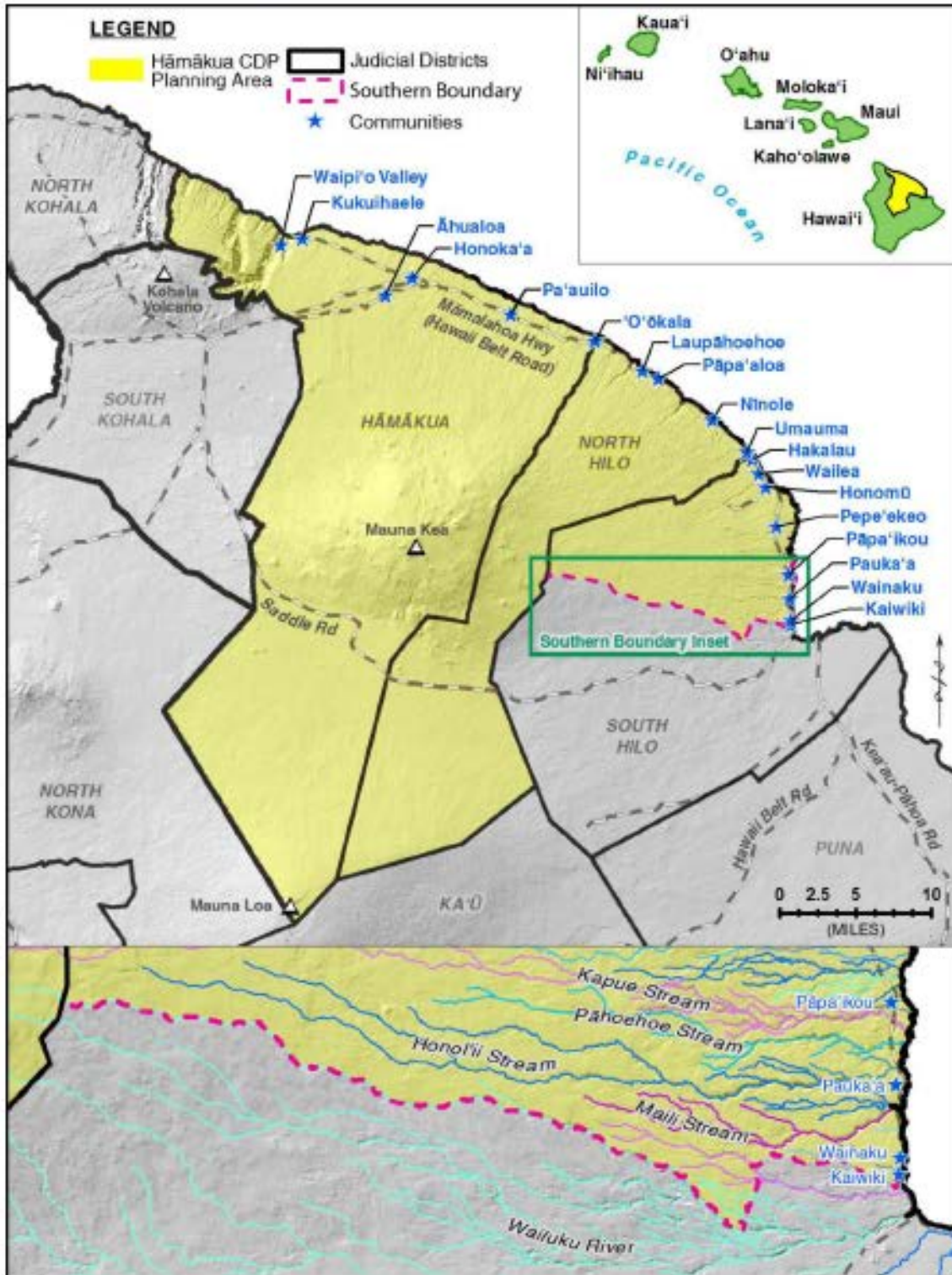
<sup>1</sup>Harland Bartholomew & Associates, Land Use Districts for the State of Hawaii, 1963.

<sup>2</sup>Department of Planning & Economic Development, Provisional Estimates of the Population of Hawaii by County, July 1, 1969.

<sup>3</sup>Department of Planning & Economic Development, General Plan Revision Program, 1967.



Figure 1: Map of Hāmākua Planning Area



## **Petitioners comment**

**Regarding**-(as a reminder the apparent question that the aqua colored text below asks is a copy of the Staff Memorandum text)

**2. *Whether the properties in question are located within the Hamakua District or Hilo District of the island of Hawai'i;***

This portion of the Staff Memorandum begins an apparent and irresponsible Staff representation to the Commission of what the Report's page 36 describes. In one part, the Staff Memorandum points to the 1969 Report as an authority, and then it selectively misrepresents the text record of the 1969 Report. It is totally irrelevant whether the Property is located in the ***Hamakua Judicial District*** or the ***South Hilo Judicial District***. There is no reference in the Report to a "***Hilo District***" or a "***Hamakua District***" as **2.** above describes.

Three paragraphs from the Report's page 36 should have been what the Staff Memorandum considered and pointed the Commissioners to.

The Petition pointed to the Report's page 36 which had several subsections in it i.e.....

*I. AGRICULTURAL DISTRICTS, II. CONSERVATION DISTRICTS, III. RURAL DISTRICTS, and IV. URBAN DISTRICTS.*

The "***Shoreline***" areas for redistricting into the Conservation District are described in the Report's page 36, *II. CONSERVATION DISTRICTS Section "C"*.

The Report's page 36, paragraph **that is just above** *CONSERVATION DISTRICTS Section "C"* **FIRST** clarifies a description of what this section

of the Report meant in reference to the "Hamakua Coast" which is found next in *CONSERVATION DISTRICTS* Section "C".

(note text highlights have been added to the text quotes below)

**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. The above **1. 2. 3.** quotes from the Staff Memorandum have the appearance that the Staff made a deliberate and calculated attempt to mislead the Commissioners in order to..

- support Boundary Interpretation 92-48 (McCully), and

- reduce the potential for increased future staff workload if the Petition is allowed.

The **FIRST paragraph's** references identifiable shoreline locations, not Judicial Districts.

