BRIEF, Church & Hildal **vs.** The Land Use Commission,

Petition DR21-72, **Motion to Reconsider**, dated March 24, 2022

NOTE; The Commission is likely to find this Brief longer than ones that the Commission is normally used to. This is because, in part, the Petitioners are using the Brief to give a rebuttal to the Staff Memorandum that was given to the Commissioners in advance of the Petition Hearing which was held on Sept. 8, 2021. The Petitioners were not also given an advance copy. The Petitioeners feel that the Staff Memorandum appears to be highly prejudicial to the Commission's denial of the Petition. The Petitioners have provided a rebuttal to the Staff Memorandum in this Brief in order to correct errors and omissions in the Staff Memorandum.

INTRODUCTION

HISTORY

- 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 never dealth with by the LUC Staff or the Commissioners.
- On September 8, 2021 the Land Use Commission (the "**LUC**") held a hearing for Petition DR21-72,
- On March 15, 2022 the LUC issued a Declaratory Order (the "**DO**") denying the Petition,
- On March 21, 2022 the Petitioners filed a Motion for Reconsideration for the LUC's Denial of the Petition (the "**Motion**"),

- On **Mach 21, 2022** Petitioner Church was given a copy of the LUC's Executive Officer's "STAFF REPORT" (hereafter referred to as the "**Staff Memorandum**"), dated **September 4, 2021**, *ref., Exhibit AA*
- A copy of the Staff Memorandum was provided to the Commissioners 4 days in advance of the Petition Hearing which was held on **September 8, 2021**,
- The Petitioners were not given a copy of the Staff Memorandum in advance of the Petition Hearing.

The Petitioners are disappointed that the Commission's ***Hearing*** for the Petition (the "**Petition Hearing**"), September 9, 2021, did not result in a more favorable outcome. Following the Petition Hearing and the issuance of the DO, which was several months later, the Petitioners got a copy of the Staff Memorandum that was provided to the Commissioners before the Petition Hearing which gave an <u>incomplete</u> **AND** <u>misleading</u> analysis of the facts and the applicable Laws. In this way the Petitioners believe that the Staff Memorandum improperly prejudiced the Commission against the Petition.

The Petitioners did not know such documents existed and even if they did they wouldn't know whether the Staff Memorandum was available to the public at the LUC's Office in Honolulu before the Petition Hearing. It is not reasonable that Petitioners, who live on other islands, be expected to travel to Oahu in order to become aware of a document that they do not even know exists. Staff Memorandums should be made known to a petitioner in advance of a relevant Commission Hearing.

The Commission should have a policy that the Staff Memorandum is sent to petitioners in the same way, form **AND** time that it is sent to the Commissioners in advance of a Hearing. In that way petitioners may raise a rebuttal if they believe that the Staff Memorandum has errors, is incomplete, misrepresents Factual Evidence **AND** Law **OR** is obviously prejudicial in an unfair way. In that way the Commission can adapt and control its staff to be equally impartial in preparation of Staff Memorandums for Commissioners in advance of Petition Hearings.

The Petitioners also describe to the Commissioners that the original "***certified copy***" of the signed DO, which was sent to the Petitioners by USPS, was incomplete and missed 2 pages (*pages 14 & 15*). On March 17th, 2022 Petitioner Church pointed out to LUC staff, by email, that the numbered pages in the "***certified copy***" of the DO skipped from the numbered page 13 to page 16.

Initially LUC staff disagreed that 2 pages were missing from the DO during a subsequent exchange of emails. Subsequently LUC staff agreed that the pages may have been missing, citing the possibility that a page feeder error may have occurred on the LUC's copying machine. LUC staff referred Church to the LUC's on-line file for the missing pages on the LUC's on-line web page in order that Church may appraise himself regarding the missing pages.

Church then discovered the pages to also be missing on the LUC's web-page on-line file. Church notified LUC staff. The on-line files were corrected and Church was again told to access the missing pages on the LUC's web page which Church did. No complete ***certified copy*** of the

entire DO was ever supplied in hard text copy to the Petitioners but we do not raise it as an error in Law here.

Throughout the period of the Petitioners' various submissions and appearances to/with the Commissioners the Petitioners have been regularly and often reminded by ....

- LUC staff,
- the Commissioners' Executive Officer, and
- the Commissioners

"***get a lawyer***".

The Petitioners were also warned at the beginning of the Petition Hearing that the Petitioners should get a lawyer to represent their Petition. Commission Chair Scheuer reminded the Petitioners that '***anything we say may be used against us***' when he noted that the Petitioners were not represented by a lawyer. The Petition has always been about correcting a mistake that the Petitioners believe that Commission staff made either in 1969 OR in 1992 when Boundary Interpretation No. 92-48 (McCully) was first made.

