

DATE: March 4, 2021
TO: Daniel Orodenker
CC: Fred Talon
FROM: Cades Schutte LLP
RE: Boundary Interpretation: Tax Map Key No. (3) 5-6-01:074

Nathan Eggen, on behalf of our client Honoipu Hideaway LLC (“**Honoipu**”), previously requested a State Land Use District Boundary Interpretation from the Land Use Commission (“**LUC**”). For the reasons explained below, we respectfully request the LUC reconsider the determination of the Conservation district boundary line on our client’s property.

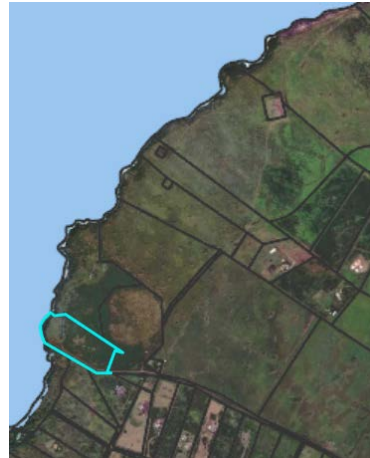
I. Introduction

Honoipu owns the real property situated at Honoipu, North Kohala, Hawai‘i County, Hawai‘i, identified by Tax Map Key No. (3) 5-6-01:074 (the “**Property**”). The current State Conservation district boundary line bisects the Property. Approximately 4.794¹ acres fall within the Conservation district, in the Resource

*Google Maps
Image of
Relevant Area*



*Location of
Property*



*County of
Hawai'i Real
Property Tax
Map*

¹ As shown on the Shoreline Survey, 0.525 acres of the Property are in the erosion area and also fall within the Conservation District. Including this 0.525 acres, the total area of the Property is 17.547 acres. The Survey was completed by Andy R. Harada, a Licensed Professional Land Surveyor, and was certified on January 21, 2021.

subzone. The remaining 12.228 acres of the parcel are within the Agricultural district. *See* Exhibit A (Shoreline Survey Map, dated January 21, 2021); Exhibit B (Plan Showing Map of Lot 19-A).

A road runs through the property. To the north, this road is identified as Upolu Point Road. The name changes to Old Coast Guard Road shortly before it crosses through the Property (the “**Road**”). To the north, the Conservation district boundary line follows the Road. Land mauka of the Road is in the Agricultural District, and land makai is in the Conservation District. Recognizing that the conservation boundary line on the Property is not consistent with this pattern, Mr. Eggen, on behalf of Honoipu, sought a district boundary interpretation from the Land Use Commission (“**LUC**”) on January 3, 2020, attached as Exhibit C.

On October 26, 2020, the LUC responded to Mr. Eggen that it had made a determination that the entire 4.794 acres (plus the 0.525 acres comprising the erosion area) are within the Conservation district, letter attached as Exhibit D. The determination that the land mauka of the Road is within the Conservation district was based on a Shoreline Survey completed in October 2019² and the State Land Use District Boundaries Map H-3, dated 1974³ (“**1974 LUC map**”), attached as Exhibit E. *See also* Exhibit C (detailing that a “Zoom excerpt of LUC map for H3-Mahukona from Dec 20, 1974” was uploaded as an attachment to the letter).

In conducting the survey of the Property, the surveyor drew the Conservation district boundary line as it is shown on the 1974 LUC map, which depicts the location of the State Land Use District Boundary lines. The LUC, in making its interpretation, followed the boundary line as it is shown on the 1974 map and the survey. Because the surveyor and the LUC relied on the 1974 map, the 1974 map essentially provided the sole source of information for the LUC’s determination.

