

Land Use Commission  
Request for Postponement  
DR 21-72



**Request for postponement and chance for petitioner to have an opportunity to present their case fairly and in the manner they had prepared to present the facts of the case.**

1: The Commission is constructed as a quasi judicial body and **MANDATED** to make **IMPARTIAL** decisions based on **proven facts** and established policies..

§91-8 Declaratory rulings by agencies. Any interested person may petition an agency for a **declaratory order as to the applicability of any statutory provision or of any rule or order of the agency in this case the Boundary Interpretation 92-48.**

**Reasons for this postponement:**

**We were not able to conduct our initial 'hearing' in an open manner to allow the facts and law to be revealed to the Commission as our video feed was cut off without time to remedy or alternatives provided.**

**Our initial 'hearing' was unfair to us and did not keep to the subject matter of the 'hearing' right from the start. A lot of time was wasted on issues not related to the Boundary Interpretation.**

**The Chair shut down our video feed without giving us reasonable time to fix the issue or suggest another date or venue. We had done a zoom meeting before with no problems. We then had no possibility to present our case in the manner we had prepared.**

**When we asked to call up 'screen shots' the Chair even ignored that request.**

**When we asked if we would be allowed 'cross examination of 'parties' the Chair said 'I believe as a party that would be allowed' but then referred to the Executive Officer who disallowed it with no legal reference.**

**The Commission came in with an obvious adversarial agenda against us possibly set for them from their 'staff report' that contained errors in fact and reasoning for example "increase in workload" which is not a fact.**

**In the first few minutes of the hearing the Commission essentially accused us of "buying cheap Conservation property" without proof and with other intentions besides Agricultural use when all our documented efforts for 8 years, already**

documented and approved before them previously, demonstrated our extensive efforts and investments in the continued Ag use of the property years before we began to permit our 'single family residence'. When we explained we had tried to apply for a 'farm dwelling' first, they also disregarded those comments and moved on.

When trying to support our case or divert back to the subject at hand the Commission continued to direct us back to 'present' or other issues which had nothing to do with Boundary Interpretation 92-48 or its relevance considering it had no reference to the law supporting it.

The entire 'hearing' was directed to discredit us and our intentions of having Agricultural use instead of considering the 'facts' we tried to present on the continued uncertainty of Boundary Interpretation 92-48.

When the State Office of Planning AG stated "they had no objection" and why, the Chair immediately was adversarial to her and set off to discredit and direct her statements to an opinion more suited to his adversarial and possibly prejudiced agenda against us, which I believe is clearly an unwarranted abuse of procedure. The Chair shut down the testimony from the State office of Planning's representatives in the audience when they tried to clarify and object to the Chair's erroneous opinions and would not provide an opportunity to explain further. Instead of managing the 'hearing' fairly and impartially according to HRS 91-10, the commission took advantage of the fact that we had no video feed or lawyer to protest when they had abused those procedures.

Hawaii law states it is unnecessary to have a lawyer and the Commission stated they were not to be biased to us because we did not have a lawyer but then threatened us that we might do ourselves harm by not having one and then proceeded to question us about things that did not pertain to the matter at hand. Hawaii's Constitution, statutes and the LUC's own rules all support "greatest POSSIBLE protections" 205-2 (a) (3) etc. for protection for Agricultural lands yet there was no reference to any of those laws even though our petition references them over 40 times.

NEVER ONCE did the Chair direct the 'hearing' to the issue at hand which was the basis and law supporting the Boundary Interpretation 92-48.

The LUC is allowed a lot of discretion. We do not deny LUC has discretion either way to promote or deny a petition by using those discretions. But they DO NOT have the right to use this discretion to adversarially and capriciously direct a 'hearing' to promote their own agenda and not adhere to the laws. They are to conduct themselves in an orderly, non adversarial manner in order to invoke an impartial decision making atmosphere.

Respectfully submitted, Joan Hildal



State of Hawaii Land Use Commission

April 21, 2022

P.O. Box 2359

Honolulu, Hawaii 96804-2359

Note: The original signed version of this letter has been sent by USPS

Subject: Petition DR21-72 (the "Petition"), the Motion for Reconsideration (the "Motion") and the April 27 scheduled Hearing for the Motion.