Not to mention the most recent LUC error, *the numerical date vs. the day of the week scheduling of the Motion to be heard*, the Petitioners have also noted several other errors by Commission staff and the Commission's Executive Officer that have occurred during the last few years regarding their dealings with the LUC but the Petitioners will not be raising them by specific reference here. However the Petitioners believe that the Commission and its staff should be held to the same standard of ***perfect,*** **OR** ***less than perfect*** submission and presentation of Petitions

and requests. The Petitioners believe that it would be most appropriate that the Commission and its LUC staff work patiently and in full co-operation with the Petitioners in order to effect a final outcome that is in respect of everyone's interest by simply establishing the 1969 Commission's redistricting intentions and applying them to the District Boundary in the area of the Property.

Therefore the Petitioners believe that the Commission and its staff should have used a bigger effort to assist the Petitioners through this process. This is a process that is employed by courts and it should also be the Commission's process if the Commission is truly interested in fact finding and not more preoccupied defending the Commission's own past mistakes.

ACT 193

Act 193 set the format for the Commission to be a quasi-judicial, non-political, and totally impartial Commission going forward because the State had decided that the LUC's former administrative processes were **dysfunctional** in administering the State's LAND USE LAW in the way the State originally intended. The Petitioners believe that the Commission should have been a lot less concerned regarding.....

- how many *dogs, goats, sheep, cows etc.* that we presently had,
- "***what may be really going on here***" as Commissioner Okuda seemed concerned about, and
- what we knew **OR** didn't know when we purchased the Property.

The Petitioners believe that the Commission should have been more interested in discovering the factual situation that existed in 1969.

1975 ACT 193 H.B. NO. 1870

A Bill for an Act Relating to the Land Use Commission.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purpose.** The legislature finds that although the purposes of Hawaii's land use law remain as valid today as they were at the time of its enactment in 1961, the procedures through which these purposes must be realized have proved inadequate and unworkable. Under existing procedures the land use commission has been unable to reconcile in an orderly and rational manner the increasingly hostile and conflicting points of view which surround land use decisions. This Act sets forth reforms intended to insure the effective application for an established land use policy through an adversary process in which all interests will have the opportunity to compete in an open and orderly manner. The commission is constituted as a quasi-judicial body and mandated to make impartial decisions based on proven facts and established policies.

Hawaii residents deserve a truly independent commission like the Government intended to design in 1975, **not simply the substitution of one dysfunctional political entity for another**. The Petitioners' opinion is that, while the Commissioners may be well intending, the current Commission's administrative structure is still inefficient, **expensive**, **lacks impartiality AND** is **dysfunctional** in achieving the State's goals and the State's ACT 193 "***Purpose***", the State's Constitution, and particularly the State's Laws.

The Petitioners recognized that, throughout the September 8, 2021 Petition Hearing, the questions and comments by the Commissioners gave the appearance that the Commission was hearing the Petition and was also arguing against the Petition being allowed. The Hearing had the appearance that the Commission was hearing the Petition and it was also arguing against the Petition being allowed.

Very little of the Commissioners comments and questions focused on **a 1969 fact based discovery** which was the foundation of the Petition. The Commissioners set the agenda and denied the Petitioners any right to **a fact based discovery** through cross examination of the State Office of Plannings written and oral testimony. The transcript of the Petition Hearing evidences this clearly in the transcript's page 90 through to page 108, *ref., Motion Exhibit 5*. A large part of the Petition Hearing transcript evidences that the Commissioners were preoccupied stating comments and questions that had nothing to do with the situation and facts in 1969.

The Petitioners believe that the Commission's Executive Officer's ***Staff Memorandum***, *ref., Exhibit AA* (which is submitted with this Brief) unfairly and in a prejudicial way set the Commissioners against the Petition. A copy of the Staff Memorandum was provided to the Commissioners several days before the Petition Hearing. The Petitioners were not aware of the Staff Memorandum's existence until the Petitioners presented the "***Motion for Reconsideration***" (the "**Motion**") for filing, in person, at the LUC's office on April 18, 2022.

The Commission appears to have allowed its administrative staff to set the Commission's agenda rather than the Commissioners considering the evidence independently and applying their judgement based on a fair, reasonably complete and balanced presentation of ***proven facts.*** Instead it appears that the LUC's administrative staff, in part, manage the legal process in a way which appears to suit the LUC's staff's own agenda.

The Staff Memorandum is an example that the Commission has allowed the Commissioner's Executive Officer to set the Commission's agenda rather than him presenting a fact based complete analysis of matters and presenting the analysis to the Commissioners. The State ***mandated purpose***, that is described in **ACT 193,** is that the Commissioners consider evidence independently and apply their judgment based on a fair, impartial, reasonably complete and balanced presentation of the ***proven facts*** and the ***Law*** in a fully open Hearing format. Instead, under the current administrative format, the Commissioner's Executive Officer, in part, manages the process in a way which appears to suit the Commissioner's Executive Officer's own agenda.