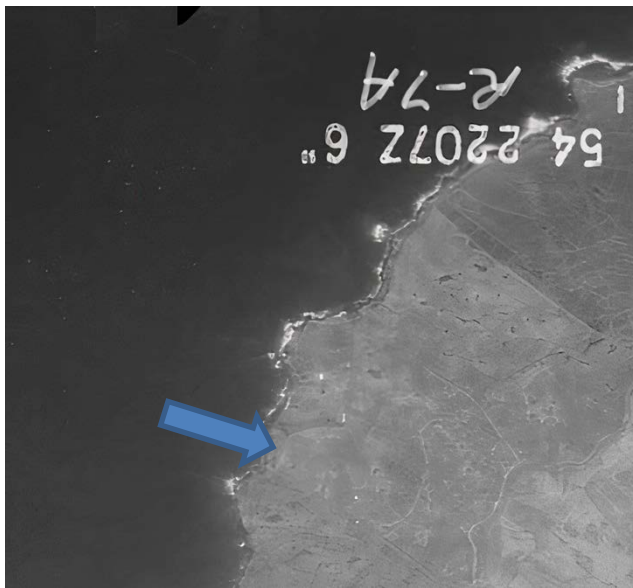
² This survey is substantively identical to the 2021 Survey. The Shoreline Survey dated October 3, 2019 is attached for reference as Exhibit R.

³ It should be noted that the letter states that the “SLU Agricultural / Conservation District designation for the subject parcel was established during the original 1964 Boundary Review, effective dated August 23, 1964.” *See* Exhibit D. However, it does not appear from the 1964 LUC map that there was a Conservation district boundary line running through the Property. Rather, the Conservation line first appears on the 1969 LUC map. Additionally, the LUC website indicates that the 1964 map was “effective dated December 20, 1964.” *SLU District Boundary Maps*, Land Use Commission, *available at* <https://luc.hawaii.gov/maps/land-use-district-boundary-maps/> (last visited March 4, 2021). In any event, whether the Conservation district boundary line first appeared on the 1964 or 1969 map does not change the analysis or conclusion that the Road was not properly mapped on the 1964, 1969, or 1974 LUC maps.

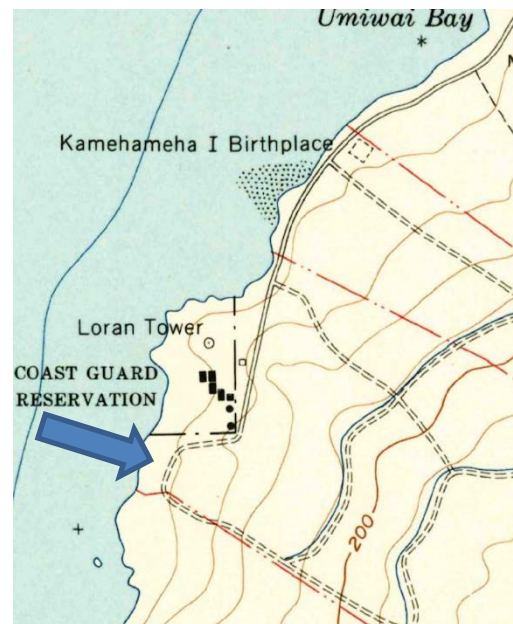
As explained below, the Conservation district boundary line is not depicted in the correct location on the 1974 LUC map. Accordingly, the boundary line is not shown in the correct location on the Survey and the boundary interpretation previously given to Honoipu is incorrect.

II. Factual Background.

Prior to 1961, there was a dirt road in the area that did not hug the shoreline or run through the Property. See USGS Aerial Photo dated April 21, 1954, attached as Exhibit F (excerpt); Exhibit G (original). Rather, it rounded out toward the shoreline and turned in a southeastward direction, as shown below, at approximately a ninety degree angle shortly before the current boundary of the Property. The location and curvature of the road as it existed prior to 1961 was correctly mapped on the 1957 USGS Map for Mahukona, attached as Exhibit H.



