



LAND USE COMMISSION  
STATE OF HAWAII

'22 SEP -2 P2 :42

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of a Motion to Reconsider  
the Order Denying Petition for Declaratory  
Order

KENNETH S. CHURCH and JOAN E.  
HILDAL

DOCKET NO. DR 21-72

ORDER DENYING MOTION TO  
RECONSIDER AND CERTIFICATE  
OF SERVICE

ORDER DENYING MOTION TO RECONSIDER  
AND  
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT  
COPY OF THE DOCUMENT ON FILE IN THE OFFICE OF THE  
STATE LAND USE COMMISSION, HONOLULU, HAWAII.

Date Sep 2, 2022

BY \_\_\_\_\_  
DANIEL E. ORODENER  
Executive Officer



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On June 17, 2021, Ken S. Church and Joan E. Hildal (“Petitioner”) filed a Petition for a Declaratory Order. As argued by Petitioner at the Commission’s September 8, 2021, meeting “[t]he current petition is to issue a declaratory order that [Petitioner’s property] was never zoned in conservation in the first place” and should instead be classified Agricultural. [Tr. 09/08/2021, pg. 47, lines 22-25]

On March 15, 2022, the State of Hawai‘i Land Use Commission (“Commission”) issued an Order Denying Petition for Declaratory Order and Waiver of Fees (hereinafter referred to as the “Order”).

On March 28, 2022, Petitioner filed the following documents: a Motion to

Reconsider, which is titled “Book 1- Motion to Reconsider”; a Memorandum which is titled “Book 1- Memorandum”; Appendices 1-10; Exhibits 1-47 which are titled “Book 2- Exhibits 1-24” and “Book 2 – Exhibits 25-47”; and a Certificate of Service (“COS”) (collectively referred to as the “Motion to Reconsider”).

On May 19, 2022, the Commission held an in person meeting in Hilo, Hawai‘i which was recorded via Zoom interactive conference technology. The Commission having heard and examined the testimony and evidence presented by Petitioner, and the submitted filings, hereby makes the following findings of fact, conclusions of law, and order.

### FINDINGS OF FACT

#### Procedural Matters

1. On June 17, 2021, Petitioner, filed a Petition For Declaratory Order pursuant to Hawai‘i Revised Statutes (“HRS”) § 91-8 and Hawai‘i Administrative Rules (“HAR”), § 15-15-98 *et seq.*; Memorandum, Verification, Exhibit List, and Exhibits 1 – 19 (collectively referred to as the “Petition”). Petitioner requested a declaratory order from the Commission seeking clarification and correction to a Commission Boundary Interpretation and reimbursement and waiver of fees.
2. On September 8, 2021, the Commission, after having heard and examined the testimony and evidence presented by Petitioner, and the filings submitted via regular or electronic mail; voted to deny the declaratory relief requested by Petitioner.
3. On March 15, 2022, the Commission issued its Order. The Commission staff mailed a copy of the Order via certified mail to Petitioner, and emailed copies of the Order to the

State Office of Planning and Sustainable Development (“OPSD”) and the County of Hawai‘i Planning Department (“County”).

4. On March 18, 2022, after being notified by Petitioner that certain pages (pgs. 14-15) were missing from the mailed copy they received; LUC staff checked both the official hard copy Order and the electronic version posted to the Commission website. The original hard copy contained the missing pages; however, the electronic copy on the website was missing the identified pages. A new complete copy was mailed to Petitioner and a new complete electronic version was emailed to Petitioner and posted to the website. Further, LUC staff confirmed with Petitioner that it would extend any deadline for filing of a motion for reconsideration an additional three days.

[Petitioner’s Memorandum Chapter 1a, pgs. 1-3]

5. On March 28, 2022, Petitioner filed a Motion to Reconsider, totaling approximately 1,334 pages.
6. On April 4, 2022, the Commission received a memorandum from OPSD in response to the Petitioner’s Motion to Reconsider, stating that OPSD had no new comments and did not intend to participate further in the matter.
7. On April 18, 2022, LUC staff mailed and emailed the notice and agenda for an April 27, 2022, meeting in Hilo, Hawai‘i to Petitioner, and the Statewide and County mailing and email lists.
8. On April 22, 2022, the Commission received two memorandums from Petitioner. The first memorandum was titled, “The Petition DR21-72 (the "Petition"), the Motion for Reconsideration (the "Motion") and the April 27 scheduled Hearing for the Motion” and the second memorandum was titled, “Request for Postponement”.