The Petitioners believe that the Commissioner's Executive Officer has been prejudiced against them for a period dating back some 2 years. This is described in email exchanges that are shown in the Motion's ***Appendix 4*** in detail. The Staff Memorandum's last page appears to describe one of the Commissioner's Executive Officer's motives, *i.e. to reduce his workload*, however the Petitioners believe that, over time, the Executive Officer's attitude towards the Petitioners grew into resentment, in part, because we weren't represented by a lawyer.

The Petitioners do not recall having FIRST attempting to initiate contact directly with the Commissioner's Executive Officer. The Motion's Appendix 4 evidences that it was the Commissioner's Executive Officer that improperly initiated direct contact with the Petitioners on April 29, 2020 which continued through exchanged emails thereafter which ended whit his instruction to us '***quit bothering my staff they are too busy to have to deal with the Petitioners inquiries and filings***'.

The Government intended to fix the Law in 1975. It takes strong leadership from within the Commission to effect the ***purpose*** of the 1975 Law. A few more hours of proper research in 1992 by LUC staff, for the McCully boundary interpretation 92-48, should have discovered the 1969 Commission's redistricting Hearing transcripts, minutes **AND** the 1969 Commission's redistricting Report page 36.

If the 1969 transcripts had been considered they would have removed any uncertainty or confusion regarding the 1969 Commission's intended redistricting ***actions*** far beyond what one paragraph of the Report's page 36, Section "***C The Shoreline***", r*ef., Petition exhibit 1*, described and what the ***district reference line*** on the Commission's adopted Map H-65 should have represented in 1969, in 1975, in 1999 and even presently.

Instead hundreds of hours of LUC staff time continue to be invested in matters that would have only taken a few hours to properly discover in the first place had LUC staff done their job in 1992. In this way, the current LUC Staff Memorandum's described a situation of Administrative overload, which appears to have been the staff's motive that resulted in the improper Staff Memorandum. All of this is the result that first began when the LUC's Administration staff not doing just a few hours of their job more thoroughly in the first place.

The Petitioners do not deny that there exists an undefined **district reference line** on LUC map H-65. **All such lines** have to have a basis in an official **text record** in order that they may be finally interpreted to be in a more defined location than the map depicts.

The 1975 ACT 193 *mandates* that not just the Commissioners be a ***neutral***, open minded body to apply the ***facts*** **BUT** its Executive Officer and the LUC's administrative staff are also ***mandated*** to be ***neutral*** and open minded. Instead, our experience and the text record of the.......

(i) Petition Hearing transcript,
(ii) the Staff Memorandum, and
(iii) the Declaratory Order...............

all speak(s) for themselves. Instead of being ***open minded*** and ***neutral*** the Staff Memorandum **AND** the Commissioners defended the LUC's 1992 McCully boundary interpretation 92-48, at the Petition Hearing, based on the undefined District Boundary reference line on the various amended Commission's Maps H-65 that cover the period following July 18, 1969 to the present.

The Commission mistakenly applied HRS 205-2 (a) (4), Conservation Districting, to be a greater priority than HRS 205-2 (a) (3) Agricultural.

HRS 205-2 (a) (3) 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;*

The State's ALISH and LSB classification of lands suitability of land describe that the Property has "*a high capacity for intensive cultivation".*

The Petitioners recognized that throughout the Petition Hearing it had the appearance that the Commission was hearing the Petition and was also arguing against the Petition being allowed.

The Commission has allowed its administrative staff to set the Commission's agenda rather than the Commissioners considering the evidence independently and applying their judgment based on a fair, reasonably complete and balanced presentation of ***proven facts*** and the ***Law*** in a fully open Hearing format as the State intended. In effect the LUC's administrative staff, in part, manage the legal process in a way which appears to suit the LUC's staff's own agenda.

The Government intended to fix the Law in 1975. It takes strong leadership from within the Commission to effect the intention of the 1975 Law. A few more hours of proper research in 1992 by LUC staff, for the McCully boundary interpretation 92-48, should have discovered the 1969 Commission's redistricting Hearing transcripts **AND** the 1969 Commission's redistricting Report.

If the transcripts had been considered they would have removed any uncertainty or confusion regarding the 1969 Commission's intended redistricting actions far beyond what one paragraph of the Report's page 36, Section "***C The Shoreline***", r*ef., Petition exhibit 1*, described and what the district reference line on the Commission's adopted Map H-65 represented in 1969, in 1975, in 1999 and even presently. The Petitioners intend to evidence this in a complete way in another part of this Brief today.