The **SECOND paragraph** generally describes the **Hamakua Coast** to encompass a number of "*steepwalled scenic valleys*" leading from the northerly-most **Hamakua Coast** valley, **Kaawalii**, to the southernmost **Hamakua Coast** valley **Wailuku**. The Property is located between **Hakalau** & **Kolekole** valleys 14.5 miles north of the City of Hilo. Therefore it is very clear that, in this area of the Report, the Report intended that its description of the **Hamakua Coast** ended at the **City of Hilo**, i.e. the **Wailuku** river valley which is the northern boundary of the City of Hilo **AND NOT** the South Hilo Judicial District which ends at **Hakalau**.

**Shoreline areas** were discussed in the Report independent of whatever County Judicial District that they were located in. The Report's page 37 describes the "*South Hilo Judicial District*" in reference to "*Urban District*" boundary amendments, **not "shoreline areas"** **AND** areas that were in agricultural use.

**Shoreline** redistricting recommendations and Commission "**approvals**" are described on the Report's page 36. **The Report's page 37 was not provided as an Exhibit to the Petition** because it was not applicable **NOR** was it discovered during the Petition Hearing.

It is **Patently Obvious** that the Staff Memorandum misrepresented that the Commission interpret the correct location of the District Boundary for the Property in this way.

HAR 15-15-37 (d) states.....

*"(d) Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the commission, by such an act represents that the person is legally authorized to do so and shall comply with the laws of this State and the several counties, and the rules of the commission. Further, the person shall maintain the respect due to the commission, and shall never deceive or knowingly present any false statements of fact or law to the commission."*

### **Continuing here with the Staff Memorandum**

**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.**

### **PETITIONERS' COMMENT**

#### **Regarding the 1969 redistricting**

The Petitioners have Exhibited Hard Evidence to the Motion, *i.e.* Exhibits 43, 44 and 45, that the land owners were assured in 1969 that ***Hamakua Coastal*** lands, that were in agricultural use, would not be redistricted or interpreted subsequently to be redistricted. Therefore it would have not been necessary for the owner of the Property to challenge the 1969 redistricting.



### **Regarding the 1974 redistricting**

The text record of the 1974 State Land Use District Boundary Review **specifically identified, in its text on pages 27 and 28, affected properties by their TMK numbers**, *ref., Motion Exhibit BB.*

The TMK (3) 2-9-003; 013, in which the present Property's land area is included, is not identified in the 1974 State Land Use District Boundary Review as an area that was recommended for redistricting. Therefore it would have not been necessary for the owner of the Property to challenge the 1974 redistricting.

The Staff Memorandum's **Patently Obvious** misrepresentation of the text record of the Report's page 36 was echoed and quoted in the Declaratory Order (the "**DO**") that denied the Petition in the DO's paragraphs 41, 42 & 43 FINDINGS OF FACT. Therefore the DO's FINDINGS OF FACT's 41, 42 & 43 are equally incorrect.

Finally in this same regard the **THIRD paragraph** above referenced "***from Hilo to Kapoho***".

The DO states in its item 25.....

*"The Report, in its Appendix D, provides a reference to each of the 73 quadrangle maps shown on the islandwide map for Hawai'i island."*

*The Report, in its Appendix D has a "Hilo" quadrangle Map H-66 AND H-73 "Kapoho" quadrangle Map which maps also **may** also appear to be what the above cited Report page 36's **THIRD paragraph** appeared to be referencing. The Hilo H-66 map's northern boundary*

ends at the southern end of quadrangle map H-65's southern boundary. The Property is located at the northern boundary of Map H-65. (ref., Motion Exhibit 9, Hawaii Island quadrangle map).

### Continuing here with the Staff Memorandum

#### **I.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.*

#### **Petitioners comment**

It would not have been necessary that a land owner file an objection. The Commission's 1969 redistricting hearing transcripts and minutes **clearly AND repeatedly** describe that the land owners were assured that '**coastal land that was in agricultural use in 1969'** **AND** that district lines on the maps that appeared to show otherwise would be interpreted to **not include lands that were in agricultural use**.....

Regarding **There was no registered opposition by the landowner at that time.** The Staff Memorandum and DO are incorrect in this regard.....

(note: emphasis has been added to the following text quotes from the 1969 redistricting hearings).....

**REF., 1**

**Motion Exhibit 45, page 23, 1969 Commission hearing minutes**.....concerned land owner.....

*Mr. Harold A. Robinson - Theo H. Davies & Co., Ltd.  
Primarily concerned with the proposed 200-300 foot setback along the **Hamakua Coast**. Most of subject area is plantation-owned land. Although a portion of the land is not presently being utilized for agricultural pursuits, agriculture would be the highest and best use for this area as opposed to the proposed conservation districting.....  
Therefore, Mr. Robinson requested that **this area** remain in the Agricultural District.*

Mr. Robinson referred to the Hamakua Coast and *requested that **this area** remain in the Agricultural District.*

**REF., 2**

**Motion Exhibit 45, page 9, 1969 Commission hearing minutes**.....concerned land owner.....

*"Mr. Richard H. Frasier - Honokaa Sugar Company  
Mr. Frasier queried Mr. Williams as to his definition of the 300-foot setback for shoreline areas. In acknowledgment, Mr. Williams answered that the 300-foot set back is used only in areas*

*where there are no physical features, i.e., the top of a pali or ridge...." AND agricultural land was excluded*

The Honokaa Sugar Company was located on the ***Hamakua Coast***. Consultant Williams assured Mr. Frasier that the *300-foot setback* would only apply for *shoreline areas ..... where there are no physical features, i.e., the top of a pali or ridge AND* no agricultural use existed.

**REF., 3**

***Motion Exhibit 44, page 4, 1969 Commission hearing***

***transcript***.....Consultant Dagenhardt clarifies the Commission's intention to strengthen the LAND USE LAW....

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

Very clearly the intention was to strengthen the **protection of prime agricultural land** and not to make redistricting of **prime agricultural land** if other districting options were reasonably available.

This was further reflected in DR99-21 (Stengle) and Boundary Interpretation 07-19 (Muragin).

**REF., 4**

**Motion Exhibit 44, page 11, 1969 Commission hearing**

**transcript**.....Consultant Dagenhardt clarifies the Commission's intention regarding how boundary interpretations would not rely heavily on the district line on maps.....