9. On April 25, 2022, LUC staff emailed a Hearing Cancellation Notice to Petitioner, and the Statewide and County mailing and email lists.
10. On May 10, 2022, LUC staff mailed a letter to the Petitioner titled “Notice of a New Meeting Date,” explaining that the May 19, 2022 date should provide Petitioner with ample additional time to prepare their case, as requested in their April 22, 2022, request for postponement.
11. On May 10, 2022, LUC staff mailed and emailed the notice and agenda for a May 19, 2022, meeting in Hilo, Hawai‘i to Petitioner, and the Statewide and County mailing and email lists.
12. On May 10, 2022, LUC staff provided Petitioner with the Staff Report for the September 8, 2021, by email. This Staff Report had been available beginning on September 4, 2021, to anyone requesting to review it at the Commission office.<sup>1</sup>
13. On May 13, 2022, Petitioner filed a document titled “Brief, Motion to Reconsider” which includes the following documents: a Cover Letter; an Index, an Introduction; a document titled “Staff Reports errors”; a document titled “Final DO Errors”; Exhibits AA, BB, CC, D, E, F, G, H, J; and a COS, totaling approximately 276 pages.
14. On May 18, 2022, LUC staff provided the Staff Report for the May 19, 2022, meeting to Petitioner by email. The original Staff Report was also available to anyone requesting to review it at the LUC office.

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<sup>1</sup> Pursuant to Hawaii Revised Statutes (HRS) 92-7.5, the board packet including any staff report will be made available “...at the time the board packet is distributed to the board members, the board shall make the board packet available for public inspection in the board’s office...The board is not required to mail board packets. As soon as practicable, the board shall accommodate requests for electronic access to the board packet.”

### Motion to Reconsider

15. On May 19, 2022, the Commission held a public hearing at 9:00 a.m. at the University of Hawai‘i at Hilo, Campus Center Facility - Room 301, 200 West Kawili Street., Hilo, HI, 96720, to hear the Motion to Reconsider pursuant to HAR §15-15-84. The Commission met in person<sup>2</sup>, while the meeting was also recorded via Zoom interactive conference technology. Kenneth Church and Joan Hildal appeared in person on behalf of Petitioner.
16. There was no public testimony received by regular or email, or via Zoom on the matter. [Tr. 5/19/2022 p. 17, lines 22-25; and p. 18, lines 2-5].
17. The Commission went into executive session via motion pursuant to HRS § 92-5(4) to consult with the Commission’s attorney on questions and issues pertaining to the Commission’s powers, duties, privileges, immunities, and liabilities. [Tr. 5/19/2022 p. 8-9]
18. After exiting from executive session and during continuation of proceedings, First Vice-Chair Commission Dan Giovanni (hereinafter referred to as the “Chair”) discussed the Commission’s administrative rules regarding reimbursement of hearing expenses with Petitioner. It was at this time that Petitioner acknowledged and agreed to reimburse the Commission’s expenses. [Tr. 5/19/2022 p. 17, lines 13-19; HAR 15-15-45.1]
19. The Chair indicated that OPSD had provided a statement of its position in writing on March 31, 2021, and had chosen not to appear at the hearing. [Tr. 5/19/2022 p. 18, lines 6-8]. The County also chose not to appear at the hearing. [Tr. 5/19/2022 p. 18, lines 8-10]

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<sup>2</sup> All Commissioners were present except Chair Jonathan Scheuer who was excused.

20. The Chair provided an overview of the standards and requirements for the Motion to Reconsider, including reading the pertinent administrative rule section, HAR § 15-15-84(b). That Petitioner needs to "...state specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous." [Tr. 5/19/2022 pgs. 18-20]
21. The Chair acknowledged the exhaustive record filed by Petitioner and provided assurance that the Commissioners had reviewed the record in detail. [Tr. 5/19/2022 pg. 18, lines 15-20]. The Chair requested that Petitioner focus on new information that was not part of the existing record. [Tr. 5/19/2022 pg. 19, lines 11-15]. A time limit of one-hour was provided to Petitioner for their proposed combined presentation to be divided between Mr. Church and Ms. Hildal as they determined appropriate. [Tr. 5/19/2022 pgs. 19, 21; HAR §§15-15-10 and 15-15-65]. Petitioner felt that they needed more time to present and objected to the one-hour time limitation. [Tr. 5/19/2022 pg. 22, lines 7-10; pg. 24, lines 11-12; pgs. 102-103]
22. The Petitioner's presentation provided a discussion of their positions which was also contained in their filings in support of their Motion to Reconsider and is summarized as follows:
  - The Staff Report was improper. [Tr. 5/19/2022 pg 21, 65, 67-68]
  - The Order contained errors. [Tr. 5/19/2022 pg. 21; Petitioner's Memorandum, Chapter 1b, pgs. 39, 41]
  - HRS § 205-2(A)(3) was the applicable authority. [Tr. 5/19/2022 pgs. 21-22, 36-37]