It has come to our attention that the State Office of Planning ("OP") will not be represented at the scheduled Hearing for the Motion. A key element to our Motion was predicated on we being allowed cross-examination of OP "Parties" to the Petition Hearing which was held on September 8, 2021 for the Petition (the "Petition Hearing").

Today Petitioner Joan Hildal discussed this matter with LUC staff Scott Derrickson. Joan stated to Derrickson that it is our belief that before the Motion is heard by the Commission on April 27, 2022 it is necessary that it first be established whether OP will be represented at the scheduled Hearing and whether the Commission will allow cross-examination of OP Parties which were sworn in to testify at the Petition Hearing and the AG representative Alison Kato who also was questioned considerably by the Commissioners during the Petition Hearing. We believe that such cross-examination is essential in order that the Commission can make an *impartial* determination through an *adversary* process of the Petition and the Motion (see *italicized* word references below).

The Commission is constituted according to State Act 193.....

**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.

Because the word "*mandated*" (above) is described in this law it's application has to be applied based on the *legally* applied meaning of the word and not the common definition.

The Petition effectively requested a Hearing according to HAR 15-15-103.....

Comes now Kenneth S. Church and Joan E. Hildal (the "Petitioner(s)") for a declaratory order clarifying and correcting the LUC, December 16, 1992 Boundary Interpretation No. 92-48 and the re-imbursment of LUC and Court Reporter fees.

This Petition is bought pursuant to Sections 15-15-98 through 104 HAR, 15-15-17,

The Petition was not applied for according to HAR 15-15-10 which is for a Commission "**Meeting**". Furthermore we were not advised that it was not a "**Hearing**".

Several examples of evidence exists that the Commission did, in fact, hold a "**contested case hearing**", as is defined in HRS 91-10, for the Petition on September 8, 2021. As a first example the Commission's Decision and Order (the "DO") for the Petition described on its Page 4.....

### FINDINGS OF FACT

#### Procedural Matters

1. On June 17, 2021, Petitioners filed a Petition for a Declaratory Order, Memorandum, Verification, Exhibit List, and Exhibits 1 – 19.
2. On September 1, 2021, the Commission mailed an agenda and hearing notice for a meeting on September 8-9, 2019 to the Petitioner; and, the Statewide, email, and Hawai'i County and Maui County mailing lists.

OP "parties" attended the Petition Hearing as ""parties"" and represented to the Commission as is required in State Law HRS 205-1 **for the greatest portion of the Hearing**. (see copies of the Law and Rules later herein).

Early in the Petition Hearing the Petitioners requested, as a preliminary matter, that they would be allowed cross-examination of "**parties**". While the Commission Chair appeared to recognize the Petitioners' right to

cross-examine "*parties*" to the Hearing the Commission's Executive Officer, Orodanker, advised the Chair that cross-examination of "*parties*" was not allowed without providing any legal reference.

3                   COMMISSIONER SCHEUER: Let me ask Mr.  
4 Orodanker and Ms. China. But I believe as a party,  
5 that would be allowed.  
6                   MR. ORODENKER: Actually, Mr. Chair,  
7 that's -- that's not quite correct. This is not an  
8 evidentiary hearing. There are -- it's not an  
9 opportunity for cross-examination, and there are no  
0 witnesses.

Mysteriously the LUC's AG representative to the Hearing, Ms. China was not also consulted. The Chair advised the Petitioners that cross-examination of "*parties*" would not be allowed.

Mr. Orodanker's description of the style of an "*evidentiary hearing*" is apparently a "*contested case*" hearing which, effectively, he said the Petition Hearing was not. The style of the "*meeting*" that Mr. Orodanker appeared to refer to instead is according to HAR 15-15-10. To be clear, again, the Petitioners requested a Hearing according to HAR 15-15-103 and in no place did the text of the Petition refer to HAR 15-15-10.