*"it is not our thinking that this has to be a rigid or firm line. It is flexible in the same manner as all boundaries are upon application."*

**REF., 5**

**Motion Exhibit 44, page 42, 1969 Commission hearing**

**transcript**.....Consultant Dagenhardt clarifies the Commission's intention to concerned Hamakua land owner Ken...

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

Consultant Williams responds.....

*"I think what we're saying is that land, shoreline land which is not in agricultural use is easier to destroy. It is better not in agricultural use is easier to destroy. It is better to be classified as conservation"*

A lot of these lands have become dumping grounds for old fridges, derelict cars and overgrown with invasive weedy plant growth and incubators for invasive plants and animals. This was not foreseen but it clearly has happened.

**REF., 6**

**Motion Exhibit 43, page , 1969 Commission hearing transcript.....**

the Commission's Executive Officer introduces the final agenda item for the Commissioners to vote on at the final Commission hearing on Hawaii Island on July 18, 1969. It is important to apply that the Commissioners had been sitting through 2 community redistricting hearings 2 months earlier. The Commissioners were very aware that land owners had been assured at the redistricting community hearings that the 300 ft. inland boundary would not be interpreted to apply, particularly to Hamakua Coastal land, that was in agricultural use. Therefore when Executive Officer Duran introduced 72 quadrangle maps for the Commissioners to adopt the Commissioners reasonably would take his assurance.....

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

**Turning back here** and repeating an earlier quote.....

**REF., 4**

**Motion Exhibit 44, page11, 1969 Commission hearing transcript.....**

Consultant Dagenhardt clarifies the Commission's intention regarding how boundary interpretations would not rely heavily on the district line on maps.....

*"it is not our thinking that this has to be a rigid or firm line. It is flexible in the same manner as all boundaries are upon **application.**"*

The Petitioners submitted a written **application** in Feb. of 2020. It was ignored, ref., 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."*

When the Petitioners inquired by telephone regarding that **written application** we were told that the only LUC format was to submit a Petition for a Declaratory Order according to HAR 15-15 Subchapter 14 and pay a filing fee of \$1,000.00 **AND** the **written application** would not be administered.

The district boundary **reference** line on other **Hamakua Coastal** quadrangle maps had been interpreted to be the Coastal pali ridge top even though the district line on the maps did not follow the obvious Coastal pali ridge top. Generally many of the maps followed the 200 ft. contour line which was inland of the Coastal ridge top which ridge top was obvious as a bold contour line.

**NOW COMES THE PETITIONERS** with a **preponderance** of **new evidence**.....

- the above **6 quoted text** copies from the 1969 Commission's redistricting hearing transcripts and minutes (**6 pieces of new evidence**), **AND** more new evidence.....
- the Report's page 36 text copy of the **FIRST paragraph**, **AND**



- the Report's page 36 text copy of the **THIRD paragraph** which are now added to the previously submitted
- **SECOND paragraph.....** (See 3 paragraph copies on the next page)

A total of **8 pieces of new preponderance of evidence are the LUC's own DOCUMENTS.**

- The accuracy of these **LUC DOCUMENTS** are without question of authenticity.
- The text excerpts are copied from the Commission's own records.
- No further **preponderance of evidence** needs to be applied.
- No **burden of persuasion** needs to be applied.
- No **interpretation of meaning** is required because the text record of the documents is authentic, authoritative **AND** the documents speaks for themselves.

**The Evidence is that.....**

- the **LUC's own DOCUMENTS** Evidence that the 1969 Commission did not intend to redistrict **Hamakua Coastal** land, that was in agricultural production into the Conservation District,
- the 1969 Commission intended that the **Coastal pali ridge top** be the SLUD boundary,
- the Property is located in an area which the **LUC's own DOCUMENTS** describe to be the **Hamakua Coast**,
- the Property was in agricultural use in 1969,

- there exists a distinct **Coastal pali ridge top** on the makai boundary of the Property,
- a former railroad, by 1969 a field road, bisected the 13 acre TMK Lot (3) 2-9-003; 013 agricultural use field leaving the Property's 3.4 acre field area makai of the former railroad, and
- the Property's area was "***dedicated agricultural land***".

These paragraphs are shown in consecutive order from the 1969 Report's page 36

### **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** to be the "**Hamakua Coast**".

### **Continuing here with the Staff Memorandum**

*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.*

### **Petitioners comment**

The *1974 Five Year District Boundary Review* identified on its pages 27 and 28 the description of the TMK numbers of properties that were recommended to be redistricted in 1974. It is no wonder that *landowners* did not *challenge the classification of lands that were part of the 1974 periodic boundary review* if they **FIRST** had been assured in 1969 that the reclassification would not affect their land **AND AGAIN** their lands were not described to be up for redistricting in 1974, *ref., Brief Exhibit BB.*

### **Continuing here with the Staff Memorandum**

*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.*

### **Petitioners comment**

It is obvious that the 1969 Commission's staff did not carefully consider *the "State of Hawaii Land Use Districts and Regulations Review" prepared by Eckbo, Dean, Austin and Williams* or they would have applied the **FIRST paragraph AND SECOND paragraph** of the Report's page 36 that were referenced earlier herein.

Frankly had the 1992 LUC Staff spent just a few more hours doing research, including the 1969 redistricting hearing transcripts, the McCully Boundary Interpretations 92-48 should have reflected the Coastal pali ridge top to be the SLUD boundary. **Instead of investing a few more hours up front, the Commission's Staff have wasted hundreds of hours of time since defending an incorrect Boundary Interpretation.** Not just Staff time was wasted but also the Commissioners' volunteer time.

### **Continuing here with the Staff Memorandum**

*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 question2 • 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.*

### **Petitioners comment**

On Feb. 9, 2021 the Petitioners filed a ***motion*** that the "***Commission***" issue a **boundary determination** for the Property according to HAR 15-15-22 (f). That ***motion*** was posted on the LUC's web site's page. That ***motion*** was never administered by the LUC Staff or the Commissioners in a formal way. The Staff Memorandum is factually incorrect stating that ***The Petitioner filed a motion to reconsider that was also denied.*** The Petitioners are not aware ***that was also denied.***

Instead Commission Staff variously described in telephone discussions that the Petitioners Property survey map's mauka boundary did not match the McCully 1992 Boundary Interpretation 92-48 SLUD line which was shown on McCully's property survey. This was irrelevant to the ***motion***.