- Petitioner was not allowed to present their case due to video feed issues. [Tr. 5/19/2022 pgs. 23, 52-56, 63; Petitioner’s Memorandum Chapter 1a, pgs. 63-65; Chapter 1b, pgs. 1-2, 7-9; Chapter 2B, pgs. 114-115]
- The Commission conducted questioning on issues that did not concern the declaratory ruling. [Tr. 5/19/2022 pgs. 23, 41, 56-58, 62; Petitioner’s Memorandum Chapter 1a, pgs. 13; Chapter 1b, pgs. 14, 16-20, 30-32, 40-41, 50, 67-68; Chapter 2A, pgs. 9, 39; Chapter 2B, pgs. 15-22, 25, 69, 89]
- There was confusion over whether HAR § 15-15-100 or contested case proceeding rules dictated the standard of review. [Tr. 5/19/2022 pg. 23; 68-69, 91, 95-96; Petitioner’s Memorandum Chapter 1a, pg. 4-5, 8-9, 11, 45-51, 56-57; Chapter 1b, pgs. 4-7, 49-50, 63, 66-67; Chapter 2A, pgs. 5, 16-23; Chapter 2B, pgs. 105-113]
- Boundary Interpretation No. 92-48 contained no stated foundation in law and was inconsistent with other boundary interpretations issued for other properties. [Tr. 5/19/2022 pgs. 26; 31, 34; Petitioner’s Memorandum Chapter 1a, pg. 25, 36, 65-67, 71; Chapter 1b, pgs. 10, 62; Chapter 2A, pgs. 7]
- An error was made and the Petitioner’s Property should have been excluded from redistricting based on the 1969 District Boundary Review Report<sup>3</sup> and the 1969 meeting transcripts, which stated that areas in agricultural use along the Hamakua Coast would be excluded. [Tr. 5/19/2022 pgs. 44-45, 53, 64, 66, 70-76, 87-88, 100-101]. Similar arguments were made in other filings. [Petitioner’s Memorandum Chapter 1a, pg. 4, 14-15, 30, 35, 37, 39, 55-56, 58-63, 72-74; Chapter 1b, pgs 24-25, 30, 42, 56, 60, 65, 68; Chapter 2A, pgs. 4, 27, 29, 32-33, 40, 49-54, 58, 60, 62, 64-68, 72, 78, 80, 84,

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<sup>3</sup> State of Hawai‘i Land Use Districts and Regulations Review (August 15, 1969), Eckbo, Dean, Austin, & Williams (“Report”)

88, 92, 107-108, 111-113; Chapter 2B, pgs. 5, 12, 34, 36-37, 54-55, 60, 66, 119-120; Appendix 1; Appendix 5]

- The Commission had not read and was not familiar with the entire record and the Commission and the LUC staff were not impartial or discriminated against Petitioner. [Tr. 5/19/2022 pgs. 25, 50-51, 63; Petitioner’s Memorandum Chapter 1 a, pg. 5-7, 51-52; Chapter 2A, pgs. 4-5; Chapter 2B, pgs. 22-24; Appendix 2; Appendix 4; Appendix 5; Appendix 8]
  - The map boundaries approved by the Commission in 1969 are not authoritative and were not approved consistent with meeting transcripts or the 1969 District Boundary Review Report. Also, because the Commission’s administrative rules provide an opportunity for district boundary interpretations, all mapped boundaries are to be considered “undescribed” or “undefined.” [Petitioner’s Memorandum, Chapter 1 a, pgs.; Chapter 1 b, pgs. 9-35, 43-49, 62-63, 69-74; Chapter 2A, pgs. 4, 10-15, 58, 68-69, 75-76, 85, 101; Chapter 2B, pgs. 38, 42-45; Appendix 1; Appendix 2; Appendix 3; Appendix 5; Appendix 7]
  - The Commission can waive its rules regarding fees because it made an error with respect to Boundary Interpretation No. 92-48. [Petitioner’s Memorandum Chapter 1 b, pgs. 75-76; Chapter 2B, pgs. 81]
23. Throughout the Petitioner’s presentations, the Chair and other Commissioners reminded Petitioner of the need to specifically focus on providing the grounds for the prior decision being “...unreasonable, unlawful, or erroneous.” [Tr. 5/19/2022 pgs. 19-20, 49-51, 57, 61, and 64]