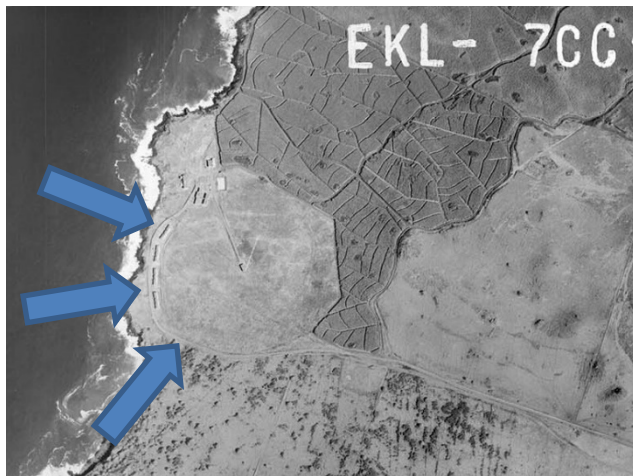
USGS Aerial Photo, April 21, 1954



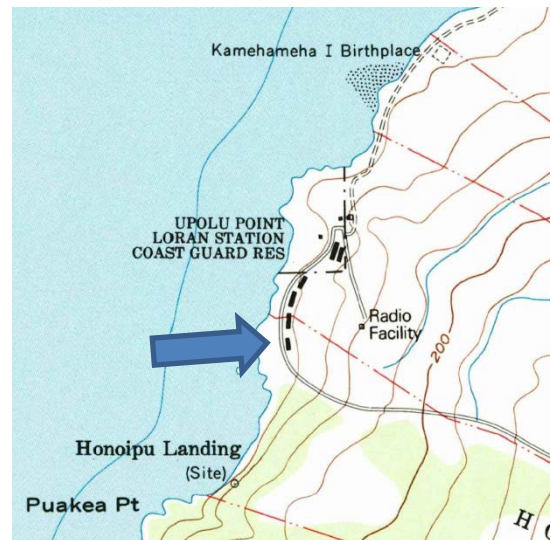
1957 USGS Map Mahukona

In 1961 the road was reconstructed and paved to service the newly-built Loran Coast Guard Station. See U.S. Coast Guard, *Loran Station General Information Book*, at 1-1 (1969), Exhibit I; *250 Kohalans Tour Coast Guard Facility At Upolu, HAW. TRIB.-HERALD*, Oct. 3, 1961, at 2, Exhibit J. The change in direction and curvature of the Road after 1961 is reflected on the USGS aerial photo dated January 18, 1965, attached as Exhibit K (excerpt); Exhibit L (original). As shown on the 1965 aerial photo, the reconstructed road hugged the shoreline and cut through the Property.

The circular curve of the reconstructed road appears to be in substantially the same location as the Road is today. This change was properly mapped on the 1982 USGS Map for Mahukona, attached as Exhibit M.