Instead hundreds of hours of LUC staff time continue to be invested in matters that would have only taken a few hours to properly discover in the first place had LUC staff done their job in 1992. In this way, the current LUC staff described situation of Administrative overload, which appears

to have been **the staff's motive** that resulted in the the improper Staff Memorandum, has resulted from the LUC's Administration staff not doing just a few hours of their job more thoroughly in the first place.

The Petitioners do not deny that there exists an undefined **district reference line** on LUC map H-65. **All such lines** have to have a basis in an official **text record** in order that they may be finally interpreted to be in a more defined location that was first intended.

The 1975 ACT 193 requires not just the Commissioners to be a ***neutral***, open minded body applying ***facts*** **BUT** its administrative staff also must be ***neutral*** and open minded. Instead, our experience and the text record of the.......
(i) Petition Hearing transcript,
(ii) the Staff Memorandum, and
(iii) the Declaratory Order...............
all speak(s) for themselves. Instead of being ***open minded*** and ***neutral*** both the LUC's Administrative Staff and the Commissioners defended the LUC's 1992 McCully boundary interpretation 92-48, at the Petition Hearing, based on the undefined District Boundary reference line on the various amended Commission's Maps H-65 that cover the period following July 18, 1969 to the present.

Particularly this Commission did not appropriately apply the Report's page 3, 36, 85 & 86 **OR** HRS 205-2 (a) (3) **AND** HRS 91-10 (3) during the Petition Hearing. The DO referred to several documents or parts of documents that were not Exhibited to the Petition Hearing nor were they discovered during the Petition Hearing.

<u>The significant Legal errors</u> that the Commission made in this regard are described in various sections of this Brief **AND** the Motion.

In 2014 the Petitioners purchased a parcel of 4.6 acres of Coastal "***Prime agricultural land***". It comprised 3 legal lots of record. In 2016 the Petitioners identified this to Commission's administrative staff. The Petitioners intentions and actions, in this regard are described in more detail in the Motion and its **<u>Appendix(s) 9 and 3</u>**.

The Petitioners interest has always been to start a small farm on the Property and it was not something that was '***cooked up***' in order to support the Petition now 6 years later. During the Petition Hearing Commissioner Okuda and others appeared skeptical regarding the Petitioners sincerity of their planned farming operation, *ref., Petition Hearing transcript, Motion Exhibit 5*...........

Hawaii State Land Commission Hearing September 8, 2021 NDT Assgn # 52880 Page 77

1 factual implications -- or to put it in plain
2 English, there might be a lot more going on than

and continuing on page 77, Commissioner Okuda........

9 I mean, would -- would I be totally crazy
10 to come to that kind of conclusion that, hey, when
11 we're dealing with important lands like conservation
12 or we're dealing with agricultural lands, something
13 that the constitution has, you know, given special
14 protection and recognition, maybe we better to make
15 sure we have a complete factual record so that, you
16 know, there's no question what's really going on?
17 In other words, maybe you don't flesh the
18 record out. Would I be totally wrong to the point
19 where I get reversed by the Hawai'i Supreme Court?

Commissioner Okuda described being very skeptical that the Petitioners intended agricultural use on the Property despite the Evidence that the Petitioners had already invested $100,000 in ag. equipment and structures during the period between 2014 and 2016. The transcript records the Commissioners skepticism regarding the Petitioners' intention to farm the Property generally throughout the transcript but Commissioner Okuda's comments particularly captured the skepticism beginning on Petition Hearing transcript page 75 and ended on 77.

On Sept. 30, **2016** the Petitioners informed Scott Derrickson regarding this, via email, the following ....

' When the Petitioner first considered purchasing a property his intention was to find a property whose qualities and regulatory zoning would allow/be……..

(1) agricultural uses of the Property and

(2) a farm dwelling thereon

(3) relative closeness of the property to the main population center of Hilo

(4) a coastal property, the Petitioner also sought the enjoyment the views afforded by a coastal property

(5) open grassland without the requirement of land clearing of overgrowth

(6) low investment risk

(7) a stream on or bordering the property'

As Commissioner Okuda identified above, agricultural lands are "***important***" when the Commission considers Petitions and issues Decision's and Orders. The Petitioners assert that the LAND USE LAW, HRS 205-2 (a) (3) makes it ***mandatory*** that the State's Prime Agricultural land be given the "***greatest possible protection***" by the Commission when considering Land Use District Boundary matters.

The Petitioners believe that certain points of issue raised in this Brief warrant that the Commission, by the Commission's own motion....