As the Petition Hearing progressed, the Petition Hearing transcript evidences on its pages 39-40 that Commissioner Okuda stated that HRS 91-10 (5) required the Petitioners meet the standard of evidence and persuasion that is prescribed in HRS 91-10 (5) in order that the Commission may rule favorably. This was echoed by Commissioner Scheuer in Deliberations.

HRS 91-10 (5), which again, is for "**Contested Case Hearings**" was also recited in the CONCLUSIONS OF LAW section of the DO in its paragraph 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.**" (Emphasis added.)

HRS 91-8 Describes that.....

§91-8 Declaratory rulings by agencies. Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the 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. [L

The Commission's HARules 15-15 do not clearly describe in the Commission's "**adopted rules**" the "**form of the petitions and the procedure for their submission, consideration and prompt disposition.**" regarding Petitions for Declaratory Orders for Boundary Interpretations according to HAR 15-15-22 (f) (the "Rule"). The Rule does

not describe that a "*meeting*" be requested or a Petition for a "*hearing*" be requested. It simply states.....

(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. [Eff

In the case of HAR 15-15-22 (b)

**(b) All requests for boundary interpretations shall be in writing and include the tax map key identification of the property and a print of a map of the property.** All requests for boundary interpretations involving shoreline properties shall be accompanied by a survey map showing the locations of the shoreline as provided for in section 205A-42, HRS. Any erosion or accretion through natural processes shall be reflected on the map. Further, any shoreline structure, piers, and areas of man-made fill which were constructed or completed since the date of adoption of the state land use district boundaries existing as of the date of the request for boundary interpretation shall be reflected on the map.

(c) The executive officer may request the following information:

It is a fact that the LUC's Rules describe that a request for a boundary interpretation by the Executive Officer or a request to the Commission in order to remove uncertainty only need to be *in writing*. It is a fact that when the Petitioners first discussed their desire to have the Commission clear up *uncertainty* regarding the correct location of the District Boundary the LUC's administrative staff advised that the only way to request that the



Commission remove *uncertainty* was through a Petition for a Declaratory Order according to HAR 15-15 Subchapter 14, Declaratory Orders and the payment of a filing fee of \$1,000.00 which the Petitioners did.

Looking back, from today's LUC's administrated confusion, at HAR 15-15-22, HAR 15-15-10 and HAR 15-15 Subchapter 14 today it is clearer to the Petitioners that all that was required initially was a simple letter requesting that the Commissioners consider the Boundary Interpretation according to HAR 15-15-10. Then the next step would be a Petition for a Contested Case Hearing according to HAR 15-15 Subchapter 14, Rules -98 through -104.5 and the payment of fees.

The record is that this is the way the Commission has been conducting boundary interpretations for some time. First requiring a Petition for a Declaratory Order be filed, with the payment of the filing fee of \$1,000.00, and then hearing the request according to HAR 15-15-10 rather than holding a contested case hearing according to HAR 15-15 Subchapter 14.

It does not appear that HAR 15-15-22 (f) meets the administrative standard required in HRS 91-8 but rather HAR 15-15 Subchapter 14 does.

It is a fact that HRS 91-10 is a Legal Authority for "Contested cases". Contested Cases also provide in 91-10 (3) for cross-examination of ""parties"" .....

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

- (1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law;
- (2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;
- (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;
- (4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and
- (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. [L 1961, c 103, §10; Supp, §6C-10; HRS §91-10; am L 1978, c 76, §1; am L 2003, c 76, §3]

HRS 205-1 (e) states.....

*(e) The land use commission shall maintain its independence on matters coming before it to which the office of planning and sustainable development is a party (emphasis added)*

HAR 15-15-03 Definitions states.....

*""Party" means a person named or admitted as a party or entitled as of right to be admitted as a party in any contested case proceeding before*

*the commission.*" (emphasis added)

The format for a Petition according to HAR 15-15 Subchapter 14 is described in.....

§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) The question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future; or
  - (B) The petitioner's interest is not of the type which confers sufficient standing to maintain an action in a court of law; or
  - (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; or
  - (D) The petitioner requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission; or
- (2) Issue a declaratory order on the matters contained in the petition; or
- (3) Set the petition for hearing before the commission or a hearings officer in accordance with this subchapter. The procedures set forth in subchapter 7 shall be applicable.