The ***motion*** did not ask that the Commission determine the Petitioner's mauka boundary to be a new district boundary. The ***motion*** asked that

the Coastal pali ridge top be considered and determined to be the district boundary. The **motion** took note of the previous McCully Boundary Interpretation 92-48 which showed the SLUD boundary to be the **mauka boundary of a former railroad which bisected McCully's 13.064 acre field** (*ref., Motion Exhibit 29*).

The effective stand off resulted that this matter was never determined. The Petitioners raised the matter during a Commission hearing in June of 2021. The Commission's Executive Officer advised Commissioners that his Staff was dealing with the unresolved matter with the Petitioners. The Commission's Executive Officer statement to the Commissioners was incorrect.

The Motion's Appendix 4 evidences the back and forth **prejudicial** emails from the Commission's Executive Officer in this regard.

### **Continuing here with the Staff Memorandum**

***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.***

### **Petitioners comment**

Church never made any such **acknowledging** statement.

### **Continuing here with the Staff Memorandum**

***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.*

*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.*

### **Petitioners comment**

The *August 2020* letter did not describe that *accurate acreage figures reflecting the consolidation and resubdivision of previous parcels in relation to State Land Use District boundaries* were required.

### **Continuing here with the Staff Memorandum**

*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.*

Church only asked that a new boundary interpretation be issued that showed the SLUD boundary to be the makai boundary of the Property which makai boundary was described in metes and bounds in the submitted documents. It has always been irrelevant whether the



Property's mauka boundary matched the McCully 1992 survey map and **the Petitioners have plainly and repeatedly stated this to the LUC staff.**

**Continuing here with the Staff Memorandum**

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

**Petitioners comment**

On June 25, 2020 the LUC conducted a hearing that resulted that the Commissioners made 2 FONSI(s), the Church-Hildal FONSI **AND** the Barry Trust FONSI. The following week the Commission's Executive Officer notified the State's OEQC that the Commissioners had made a FONSI for the Barry Trust EA.

After several more weeks the Petitioners informed the LUC's staff that the Commission's FONSI for their EA had not been sent to the OEQC. There was no response from the LUC nor was the FONSI sent to the OEQC. After a few more weeks had passed the Petitioners again informed the LUC's staff that the Commission's FONSI for their EA had not been sent to the OEQC. In that letter the Petitioners reminded the LUC staff that it was a legal requirement that the OEQC be notified within 30 days of a FONSI being made by the Commission. Again no response and the FONSI was not sent to the OEQC. Finally the Petitioners complained to Ms. Evans, the Administrator of the State Office of Planning. Shortly thereafter, on November 10, 2020, the Commission's Executive Officer notified the OEQC of the

Commission's June 25, 2020 FONSI which was over 4 months later and over 3 months late according to the Law.

### **Continuing here with the Staff Memorandum**

*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§ 15-1 5-98(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.*

*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 I: 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 § 15-15-1 00(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.

**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. 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 § 15-15-1 00(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 §§ 15-15-1 00(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 A 18-805 and \$1,000.00 for this Petition for a Declaratory Order and that Court Reporter fees, for this proceeding, be waived.*

#### **Petitioners comment**

The Petition offered 2 options.

1.) issue a new boundary interpretation for the Property showing the Coastal pali ridge top to be the SLUD boundary.

2) do 1.) 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.*

The Petitioner continues to *requests the refund of filing fees of \$5,000.00 for Petition A 18-805 and \$1,000.00 for this Petition for a Declaratory Order and that Court Reporter fees, for this proceeding, be waived.*

Note: beginning on page 8 of the Staff Memorandum, *ref., Brief Exhibit AA*, it is obvious that the page formatting strangely appeared to be overlaid on previous text. Therefore the Petitioners are not able to verify whether the copy of the Staff Memorandum

that was given to them is a **true and original copy** of the original Staff Memorandum. **That is for the Commissioners to determine.**

None-the-less the Petitioners will continue to add their notes to the remaining pages of the copy of the Staff Memorandum which was given to them.

### **Continuing here with the Staff Memorandum**

*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§ 15-1 5-22(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 8, 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) (I) 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.
  - o The Property lays on the Hamakua Coast.
  - o The Property lays mauka of the coastal pali ridge top and it was in agricultural production at that time
  - o 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.
  - o 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.
  - o 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.
  - o The Official Map H-65 conflicts with what was "approved" by the LUC at the July 8, 1969 meeting in the County of Hawaii

- 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 A99-2 I 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 I 5-15-45.2 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) (I) 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. A 18-806 (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 LU C's judgment 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]*

### **Petitioners comment**

To be clear the Report's **1969 pg. 85]** is found in **Chapter 8** of the Report. The Report's page 3 first describes that **Chapters 4-7 provide both the 1969 Report's recommendations to the Commissioners but also Chapters 4-7 records the Commission's redistricting "actions"**. Therefore the above referenced **page 85 from Chapter 8 is background information** and **it is not a record of the Commission's redistricting "actions"** which, in the case of the Report's **Chapter 5's page 36**, is relevant to the Property. Page 36 is **the final record** of what was **"approved"**, **"partially approved"** and **"not approved"**.

### **FIRST FROM THE REPORT'S PAGE 3**

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

*Chapters 8 through 11 deal with....."*

## **NEXT FROM THE REPORT'S PAGE 36**

Note: this is copied from earlier herein.....

The Petition pointed to the Report's page 36 which had several subsections in it i.e.....

*I. AGRICULTURAL DISTRICTS, II. CONSERVATION DISTRICTS,  
III. RURAL DISTRICTS, and IV. URBAN DISTRICTS.*

The "**Shoreline**" areas for redistricting into the Conservation District are described in the Report's page 36, *II. CONSERVATION DISTRICTS Section "C"*.

The Report's page 36, paragraph **that is just above** *CONSERVATION DISTRICTS Section "C"* **FIRST** clarifies a description of what this section of the Report meant in reference to the "Hamakua Coast" which is found next in *CONSERVATION DISTRICTS Section "C"*.

(note text highlights have been added to the text quotes below)

### **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. The above **1. 2. 3.** quotes from the Staff Memorandum have the appearance that the Staff made a deliberate and calculated attempt to mislead the Commissioners in order to..

