



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter of Docket DR21-72)	NOTICE OF OBJECTION,
Kenneth S. Church and)	
Joan E. Hildal)	re; DOCKET DR21-72
)	
for Motion For Reconsideration of)	
the Boundary Reclassification,)	
Boundary Interpretation,)	
the 1974 Land Use District Map)	
H-65,)	MEMORANDUM,
Reimbursement of Filing Fees for)	
Petition A18-805 and Petition DR)	CERTIFICATE OF SERVICE,
21-72,)	
Waving of Court Reporter fees for)	2 Exhibits.
all of the above.)	
)	
)	
)	

MEMORANDUM

Whereas, on May 19, 2022, the LAND USE COMMISSION (the "**Commission**") held a Hearing in the City of Hilo, Hawaii (the "**Hearing**") to hear Church's and Hildal's, (the "**Petitioners**") MOTION FOR RECONSIDERATION (the "**Motion**") of the Commission's DENIAL (the "**Denial**") of Petition DR21-72 (the "**Petition**").

At the beginning of the Hearing the Commission specified that the Petitioners would only be allowed 1 hour of the Hearing's time for presentation of the Motion to the Commissioners.

The Petitioners registered an Objection (the "**Objection**") to the 1 hour time limit.

The Commission effectively denied the Petitioners request that substantially more time be allowed.

The Petitioners hereby formally **repeat** their OBJECTION, by form of this formal NOTICE OF OBJECTION, which NOTICE OF OBJECTION the Petitioners also stated 3 times during the Commission's May 19, 2022 Hearing, that the Commission Denied the Petitioners enough time to properly present the Motion and its Exhibits.

The Commission cited that a portion of the existing slate of Commissioners would be retiring on June 30th, 2022 and new Commissioners would be appointed. The Commission stated therefore the Commission intended to retire other matters that were before the Commission during the remaining few weeks and therefore the 1 hour time limit was all that could be provided. Commissioner Okuda made a motion that more time be provided for further consideration by the Commission but his motion was defeated.

The Hearing for the Motion was subsequently concluded around noon. Hildal's presentation was allowed to modestly exceed the stipulated one hour. Petitioner Church was not allowed any time for oral and video presentation of facts and exhibits.

The limiting of the Petitioners presentation to 1 hour before the Commission was particularly problematic for several reasons.

1. The Petitioners were not able to fully participate in the September 8, 2021 hearing for the Petition due to the "**remote**" ZOOM format of the

Petition hearing resulting that the Petitioners' May 19th, 2022 Motion hearing was intended to provide both an audio and visual presentation that the Petitioners had intended to have given at the September 8, 2021 hearing for the Petition.

2. The Petitioners Motion also contained a considerable ***rebuttal*** relating to an incorrect, misleading and improper Staff Memorandum that had been given to the Commissioners by the Commission's Executive Officer, Mr. Orodenker, before the September 8, 2021 hearing for the Petition, which the Petitioners were not aware of at the time of the September 8, 2021 hearing for the Petition which Staff Memorandum, the Petitioners believed improperly prejudiced the Commissioners against the Petition.
3. The Petitioners Motion also contained a considerable discussion relating to errors in the Commission's March 15th, 2022 Declaratory Order (the "**DO**") which formally Denied the Petition, particularly also a highly relevant and proper definition of what the Report's page 36 (*ref., Petition Exhibit 1 and Motion Exhibit 32*) which better defined the Report's referenced "***Hamakua Coast***" to be.
4. Following the Commission's September 8, 2021 hearing for the Petition the Petitioners had discovered considerable new evidence that further supported the Petition (*ref., Motion Exhibits 43, 44 and 45, 1969 Commission hearing transcripts and minutes*). This new information was not known by the Petitioners to exist at the time of the Petition hearing on September 8, 2021.

5. The Petitioners Motion (*Memorandum Chapter 1A*) contained a list and description of **122 FACTS** that were relevant to the Petition that the Petitioners believed needed to be presented, argued and properly discovered/ determined.

In total the Motion, particularly the Motion and the Motion's relevant Exhibits and the Motion's Appendix(s) comprised a total of **821 pages**. The Chair asked and the Commissioners all affirmed that they had read all of the submitted Motion text and Exhibits. While the Commissioners affirmed that they had each read the text of the entire Motion and Exhibits it quickly became apparent, to the Petitioners during the Hearing, that the Commissioners did not correctly understand and apply portions of the Motion's text and Exhibits. The Petitioners tried to identify and correct any misunderstandings but the one hour time limit was grossly insufficient.

The Petitioners registered their OBJECTION to the 1 hour time limit 3 times during the Hearing.

BACKGROUND

- On September 8, 2021 the Commission conducted a hearing for Petition DR21-72.
- The hearing was conducted using the on line internet Zoom audio and video format.
- The Petitioners participated in the hearing remotely using the Zoom format from their home via a wifi internet connection.
- During an earlier Commission hearing the Petitioners wi-fi connection supported both audio and video format presentation.
- Due to a slow internet connection, on September 8, 2021, the Petitioners were not able to participate in the hearing using the video slide presentation format that they had prepared for the hearing.
- The Commission Chair Scheuer instructed the Petitioners to turn off their video feed in order that they may at least participate in an audio format.
- The Petitioners followed Chair Scheuer's instruction.
- During other Commission hearings the Petitioners observed that in such instances the Commission Chair volunteered to recess the hearing providing an opportunity that a better internet connection be gained.