- Vacate its DO and a Contested Case Hearing be conducted for the Petition, **OR**
- issue a new boundary interpretation for the the Property showing the Coastal ridge top to be the District Boundary, Conservation District makai and Agricultural District mauka, **OR**
- conduct a Motion for Reconsideration of the Denial of the Petition.

The LAND USE LAW was intended, in great part, to prevent ***urban residential sprawl on to Prime Agricultural Land***. The Petitioners will now describe how the State's Administration of the LAND USE LAW has set the Property up for ***scattered Urban Development*** as opposed to agricultural use. It is a fact that the DLNR generally permits residential construction on each legal lot of record of "***Resource***" sub-districted

Conservation Districted land because generally it is an established land ownership right.

The Petitioners purchased 3 legal lots of record, each of which are allowed in the DLNR's Rules to have a residence on them. The Petitioners intended to have a farm instead with one residence. The State's Administration of the Property is effecting ***scattered urban residential development*** on these lots as well as a lot of other Coastal land as opposed to agricultural use. It takes substantially under one year to get a residence permit on Resource sub-districted Conservation land. It has taken the Petitioners 8 years in order to formally establish that the Petitioners be allowed to legally use the Petitioners' Prime agricultural land for agriculture through the DLNR and the LUC's processes. This runs against the LAND USE LAW and the State's Constitution XI (3) Agricultural paragraph.

The Petitioners hereby make it known that the continuing loss of income from the agricultural use of the Property and years of stalled preparation and development of the Property for agricultural use has now set the stage that the Petitioners may now be forced to sell one of the 2 remaining lots that the Petitioners purchased in 2014.

While this Commission's job has been to increase the use of State land for agriculture the State's administrative authorities culminating in this Commission have done the opposite. Besides the 3 lots that the Petitioners purchased in 2014 the Petitioners invested over $100,000.00 in the agricultural use of the Property during the first 2 years of land ownership.

The Petitioners stopped making such large investments when the Petitioners ran into the DLNR's administrative roadblock ***Per se***. The Petitioners now remind the Commissioners that the Petition described 2 of the Petitioners big ticket investments that the Petitioners had already purchased during this early 2 year period....

- a farm tractor with tillage implements, and
- the Petitioners constructed a 720 sq. ft. agricultural use and processing structure accessory to the agricultural use of the Property in 2015 long before the Petitioners applied for a residence some 3 years later in 2018.

The Petitioners again point to Commissioner Okuda's discussion with Kato during the Petition Hearing transcript where he appears to be skeptical whether the Petitioners seriously intended to use the Property for agricultural use.

```
23            COMMISSIONER OKUDA:  Well, if we have --
24  and I'm just speaking for myself. If I were to have
25  a concern that this legal question might have
```

AND Petition Hearing transcript, Motion Exhibit 5 page 78,

> *"COMMISSIONER OKUDA: Well, in making a legal determination, is the LUC precluded from taking into account what might be the underlying factual situation?*
>
> *And the reason why I raise that is, you know, just a while ago, as you're probably aware, we were faced with what I would describe as a somewhat technical argument being made to allow short-term vacation rentals on agriculturally districted land -- you know, very cogent*

> *technical argument. But, you know, it -- it, in my view, required looking at **what is really the reality of going on**.*
>
> *In making our legal determination, are we supposed to shut our eyes to the reality of **what might be going on**?"*

There should be no question "***what's really going on***". Purchasing 3 lots, in order that the Petitioners get a large enough area for a viable farm, **AND** spending over $100,000 on equipment **AND** a structure is Hard Evidence that the Petitioners intended a small farming operation. This was described in the Petition but it was not noted in the Staff Memorandum nor did Commissioner Okuda appear to be aware of this. **IT WAS ALSO DESCRIBED** in the EA and FONSI for the Property which was passed by the Commissioners unanimously one year earlier.

The transcript of the Hearing is evidence that during the Hearing the Commissioners' discussions hinted at their disbelief that the Petitioners intended serious Ag. use of our Property. This is not relevant to the factual situation that existed in 1969, which is what the Petition was about. The Petitioners only discuss it here because a Commissioner raised the issue.

The Petitioners ask how much more ***preponderance of evidence*** and ***burden of persuasion*** can possibly be required by the Commission establishing that the Petitioners are serious about the agricultural use of the Property than such huge cash investments? This is also not to mention the fact that the Petitioners purchased 3 legal lots of record comprising 4.6 acres. If all the Petitioners wanted was a coastal residential property all the Petitioners needed would have been one lot. This is described in detail in the Motion for Reconsideration's **Appendix 9**

where the Petitioners discussed 3 land purchase options that the Petitioners surveyed at that time.