- support Boundary Interpretation 92-48 (McCully), and
- reduce the potential for increased future staff workload if the Petition is allowed.

The **FIRST paragraph's** references identifiable shoreline locations, not Judicial Districts.

The **SECOND paragraph** generally describes the Hamakua Coast to encompass a number of "*steepwalled scenic valleys*" leading from the northerley-most Hamakua Coast valley, Kaawalii, to the southernmost Hamakua Coast valley Wailuku. The Property is located between Hakalau & Kolekole valleys 14.5 miles north of the City of Hilo. Therefore it is very clear that, in this area of the Report, the Report intended that its description



of the *Hamakua Coast* ended at the **City of Hilo**, i.e. the *Wailuku* river valley which is the northern boundary of the City of Hilo **AND NOT** the South Hilo Judicial District which ends at *Hakalau*.

**Shoreline areas** were discussed in the Report independent of whatever County Judicial District that they were located in. The Report's page 37 describes the "*South Hilo Judicial District*" in reference to "*Urban District*" boundary amendments, **not "shoreline areas"** **AND** areas that were in agricultural use.

***Shoreline*** redistricting recommendations and Commission "***approvals***" are described on the Report's page 36. **The Report's page 37 was not provided as an Exhibit to the Petition** because it was not applicable **NOR** was it discovered during the Petition Hearing.

It is **Patently Obvious** that the Staff Memorandum misrepresented that the Commission interpret the correct location of the District Boundary for the Property in this way.

HAR 15-15-37 (d) states.....

*"(d) Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the commission, by such an act represents that the person is legally authorized to do so and shall comply with the laws of this State and the several counties, and the rules of the commission. Further, the person shall maintain the respect due to the commission, and shall never deceive or knowingly present any false statements of fact or law to the commission."*

### Continuing here with the Staff Memorandum

- *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]*

### Petitioners comment

To be clear the Report's **1969 pg. 86** is found in **Chapter 8** of the Report. The Report's page 3 first describes that **Chapters 4-7** provide both the 1969 Report's **recommendations to the Commissioners** but also **Chapters 4-7 records the Commission's redistricting "actions"**. Therefore the above referenced **page 85 from Chapter 8 is background information** and **it is not a record of the Commission's redistricting "actions"** which, in the case of the Report's **Chapter 5's page 36**, is relevant to the Property. Page 36 is **the final record** of what was **"approved"**, **"partially approved"** and **"not approved"**.

### FIRST FROM THE REPORT'S PAGE 3

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

*Chapters 8 through 11 deal with....."*

### Continuing here with the Staff Memorandum

- *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]*

### Petitioners comment

The Petition stated that the Property was in agricultural use in 1969 (both before and after for decades). That assertion was backed up by Petition *Exhibit 9, a field map, Exhibit 10, a letter from the field manager, Exhibit 13 a historical picture/map*. During the Petition Hearing no question was raised by any Commissioner regarding the accuracy of the above referenced Exhibits.

### Continuing here with the Staff Memorandum

**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.*

### **Petitioners comment**

Six affirmative votes are for a **boundary amendment** not a boundary interpretation.

- **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.**

It is not entirely accurate to state **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** . The Motion's Exhibit 43 is a record of what was voted on.....

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

The District lines on the maps were to be treated as reference lines and not "boundaries" from which a boundary interpretation was to be subsequently made by the Commission. In the cases of both DR 99-21 (Stengle) and DR 96-19 (Castle Foundation) the Commission also applied the text reference of the original Commission's redistricting intention. In both cases the boundary interpretations were amended to reflect the original text.

There would not be a provision in HAR 15-15-22 (f) for such interpretations if it was intended that the District reference lines on maps were intended to be final....

*"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."*

**AND** HAR 15-15-22 (d).....

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

We also have **Motion Exhibit 44, page 11, 1969 Commission hearing transcript**.....Consultant Dagenhardt clarifies the Commission's intention regarding how boundary interpretations would not rely heavily on the district line on maps.....

*"it is not our thinking that this has to be a rigid or firm line. It is flexible in the same manner as all boundaries are **upon application**."*

**AND** we have the 1969 Commission's Executive Officer Mr. Duran assuring the Commissioners that the maps that the Commissioners were just about to vote to approved were not to be interpreted to include lands that were in agricultural use in 1969...

**Motion Exhibit 43, page , 1969 Commission hearing transcript**.....

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

**AND finally** we have the text record of the Report's page 36 which states.....

***"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."*

**Continuing here with the Staff Memorandum**

- *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.'*

**Petitioners comment**

This portion of the Staff Memorandum begins an apparent and irresponsible Staff representation to the Commission of what the Report's page 36 describes. In one part the Staff Memorandum points to the 1969 Report as an authority and then it selectively misrepresents the text record of the 1969 Report. It is totally irrelevant whether the Property is located in the ***Hamakua Judicial District*** or the ***South Hilo Judicial District***. There is no reference in the Report to a "***Hilo District***" or a "***Hamakua District***" as 2. above describes.



Three paragraphs from the Report's page 36 should have been what the Staff Memorandum considered and pointed the Commissioners to.

The Petition pointed to the Report's page 36 which had several subsections in it i.e.....

*I. AGRICULTURAL DISTRICTS, II. CONSERVATION DISTRICTS, III. RURAL DISTRICTS, and IV. URBAN DISTRICTS.*

The "**Shoreline**" areas for redistricting into the Conservation District are described in the Report's page 36, *II. CONSERVATION DISTRICTS Section "C"*.

The Report's page 36, paragraph **that is just above** *CONSERVATION DISTRICTS Section "C"* **FIRST** clarifies a description of what this section of the Report meant in reference to the "Hamakua Coast" which is found next in *CONSERVATION DISTRICTS Section "C"*.

(note text highlights have been added to the text quotes below)

**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. The above **1. 2. 3.** quotes from the Staff Memorandum have the appearance that the Staff made a deliberate and calculated attempt to mislead the Commissioners in order to..

- support Boundary Interpretation 92-48 (McCully), and
- reduce the potential for increased future staff workload if the Petition is allowed.

The **FIRST paragraph's** references identifiable shoreline locations, not Judicial Districts.