24. The Commission asked Petitioner several times to clarify whether the record before the Commission was complete for their Motion to Reconsider in order to allow the Commission to render a decision. Petitioner acknowledged that the record was complete. [Tr. 5/19/2022 pgs. 84-90, 98-99, 107]
25. A motion was made, seconded, and discussed whether to allow Petitioner additional time to submit supplementary information. The motion failed to receive the five affirmative votes required to pass. [Tr. 5/19/2022 pgs. 103-114]
26. The Chair received confirmation by Commissioners that they had reviewed the record and were prepared to deliberate on the Motion to Reconsider. [Tr. 5/19/2022 pgs. 115-116]
27. A motion to deny Petitioner's Motion for Reconsider was made, seconded, and discussed. The Commissioners indicated that extensive filings had been submitted; that the record was complete as acknowledged by Petitioner; Petitioner had not presented any new information; Petitioner had not convinced the Commission that the prior decision was made in error, was unlawful or unreasonable; and, that the Commission's decision in 1969 to reclassify the subject property was not in error. The motion to deny the Motion to Reconsider passed with eight affirmative votes, with one excused. [Tr. 5/19/2022 pgs. 116-125]

#### RULING ON PROPOSED FINDINGS OF FACT

Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

## CONCLUSIONS OF LAW

### Declaratory Order

1. HRS § 91-8 allows any interested person to petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of an agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.
2. The Commission had jurisdiction to issue the Order. HRS § 91-8, as implemented by the Commission's administrative rules, [HAR §§ 15-15-98 through 15-15-104.1] authorizes the Commission to issue a declaratory order "as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation." The Commission's statutes and rules, the applicability of which were put at issue by the Petition, are those sections of HRS Chapter 205 that govern the authority to reclassify land, including during periodic boundary reviews, and to interpret those same boundaries.
3. Petitioners are interested persons pursuant to HRS § 91-8 and HAR § 15-15-98(a), and, thus, had standing to bring their Petition before the Commission.
4. HRS § 205-1(c) authorizes the Commission to "adopt rules guiding its conduct[.]"
5. As defined in HAR §15-15-03,  
  
"Proceeding" means any matter brought before the commission over which the commission has jurisdiction and shall include, but not be limited to:  
  
(1) Petitions for district boundary amendment;

- (2) Petitions for special permit;
  - (3) Proceedings for the adoption, amendment, or repeal of rules under sections 91-3 and 205-7, HRS;
  - (4) Petitions for declaratory orders under section 91-8, HRS;
  - (5) An investigation or review instituted or requested to be initiated by the commission; and
  - (6) All other matters in the administration of chapter 205, HRS.
6. 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.”
7. The courts have recognized that an agency, acting as factfinder, has the discretion to determine the credibility of a witness and weigh the evidence before it.<sup>4</sup>
8. The Commission, after having heard and examined the testimony and evidence presented by Petitioner, and the filings submitted via regular or electronic mail; voted to deny the declaratory relief requested by Petitioner and issued the Order.
9. Regarding 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

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<sup>4</sup> *State v. Pioneer Mill Co., Ltd.*, 64 Haw. 168, 179, 637 P. 2d 57, 65 (1996) (citing *Territory v. Adelmeyer*, 45 Haw. 144, 163, 363 P.2d 979, 989 (1961)); *State v. Eastman*, 81 Hawai‘i 131, 139, 913 P.2d 57, 65 (1996); *Sierra Club v. D.R. Horton-Schuler Homes, LLC*, 136 Hawai‘i 505, 52, 364 P.3d 213, 230 (2015); *In re Gray Line Hawaii, Ltd.*, 93 Hawai‘i 45, 52-53, 995 P.2d 776, 783-784 (2000); and *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9<sup>th</sup> Cir. 2015)).

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.”