Unless vacated, reconsidered **OR** the Petitioned boundary interpretation is issued the Commission's Declaratory Order has set the stage that the Petitioners may seek compensation from the State for lost investment and use of the Property for agriculture. Effectively a "taking" of the Property by inverse condemnation will have occurred. The Property's only use in 1969 was for agriculture. The DLNR does not have an administrative agriculturally efficient way to allow agricultural use of the Property and it appears that the LUC similarly dithers and delays. The Petitioners sought that agricultural use of the Property through the State's administrative agencies be allowed to continue for a period of 8 years and counting now.

The Petitioners intend to continue to use the diminishing area of the Property for agriculture but the viability of the farm continues to be threatened due to the State's administration from the original 4.6 acres to the present 3.4 acres and possibly, over time, the sale of another lot and finally the sale of the last 2.4 acre lot where our residence is located. The Petitioners will continue to seek legal recognition that the Petitioners are correct, because the Hard Evidence is clear, no matter where that leads and no matter whether that means selling it all in support of this effort.

The State's LAND USE LAW was intended to prevent urban residential sprawl on prime ag. land. The Property is located on Prime agricultural Land. **It is a fact that** the State's administration's effect for the Property

is that **Urban residential use is the easiest path forward** and thus if the Petitioners sequentially sell the remaining 2 lots that comprise the Property it will result in the Petitioners realizing a much larger financial gain by selling the lots for residential use than as a farm.

This State's administrators are all powerful but they seem to be misguided. The State administrated applied effect through the DLNR first and now the LUC is that our original intended 4.6 acre farm on 3 lots will someday, instead, result in the ***scattered urban residential development*** of 3 residences on the 3 lots instead of the agricultural use of the land.

It took just substantially less than 1 year to get a legal permit to build the Petitioners home from the DLNR. The Petitioners are now 8 years on and the Petitioners still do not have the legal authority, in a clear written approval, from any State authority to be allowed to use the land for agriculture.

The Hard Evidence that is set before this Commission in this Motion reinforces that the Petitioners are right and the Commission is incorrect. The Property was not intended by the 1969 Commission to be redistricted because it was....

- dedicated ag. land in 1969,
- in agricultural use in 1969,
- known to have a Coastal pali and ridge top at the makai boundary of the existing agricultural use of the Property, and
- Prime agricultural land which State Law mandates that it remain in the Agricultural District.

Both the 1969 Report's page 36 and now also the 1969 Commission redistricting Hearing Transcripts and minutes clearly describe this. The Commission has the power, irrespective of the hard evidence, to continue to deny the Petitioners their LAND USE rights and the Petitioners have the right to seek justice. **That is the path that the Petitioners have now firmly described that the Petitioners have set before this Commission.**

Somehow the administrators have gotten everything wrong. It is not very hard to get a CDUP for up to a 5000 sq. ft. residence on Conservation Districted land. On-the-other- hand the Petitioners have found that reasonably using the land for agriculture has been a State applied administrative impossibility.

Every coastal lot owner generally has the right to a residence. The Commission is misguided to believe that somehow Conservation Districting prevents that. Eventually every Coastal lot will end up with a residence because it is provided for in State Law. Mistakenly believing that Conservation Districting will somehow reduce the likelihood that the land will ever be developed is an administrative foolish belief that has been further propagated by this Commission.

It is clear that ....

- the Commissioners have a mistaken belief that the Petition would set the State up for liability, and
- some Commissioners have a mistaken belief that residential use of Conservation Districted land is hard to achieve.

It is a fact that all existing legal lots of record, that are located in the Conservation Resource subzone, are allowed one residence of up to 5,000 sq. ft.. Barns are allowable, accessory structures are allowable. The use can even include swimming pools and garages and landscape development with ornamental plantings, paved driveways etc. Furthermore agricultural use of such land is and also has been a fully permitted use at both the DLNR and County level. All of these uses including cultivation of soils right up to the Coastal ridge top are allowable and/or allowed on Coastal Land. While the laws allow such uses it is impossible to viably manage agricultural use of such land through the DLNR's approval processes. The following copy is from our EA for a boundary amendment through this Commission....

County

Mr. Kim stated that County had no objections to the proposed Motion.

OP

Ms. Apuna summarized the Office of Planning's position of no objections to the Motion.

Commissioner Cabral requested clarification on how the County could allow a residential dwelling on Conservation designated land.

The following is evidence that at least one of the Commissioners has believed that Conservation Districted land is somehow protected from development and that its use is restricted and protected by the State's LAND USE LAW (i.e. Conservation) to be of a higher priority than Residential and Agricultural use of such land...........

Page 6, LUC meeting minutes, 1-23-19 "request to accept existing FONSI"

Mr. Church shared additional information on his expectation that the Commission be the accepting authority for the EA/FONSI and described the current and future planned agricultural uses for the Petition Area.