The **SECOND paragraph** generally describes the **Hamakua Coast** to encompass a number of "***steepwalled scenic valleys***" leading from the northerley-most **Hamakua Coast** valley, **Kaawalii**, to the southernmost **Hamakua Coast** valley **Wailuku**. The Property is located between **Hakalau** & **Kolekole** valleys 14.5 miles north of the City of Hilo. Therefore it is very clear that, in this area of the Report, the Report intended that its description of the **Hamakua Coast** ended at the **City of Hilo**, i.e. the **Wailuku** river valley which is the northern boundary of the City of Hilo **AND NOT** the South Hilo Judicial District which ends at **Hakalau**.

**Shoreline areas** were discussed in the Report independent of whatever County Judicial District that they were located in. The Report's page 37 describes the "*South Hilo Judicial District*" in reference to "*Urban District*" boundary amendments, **not "shoreline areas"** AND areas that were in agricultural use.

***Shoreline*** redistricting recommendations and Commission "***approvals***" are described on the Report's page 36. **The Report's page 37 was not provided as an Exhibit to the Petition** because it was not applicable **NOR** was it discovered during the Petition Hearing.

It is **Patently Obvious** that the Staff Memorandum misrepresented that the Commission interpret the correct location of the District Boundary for the Property in this way.

HAR 15-15-37 (d) states.....

*"(d) Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the commission, by such an act represents that the person is legally authorized to do so and shall comply with the laws of this State and the several counties, and the rules of the commission. Further, the person shall maintain the respect due to the commission, and shall never deceive or knowingly present any false statements of fact or law to the commission."*

**Continuing here with the Staff Memorandum**

- ***LUC official map H-65 Papaikou clearly shows the district boundary line at this location following the rail road 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.

### **Petitioners comment**

We have **Motion Exhibit 44, page 11, 1969 Commission hearing transcript**.....Consultant Dagenhardt clarifies the Commission's intention regarding how boundary interpretations would not rely heavily on the district line on maps.....

*"it is not our thinking that this has to be a rigid or firm line. It is flexible in the same manner as all boundaries are **upon application**."*

### **Continuing here with the Staff Memorandum**

- ***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."***
- ***This section was added to allow a process for landowners affected by any changes due to the 1974 State Land Use District Boundary Review to object or challenge such changes. Absent a challenge the boundaries as of June 2, 1975 continued in full force and effect.***
- ***The Commission has no documents showing any objection or litigation filed by the landowner in 1969 when the properties that are the subject of this declaratory ruling were placed into the State Conservation District. There also is no evidence in the record showing any objection or litigation filed by the landowner in 1975 contesting the inclusion of the subject properties within the State Conservation District.***

**Petitioners comment**

The *1974 Five Year District Boundary Review* identified on its pages 27 and 28 the description of the TMK numbers of properties that were recommended to be redistricted in 1974. It is no wonder that *landowners* did not *challenge the classification of lands that were part of the 1974 periodic boundary review* if they **FIRST** had been assured in 1969 that the reclassification would not affect their land **AND AGAIN** their lands were not described to be up for redistricting in 1974, *ref., Brief Exhibit BB.*

**Continuing here with the Staff Memorandum**

- *HRS §205-3.1 (a) "District boundary amendments involving lands in the conservation district. .. shall be processed by the land use commission pursuant to section 205-4."*

**Petitioners comment**

The Petition is not for a *District boundary amendment.*

**Continuing here with the Staff Memorandum**

- *Records show that the owner of the properties in 2005 (McCully) filed a district boundary amendment request with the LUC recognizing the properties involved were in the State Conservation District and the LUC had jurisdiction for making changes to such boundaries.*
- *Records show that the owner of the properties in 2018 filed a district boundary amendment request with the LUC recognizing the properties involved were in the State Conservation District and the LUC had jurisdiction for making changes to such boundaries.*

**Petitioners comment - PERPETUATION OF A ZONING ERROR**

The above quotes from the Staff Memorandum appear to suggest that the Property's owners during the period from 1969 through to present

somehow have accepted that the Property was properly Conservation Districted.

During the Petition Hearing the Commission discussed whether the Petitioners had relied on State zoning when they purchased the property. Reliance is principally relevant to the question of whether a landowner has a vested right to take an action or continue a use that would not be allowed after a change in the law. **See** generally *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 86 Hawai'i 343, 353–54, 949 P.2d 183, 193–94 (App. 1997) (explaining a landowner may rely on zoning ordinance in effect at the time a structure is built because “**preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate**”), *Denning v. Maui County*, 52 Haw. 653, 485 P.2d 1048 (1971) (providing a government entity may be estopped from changing its position if a landowner materially changes their position in reasonable reliance on official assurances from the County in the form of zoning approvals),

The vested rights analysis comes into play when the government unilaterally takes action against a landowner. **Reliance is not a relevant inquiry where the landowner affirmatively asks the government to take action to correct an error. Looking at this point from another angle, an error cannot be perpetuated simply because the error has been around for a long time**, *ref., Petition Hearing transcript - Commissioners are confused.*



Section 15-15-100 provides the grounds on which the Commission may deny a petition for declaratory order. The Commission is bound by its rules. **See** *Nakamine v. Bd. of Trustees of Employees' Ret. Sys.*, 65 Haw. 251, 251, 649 P.2d 1162, 1162 (1982) (explaining a reviewing court may modify the decision and order of the agency to fashion appropriate relief where an agency, by failure to follow its own rules, prejudices the substantial rights of a party before it)

**Continuing here with the Staff Memorandum**

- *HRS §205-4(a) provides that" ... any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district. This section applies to all petitions for changes in district boundaries of lands within the conservation districts ... "*

**Petitioners comment**

Again the Petitioners did not petition for the Property to be reclassified. The Petition requested a boundary interpretation according to HAR 15-15-22 (f)

**Continuing here with the Staff Memorandum**

- *This is the statutory process provided for a landowner to reclassify lands. including lands within the State Conservation District. Both the current and former owner of the subject properties have recognized and availed themselves of this process.*

**Petitioners comment**

Again just because the Staff Memorandum states the above over and over again does not mean that it is true. The earlier section

**PERPETUATION OF A ZONING ERROR** establishes, in Law, the above quote from the Staff Memorandum to be irrelevant.

### **Continuing here with the Staff Memorandum**

- *HRS §205-4.1 authorizes the LUC to establish and assess reasonable fees for the filing of boundary amendment petitions ... to recover the costs of processing them and require reimbursement be made for court reporter and any other hearing expenses as determined by the LUC.*
- *The jurisdiction nor establishing and setting fees for filing and processing petitions, including hearing and court reporter expenses is clear. This is a jurisdictional issue. The petitioner seeks a waiver of such fees with the argument that such fees are not jurisdictional. The Petitioner has also not given any reason that waiver of the fees is appropriate and warranted. There is no good cause shown to waive fees.*

### **Petitioners comment**

This is an untrue statement. The Petition clearly described reasoning 'the error was the Commission's and not the Petitioners. Therefore it is reasonable that fees be refunded.