The format prescribed in HAR 15-15-100 appears to have been applied except there exists uncertainty because the LUC's staff has described that

the format was for a meeting according to HAR 15-15-10 rather than according to the Hearing format described in HAR 15-15-100 (3).

All of the evidence is that .....

- State Law ACT 193 requires the Commission "***insure the effective application for an established land use policy through an adversary process***" ..... "***to make impartial decisions based on proven facts***" ...
- HRS 91-8 requires that the LUC's Rules meet the standard required in the Law that a land owner may request that the Commission clear up uncertainty,
- the Petitioners were advised that the only way to request that the Commission clear up the Executive Officer's Boundary Interpretation 92-48 uncertainty was to file a petition according HAR Subchapter 14 for a DO and pay a \$1,000.00 filing fee,
- therefore the Petitioners filed the Petition which requested a hearing, according to HAR 15-15-103,
- HAR 15-15-100 (3) requires that the Commission "***set the petition for a hearing***" if (1) or (2) are found not to apply,
- OP issued written testimony with exhibits to the Petition Hearing,
- OP participated as a party to the Petition Hearing including giving sworn testimony,
- OP is a ***party*** to Commission ***matters coming before it***, ref., HRS 205-1,

- the Petitioners did not request a Petition "*meeting*" according to HAR 15-15-10 and they were not advised that it was not a "*hearing*" but a "*meeting*",
- the DO described that the Commission sent out a notice of "*hearing*" to the Petitioners and the LUC's Official Mailing List,
- the Petitioners requested cross-examination of "*parties*",
- Commission Chair Scheuer denied the Petitioners the right to cross-examine "*parties*" to the hearing,
- Commissioners Okuda and Scheuer referenced the *preponderance of evidence and burden of persuasion* requirement that is specified in HRS 91-10 (5),
- the DO cited the contested case Law HRS 91-10 (5) in its **CONCLUSIONS OF LAW** section,
- HRS 91-10 (5) is to be applied in contested case hearings,
- HRS 91-10 (3) provides for cross-examination of "*parties*" to the hearing.

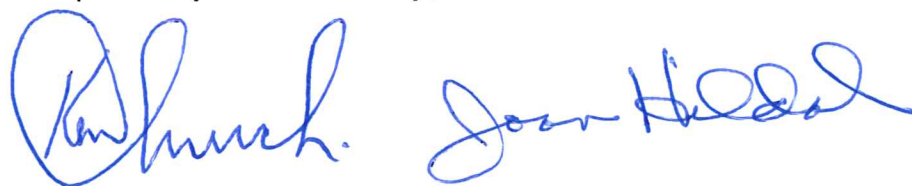
The Petitioners also note that they were not able to participate in an equal and fair way during the Petition Hearing via. the ZOOM video format. We have observed that it has been the practice of the Commission to provide a recess in order that parties may establish a better electronic connection. That opportunity was not provided to the Petitioners nor was an alternative in order that true *fact finding* may be established.

In summary the Petitioners believe that it is necessary that the Commission vacate its decision to Deny the Petition and that a proper Contested Case Hearing be convened to hear the Petition and now allow the new evidence that is provided in the Motion to also be considered and discovered OR provide a hearing format that can resolve the outstanding issues.

The Petitioners do not believe that they be subjected to further fees. The Commission's errors that are described in the Petition and now the new errors described in this letter are Commission errors and not Petitioner errors.

Additionally the Petitioners have noted that the present Hearing transcript described matters that were not discovered during the Petition Hearing i.e. the 1969 Commission's Hearing Transcripts and Minutes. Therefore the 1969 Commission Hearing Transcripts and Minutes are properly requested to be considered moving forward.

Respectfully submitted by,

The image shows two handwritten signatures in blue ink. The first signature is 'Ken Church' and the second is 'Joan Hildal'. Both are written in a cursive, flowing style.

Ken Church and Joan Hildal