OP Response

Commissioner Okuda had no further questions. Commissioner Cabral asked if OP agreed with County's response regarding structures on Conservation land. Ms. Apuna replied that she was not familiar with the BLNR's allowed uses and would have to check the statute.

Chair Scheuer shared his awareness of the BLNR's Conservation District policies.

AND AGAIN 2 YEARS LATER..............

Page 120, Petition Hearing transcript........

7 COMMISSIONER CABRAL:
8 But I'm extremely uncomfortable over the
9 thought that we can, should, or even have the right
10 to be changing property lines, as well as I'm
11 uncomfortable with the idea that we would change
12 history.

The '***historical record***' that Commissioner Cabral should be aware of is factual. There exists historical.....

- various LUC District Boundary Map H-65(s).
- the text Record of the 1969 Report, and
- the text Record of the 1969 Commission's redistricting actions.

"***History***" does not have to be '***changed***'. The "***historical record***" is clear. The Hard Evidence is that the Property was not redistricted in 1969 nor thereafter and the Property was **intended to be preserved for agricultural use**.

Commissioner Cabral's belief that Conservation Districting of Coastal land somehow prevents urban residential sprawl on such prime agricultural land is a widely held belief. The evidence is that it is much easier to get permission from the DLNR for residential urban sprawl on such land than it is to get permission to restore the land's historical agricultural use as the State always intended for Hamakua Coastal land.

The 14 mile stretch of land from Hilo to the Property has several very large residences on former Coastal sugar cane land. There is only one other property in the 14 mile stretch where the owner ever got a permit for agricultural use. The owner told the Petitioners that the delay of use, burden, cost and documentation of the DLNR application made the agricultural use of the land to not be a viable use and that he would have made a lot more money by selling it for residential use.

The McCullys even got a permit for a much larger home than ours on one of our lots. The DLNR issued CDUP HA-3445 for that home. It had a paved driveway, a two car garage, a court yard, 3 bedrooms w/3 baths, a large outdoor paved patio and a heavily landscaped yard with no agricultural use in the plan and a total living space of some 5,000 sq. ft.

Similarly the Petitioners' home was also permitted by the DLNR. The Petitioners also got a permit for a swimming pool. This was applied for at the recommendation of the OCCL as they required that the EA describe **ALL** potential future land uses to be also described.

While the LAND USE LAW intended to prevent urban residential sprawl along lands, like the Hamakua Coastal cane land, the State's

administration of the prime Coastal agricultural land makes urban residential sprawl the only viable and comparatively easy use of such land.

The McCully's changed their planned residence on our Property. Their DLNR approved planned residence and landscaping plan, however, was as follows.......

The Petitioners' use of this lot has been for an orchard that consists of over 30 fruit trees and an agricultural use storage and processing structure.

It is clear to the Petitioners that the State's Administrators have lost their way in preserving the prime Hamakua Coastal land for agriculture the way that the State's LAND USE LAW intended when its purpose was to prevent urban residential sprawl on to the State's Prime agricultural land. Hawaii Island's prime agricultural land lies primarily along the Hamakua Coast. The State's measure of land that is prime only comprises 4.5% of the land area of the total Island and is located mainly along a band of Hamakua Coastal lands.

It cannot be reasonably argued that the 1969 Commission intended that a large portion of the Hamakua Coastal land be redistricted Conservation further reducing the agricultural use area of such Prime land without regard to the State's LAND USE LAW HRS 205-2 (a) (3) which required that the "***greatest possible***" protection be applied as Agricultural Districting to such land. The State's goal of creating a "***green belt***" around the State's Islands could have, and generally was for Hamakua Coastal land, by only redistricting land that was mauka of the Coastal ridge top Conservation **IF** it was not already in agricultural use.

Instead today on Coastal lands where residences have not been built the land has become scrubby with weedy overgrowth such that scenic coastal views can no longer be seen from the highway. A little closer inspection reveals a dumping ground for derelict cars, fridges and the like. The unused areas have also become incubators for invasive plants,

fire ants and wild pigs. Surely that is not what the people of Hawaii intended when the LAND USE LAW was set and the LUC and the DLNR took over its shameful administration of the land.

The DO that denied our Petition effectively has set the stage that the Petitioners' Property will become ***scattered urban residential*** in use rather than agricultural. Three residences will result instead of the continued use of the land for Ag.

The Petitioners think that it is unlikely that this Commission has ever before so clearly set itself against a **perfect storm of circumstances** that is the antithesis to the Commission's Legislated mandate in the **Law** as the Petition, which the Commissioners has so far denied.