### **Continuing here with the Staff Memorandum**

- *HAR section 15-15-22 provides for the method of determining the location of district boundaries and how to address uncertainty where it exists. HAR section 15-15-22( e)(2) provides that "Whenever a district line is shown as being located within a specific distance from a street line or other fixed physical feature, or from an ownership line, this distance shall be controlling; ... "*
- *The boundary interpretation done by LUC staff in 1992 at the request of the landowner (No. 92-48 McCully) was done using official LUC quadrangle map H-65 Papaikou. the information contained in the 1969 and 1974 State Land Use District Boundary Reviews. and all information provided by the landowner; including the metes and bounds survey of property and district boundaries.*

### **Petitioners comment**

Very clearly the LUC staff in 1992 did not correctly apply

- the Report's page 36, nor did it
- consider and apply the Commission's 1969 redistricting hearing transcripts and minutes which, along with map H-65 are all Official Commission Records.

Nor did the **current LUC staff** properly research and apply the above records to this Staff Memorandum. Instead, it appears to the Petitioners that, staff twisted and contrived an interpretation of the meaning of the text record of the Report's page 36 in an apparent attempt to deny the Petitioners a correct boundary interpretation. Their motive is described, in part subsequently herein *i.e. "to reduce staff workload."* The Petitioners have provided Evidence in **Appendix 4** to the Motion that supports the Petitioners' belief that LUC staff are prejudiced against the Petitioners, particularly because they chose to represent themselves before the Commission instead of suffering an enormous cost burden of hiring a lawyer in order to correct an error of the Commission.

### **Continuing here with the Staff Memorandum**

- *The district boundary line in this instance was set along the mauka boundary of an existing railroad right-of-way ("ROW' ). This ROW boundary was surveyed as part of the currently recognized boundary interpretation (NO, 92-48 McCul ly) using metes and bounds by the previous landowner. This accurate method was accepted by both the landowner (McCully) and the LUC.*
- *This officially recognized boundary interpretation was provided to the current owner and petitioner (Church) upon request. Church had a survey done to support a consolidation and resubdivision*

*process under the County of Hawai'i. Those metes and bounds for the location of the former railroad right-of-way do not correspond with the surveyed boundary by McCully as recognized by the LUC (No. 92-48). Church has not provided any explanation for the discrepancy in the metes and bounds description for the mauka property line. As previously noted, subdivision maps are not determinative of district boundaries. This is the crux of the issue.*

### **Petitioners comment**

This is not *the crux of the issue*. It is irrelevant to the Petition where the District boundary line is shown on the McCully 1992 Boundary Interpretation 92-48. It is clear that McCully 1992 Boundary Interpretation 92-48 shows the interpreted boundary to lie considerably inland of the Coastal pali ridge top. The Petition requested that a new boundary interpretation be issued that showed the district boundary on the makai Coastal ridge top boundary of the Property **NOT** the mauka boundary of the Property. The effect of the LUC's staff to not deal with the Feb. 9, 2021 Motion for a boundary interpretation appears to the Petitioners to be a delaying tactic to put off work until a later date hoping the Petitioners may give up in frustration.

### **Continuing here with the Staff Memorandum**

#### **Additional Staff Comments**

*The Commission can resolve this issue in several ways:*

*1. Accept Church's argument and change the map boundaries showing the location of the State Conservation District and State Agricultural District on official map H-65 Papaikou.*

- *The basis for this would be that, although Church's property is within the South Hilo District, the Commission believes that the 1969 Commission intended the property to be treated in a similar fashion to the Hamakua Coast when setting the coastal boundary for the State Conservation District.*
- *This would place all of Church's properties within the State Agricultural District and eliminate the need for a district boundary amendment.*
- *However, the Commission should be aware that this is dangerous precedent and may open the door to reversal of many prior decisions by the Commission. Also, in taking this path to resolving the request it would potentially be changing the district boundary affecting other properties not part of the Church request and their property rights.*
- *This would also potentially set a precedent by which other landowners would request similar changes to the official maps in order to effect a district boundary amendment rather than through the process established under HRS §205-4.*

### **Petitioners comment**

The Petitioners state that the State's agencies are not bound by ***precedence***, *ref., the State Auditor General's report to the Governor No. 91-1, page 22*. It is true that the Commission should give substantial consideration to precedent. The Petition requested that the Commission consider and apply the ***factual situation*** that existed in 1969. It is totally inappropriate that the Staff Memorandum pointed the Commission to the staff's unrelated concern of ***an increased work load*** as a decision making criteria and omitted an analysis of HRS 205-(a) (3)'s or the State's Constitution 11-3 Agricultural lands applicability.

## Continuing here with the Staff Memorandum

### 2. Deny Church's request

- *The basis for denying Church's arguments: that the official LUC map H-65 Papaikou accurately reflects the Commission's intent in the 1969 Boundary Review for properties located along the Hilo to Kapoho coastline; that the LUC's boundary interpretation No. 92-48 accurately reflects that boundary; and, the LUC does not see any reason or good cause to waive fees for the petition and recovery of appropriate hearing costs.*

### Petitioners comment

The Property is not located in an area between the City of **Hilo to Kapoho coastline**. The text record of the Report's page 36 and the text record of the 1969 Commission's redistricting hearing minutes and transcripts all describe that it was not the Commission's intention to redistrict the prime agricultural lands along the Hamakua Coast, particularly ones that were in agricultural use. Frankly it would have been against the 1969 Commission's own rules and the STATE'S LAND USE LAW, HRS 205-2 (a) (3).