#### Motion to Reconsider

10. HAR § 15-15-84 allows for the filing of a clearly specified motion for reconsideration stating the specific grounds on which the movant considers the decision and order unreasonable, unlawful, or erroneous.
11. Pursuant to HAR § 15-15-84(a), a motion for reconsideration needs to be filed with the Commission within seven calendar days after issuance of the Commission’s written decision and order. The Commission finds that Petitioner timely filed the Motion to Reconsider within the seven days of the Order. [FOF 4-5].
12. Pursuant to HRS § 91-10(5), Petitioner carried the burden of proof and persuasion in this proceeding, and it was not incumbent on the Commission to assist Petitioner in meeting their burden.
13. The Commission provided Petitioner ample opportunities to make their case throughout the proceedings, including the submittal of direct testimonies and exhibits, discovery, and a hearing. The Commission provided Petitioner with sufficient due process to make their case in order to satisfy their burden of proof.
14. Pursuant to HAR § 15-15-84(b), a motion for reconsideration needs to state specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous. Petitioner has not shown that the Order was made in error, was unlawful or unreasonable.

15. The purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could or should have been brought during the earlier proceeding. *Fisher v. Grove Farm Co.*, 123 Hawai‘i 82, 93, 230 P.3d 382, 393 (Ct. App. 2009).
16. The Commission finds that the Motion to Reconsider does not present new evidence and/or arguments that could not have been presented during the earlier adjudicated Petition (DR21-71).
17. The Commission does not find Petitioner’s arguments persuasive or supported by facts on the record.
18. Review of the Order in DR21-72 affirms that the Commission’s findings and conclusions are rooted in the record, with numerous citations placed throughout to direct the reader to the pertinent source(s) in the record. In this regard, the Order clearly explains the Commission’s analysis and steps taken to arrive at its conclusions. The Order is both grounded in the record and within the bounds of a reviewing agency’s discretion.
19. The Commission finds and concludes that Petitioner has not met their burden to support reconsideration of the Order in DR21-72. The Commission concludes that the findings and conclusions in the Order are soundly grounded in the record developed in these proceedings. The arguments raised by Petitioners in the Motion to Reconsider are arguments that were previously raised, or could have been raised, during the prior

proceedings. As a result, it is inappropriate to raise them in the context of a motion for reconsideration.<sup>5</sup>

ORDER DENYING MOTION TO RECONSIDER

At the Commission’s meeting on the Motion to Reconsider on May 19, 2022, a motion was made and seconded to deny the Motion to Reconsider. Following discussion by the Commission, a vote was taken on this motion. There being a vote tally of 8 ayes, 0 nays, and 1 excused, the motion carried.

Having duly considered the Motion to Reconsider and the written and oral arguments presented by Petitioner, and a motion having been made at a meeting conducted on May 19, 2022, in Hilo, Hawai‘i, and the motion having received the affirmative votes required by HAR § 15-15-13, and there being good cause for the motion, this Commission ORDERS that the Motion to Reconsider be DENIED as follows:

Petitioner has not shown the existence of new evidence and/or arguments that could not have been presented during the earlier adjudicated petition for declaratory order; nor that the Commission’s Order in DR21-72 was unreasonable, unlawful, or erroneous.

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<sup>5</sup> *Tagupa v. Tagupa*, 108 Hawai‘i 459, 465, 121 P.2d 924, 930 (Haw. Ct. App. 2000). “[T]he purpose of a motion for reconsideration is to allow parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion.” However, “[r]econsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.” *Id.* (citing *Ass’n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd.*, 100 Hawai‘i 97, 110, 58 P.3d 608, 621 (2002) and quoting *Sousaris v. Miller*, 92 Hawai‘i at 513, 993 P.3d at 547).



ADOPTION OF DECLARATORY ORDER

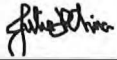
This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, O'ahu, Hawai'i, this 2nd, day of September 2022, per motion on  
May 19, 2022.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAI'I



\_\_\_\_\_  
Deputy Attorney General

By



\_\_\_\_\_  
Dan Giovanni  
Chairperson and Commissioner

Filed and effective on:

Sep 2, 2022

Certified by:



\_\_\_\_\_  
DANIEL ORODENKER  
Executive Officer



LAND USE COMMISSION  
STATE OF HAWAII

'22 SEP -2 P2 :43

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAI'I

In the Matter of a Motion to Reconsider  
the Order Denying Petition for Declaratory  
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DOCKET NO. DR 21-72

CERTIFICATE OF SERVICE

KENNETH S. CHURCH and JOAN E.  
HILDAL

CERTIFICATE OF SERVICE

I hereby certify that an ORDER DENYING MOTION TO RECONSIDER was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

CERT.       KENNETH S. CHURCH  
MAIL:       JOAN EVELYN HILDAL  
              P.O. BOX 100014  
              Hakalau, HI 96710

Dated: Honolulu, Hawai'i, Sep 2, 2022

\_\_\_\_\_  
DANIEL E. ORODENKER  
Executive Officer