(i) It appears that the Commissioners have supported a broader mistaken belief that Conservation Districting of land is more important than Agricultural Districting which, in this case, the State's LAND USE LAW HRS 205-2 (a) (3) describes the Commissioners ***mandatory*** responsibility to be, i.e. the LUC "***shall***" apply "***the greatest possible***" protection to the State's prime agricultural land in order that it may be used for agriculture.

(ii) It appears that the Commissioners have effectively scoffed in disbelief that the Petitioners ever intended to farm their Property, even though the Petitioners pointed to specific existing hard evidence of investments in the Petitioners EA and the Commission's FONSI, which investments the Petitioners made in 2014 and 2015 in their

farming enterprise exceeding $100,000 which investment purpose can only be found to solely relate to Ag. use!

(iii) It appears that the Commissioners have ignored the sweat equity that the Petitioners described in their Petition, its EA and the Commission's FONSI to have invested in the Petitioners' farming operation and permitting nightmare.

(iv) It appears that the Commissioners have **incorrectly speculated** that the Petitioners purchased land that was somehow cheaper than it would otherwise have been due to its apparent Conservation Districting.

(v) It appears that the Commissioners applied the current situation when the Petition asked that the Commissioners consider the hard evidence regarding the factual situation that existed in 1969.

(vi) It appears that the Commissioners have ignored the Petitioners' Hard Evidence generally and the Commissioners told the Petitioners that they did not have a preponderance of evidence nor a convincing argument even though the Law that supports the Commission's DO in this regard is for a Contested Case hearing which should have also provided for cross-examination of "***parties***" to the hearing in order that a full discovery of the facts could be discovered, considered and applied.

(vii) It appears to the Petitioners that the Commissioners have allowed the suppression of the discovery of facts so the truth could not be brought out in discovery in front of the Commissioners.

(viii) It appears that the Commissioners have ignored the State's Laws.

(ix) It appears that the Commissioners have allowed a secretive staff report with errors, irresponsible staff advice and omissions to prejudice the Commissioners against the Petitioners.

(x) The Commissioners have reminded the Petitioners that the Commissioners took an oath of office to uphold the **Law** and then it appears to the Petitioners that the Commissioners have selectively and improperly applied the **Law** against the Petitioners and ignored their Oath of Office and the State's Law that applied to the 1969 Commission's decision making guidelines.

(xi) The DO is evidence that the Commissioners applied evidence that was not discovered during the Hearing.

(xii) It appears to the Petitioners that the Commissioners have discriminated against the Petitioners in an unfair way.

(xiii) The real clincher is the Commissioners have recited their belief that this Petition could go either way. The Commissioners have chosen the side that has, and will, see the Petitioners farming operation be reduced in size and viability, to inevitably be replaced by scattered Urban residential development on the State's Prime agricultural land.

Instead of a functioning farm the State will eventually find 3 residences on the land that the Petitioners purchased in 2014.

This is completely contrary to the **State's Constitution's section 11.3** Agricultural lands which 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)

and it is also contrary to the **State's LAND USE LAW HRS 205-2 (a) (3)**

....

> *"in the establishment of the boundaries of agricultural districts the **greatest possible protection** shall be given to those lands with a high capacity for intensive cultivation,"*
>
> (emphasis added)

a Law the Commissioners have sworn an oath to uphold. Nothing exists in the Constitution nor the LAND USE LAW that says that Conservation districting of land is more important than districting Prime agricultural land in the Agricultural District.

(xiv) The Commissioners did this in the same time frame when the Commissioners allowed a 1/2 acre of coastal recent lava flow, south of Hilo, the Barry Trust land, to be redistricted from the Conservation District to the Agricultural District and if that petitioner's bee hives did not work out they may try something else on land that is generally unsuitable for ag. use. The Petitioners land already had a residence, a 720 sq. ft. ag. use storage and processing structure, substantial investment in ag. equipment and an established orchard when the

Commissioners heard the Petitioners Petition. The Barry Trust land was located in a lava and tsunami inundation zone that was totally undeveloped, scrubby and overgrown with substantial bare patches of exposed lava when the Commissioners heard their Petition.

It bears repeating that the Petitioners think it is unlikely that this Commission has ever before so clearly set itself against a perfect storm of circumstances and evidence that is the antithesis to the Commission's Statute administrative mandate and to the **Law**.

Should the Petitioners fear setting this Commission against us? It appeared to the Petitioners that the Commissioners already were set against us before the Commissioners even heard our Petition. It started with a Staff Memorandum that effectively set the Commissioners against us. We believe in justice.

If the Petitioners don't find it before this Commission the Petitioners believe that the Petitioners will find it in an impartial Court that is not so easily misguided by staff. The citizens of Hawaii have placed a trust in this Commission through Act 205 to be open minded, impartial and fair and to uphold the State's Constitution and, in the case of the Petition, the State's LAND USE LAW HRS 205-2 (a) (3).