## Continuing here with the Staff Memorandum

- *The Commission should point out to Mr. Church that he has a boundary amendment petition that is ready to go except for resolving the boundary interpretation issue. The easy way forward would be for Church to accept the LUC's official boundary interpretation (No. 92-48) which places all his property in the State Conservation District. This makes acceptance of his petition for processing (hearing) straightforward in that all his property acreages are being requested to be reclassified. Church's current subdivision property boundaries do not coincide with the State Land Use District boundaries due to metes and bounds surveying differences. This potentially creates slivers of property that could be*

*considered to be in the State Agricultural District and would have to be accounted for in his petition.*

- *Staff sees no outstanding issues, other than this boundary dispute, that would stand in the way of the Commission approving the Church petition for boundary amendment if it gets a hearing.*

## **IN CONCLUSION**

### **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 that 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 errors 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**

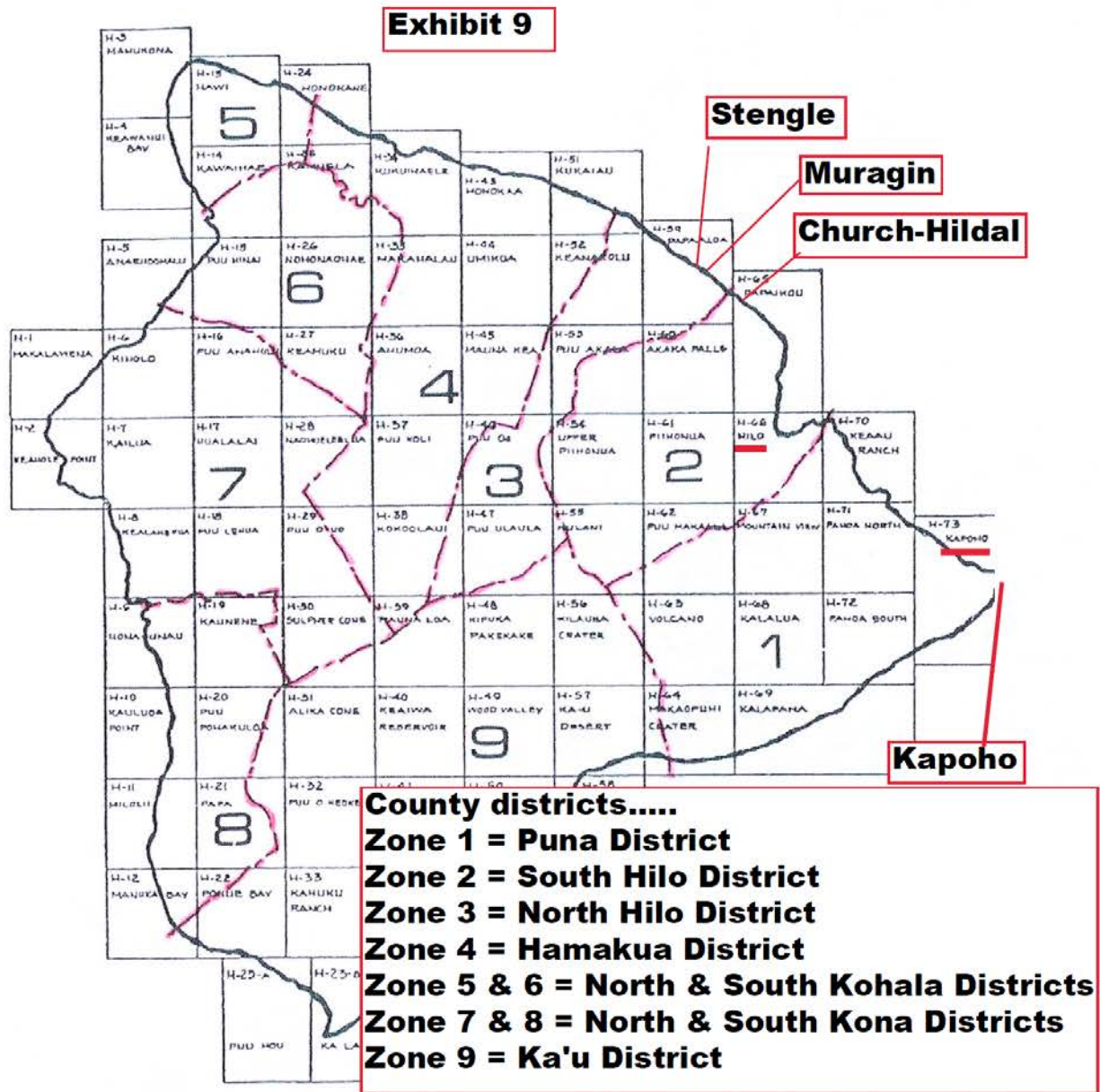
*"From Hilo to Kapoho the shore is rocky with only occasional beaches such as at Haena. It is the unique product of recent lava flows running directly into the sea. The Conservation District should include the shoreline and it is recommended that it be extended from the high water mark to a line which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



Hawai'i Quadrangle Locator, \*Click on Image To Enlarge

**HAWAII (PDF):**

- [H-1 Makalawena, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h1\\_makalawena\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h1_makalawena_1974.pdf)
- [H-2 Keahole Point, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h2\\_keahole\\_pt\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h2_keahole_pt_1974.pdf)
- [H-3 Mahukona, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h3\\_mahukona\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h3_mahukona_1974.pdf)
- [H-4 Keawanui Bay, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h4\\_keawanui\\_bay\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h4_keawanui_bay_1974.pdf)
- [H-5 Anaehoomalu, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h5\\_anaeoomalu\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h5_anaeoomalu_1974.pdf)
- [H-6 Kiholo, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h6\\_kiholo\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h6_kiholo_1974.pdf)
- [H-7 Kailua, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h7\\_kailua\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h7_kailua_1974.pdf)
- [H-8 Kealakekua, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h8\\_kealakekua\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h8_kealakekua_1974.pdf)
- [H-9 Honaunau, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h9\\_honaunau\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h9_honaunau_1974.pdf)
- [H-10 Kauluoa Point, \(http://files.hawaii.gov/luc/maps/hi\\_quadz/h10\\_kauluoa\\_point\\_1974.pdf\)](http://files.hawaii.gov/luc/maps/hi_quadz/h10_kauluoa_point_1974.pdf)