- The Commission Chair did not provide an opportunity for the Petitioners to gain a better internet connection during the September 8, 2021 hearing.
- The Commission denied the Petition by a unanimous vote of the Commissioners on September 8, 2021.
- The Petitioners believe that the Commission erred by not recessing or rescheduling the September 8, 2021 hearing in order that the Petitioners may present their Petition in their intended audio and video format **OR** that the Commission erred by not providing more time during the May 19, 2022 Hearing for the Motion for the Petitioners to present their Petition and the Motion.

AND.....

- At the beginning of the September 8, 2021 Petition hearing the Petitioners stated their belief that cross-examination of the State Office of Planning ("OP Parties") to the hearing would be allowed.
- Commission Chair Scheuer stated his belief that the Petitioners would be allowed cross-examination of parties to the Petition Hearing.
- The Commission's Executive Officer stated to the Commissioners **his opinion** that the hearing was not the type of hearing that would provide for cross-examination of OP ***parties*** to the hearing.

- Without a discussion, discovery or a vote by the Commission
Commission Chair Scheuer stated subsequently stated that cross-examination of parties to the hearing would not be allowed.
- As part of the Denial of the Petition during the hearing **AND** the resulting Declaratory Order, Denying the Petition, cited, in part, HAR 15-15-100 (c) as supporting authority for the Commission's September 8, 2021 Denial of the Petition without a contested case hearing and cross-examination of parties to the hearing.....

§15-15-100 Consideration of petition for declaratory order. (a)
The commission, within ninety days after submission of a petition for declaratory order, shall:

(1) **Deny** the petition where: (A)... (B)...

(C) 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 be expected to arise;

(emphasis added)

- The Motion very clearly described that allowing the Petition would not have *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 be expected to arise.*
- OP was represented by Attorney General representative Alison Kato who presented OP's written and verbal presentation to the Commissioners at the September 8, 2021 hearing.

- Commission Chair Scheuer also swore in OP representatives Lorraine Maki and Rodney Funakoshi to also testify at the September 8, 2021 hearing.
- The Petitioners also were not provided an opportunity to cross-examine Lorraine Maki and Rodney Funakoshi at the September 8, 2021 hearing.
- During the September 8, 2021 hearing at least 2 Commissioners cited HRS 91-10 (5), as an APPLICABLE LEGAL AUTHORITY, supporting the Commission's Denial of the Petition.....

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

(emphasis added)

- Note: ***§91-10 Rules of evidence; official notice*** is for **contested cases**.
- Note also: during the May 19, 2022 Motion Hearing the Petitioners pointed to the Commission's cited "***burden of proof***" and "***burden of persuasion***" as reasoning citing their request that more than 1 hour of Hearing time be provided.
- On March 15, 2022, a period exceeding 6 months following the September 8, 2021 hearing for the Petition, the Commission issued a Declaratory Order (the "**DO**") denying the Petition.

- The DO **ALSO** cited HRS 91-10 (5), as an APPLICABLE LEGAL AUTHORITY, supporting the Commission's denial of the Petition.
- HRS 91-10 ***Rules of evidence; official notice. In contested cases:*** section (3) provides.....

*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;*

(emphasis added)

- The DO also cited HAR §15-15-100 ***Consideration of petition for declaratory order (1) (c)*** as an APPLICABLE LEGAL AUTHORITY to Deny the Petition.
- The DO also contained a FINDING OF FACTS chapter and a CONCLUSIONS OF LAW chapter which are normal elements in a Declaratory Order for a Contested Case Hearing.
- The Petitioners believe that the Commission erred in Law by not.....
 - (i) properly determining whether the September 8, 2021 hearing for the Petition qualified to be Denied without a contested case hearing,
 - (ii) the Commission time limited, to one hour, the Petitioners oral and visual presentation for the Motion's Hearing, and

(iii) the Commission Denied the Petitioners right to cross-examine parties to the September 8, 2021 hearing during the Petition hearing and the Motion Hearing.

On April 21, 2022 Petitioner Church identified to the Commission's administrative staff that the Petitioners requested that, before the Commission hear the Motion, the Commission first determine whether cross-examination of OP parties to the September 8, 2021 hearing would be allowed before proceeding with the Motion's Hearing, (see *Exhibit 1 to this NOTICE OF OBJECTION*).

On May 10, 2022 the Commission's Executive Officer, Mr. Orodener, wrote a letter to the Petitioners, in this regard, which stated, in part,.....

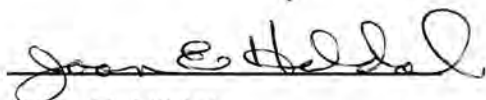
"As to the questions and issues raised in your request for postponement and earlier Motion to Reconsider; you are free to raise and address them before the Commission at the hearing."

(see Exhibit 2 to this NOTICE OF OBJECTION)

During the Motion Hearing the Petitioners repeatedly "*raised the questions and issues raised in your request for postponement and earlier Motion to Reconsider*". The Commission ignored the request.



Kenneth S. Church



Joan E. Hildal

May 24, 2022