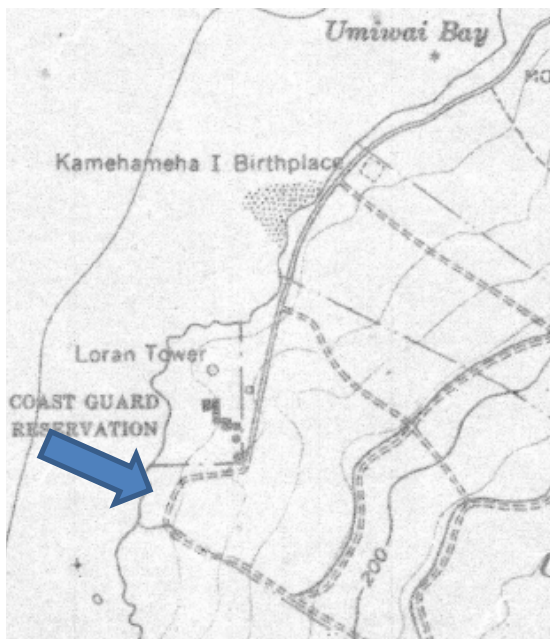
USGS Aerial Photo, January 18, 1965



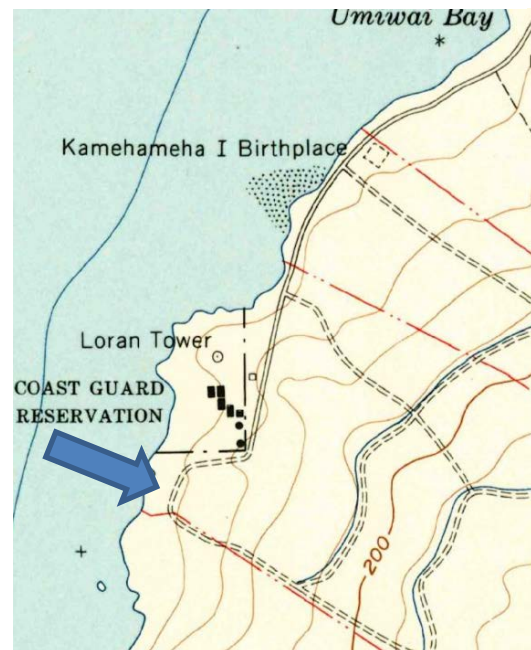
1982 USGS Map Mahukona

Unfortunately, the correct location and curvature of the Road are **not** reflected on the 1964 Land Use Boundary Map. There is no Conservation district boundary line on the 1964 LUC map. The first map on which the “C” boundary line appears is the 1969 map. The error in the 1964 Map was carried forward to 1969 and 1974 Land Use Boundary Maps.⁴ All three LUC maps reflect the curvature and location of the Road as it existed prior to 1961. The following except of the 1964 LUC map shows the dirt road as it was mapped on the 1957 USGS Map for Mahukona:

1964 LUC Map



1957 USGS Map of Mahukona

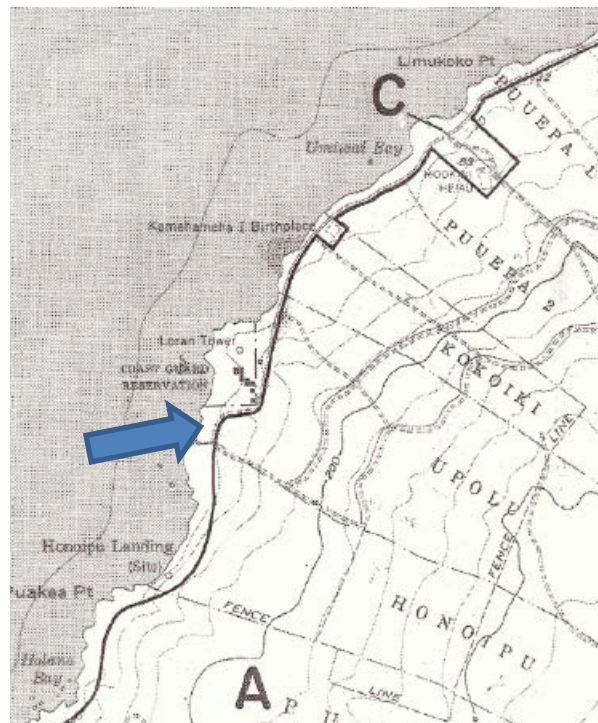


⁴ The State Land Use Law was enacted in 1961. Since 1964, the Board of Land and Natural Resources has adopted and administered land use regulations for the Conservation District pursuant to the State Land Use Law.

As you can see, the 1964 LUC map is based on the 1957 USGS map of Mahukona. The 1964 LUC map is attached as Exhibit N. Unlike the 1957 USGS map, the 1964 LUC map is inaccurate, because it did not reflect the location of the Road at the time the map was drawn. An accurate rendering would have reflected the Road running along the shoreline. See Exhibit M (1982 USGS Map of Mahukona). The inaccuracies of the 1964 map were not remedied in subsequent versions of the LUC map. Rather, both the 1969 LUC map and the 1974 LUC map depict the Road as it existed prior to 1961. See 1969 Map attached as Exhibit O. The 1974 Land Use Boundary Map, as amended, reflects the current district boundary lines. See HAR § 15-15-17(b) (“The boundaries of land use districts are shown on the maps entitled ‘Land Use District Boundaries, dated December 20, 1974,’ as amended, maintained and under the custody of the commission.”).



1969 LUC Map

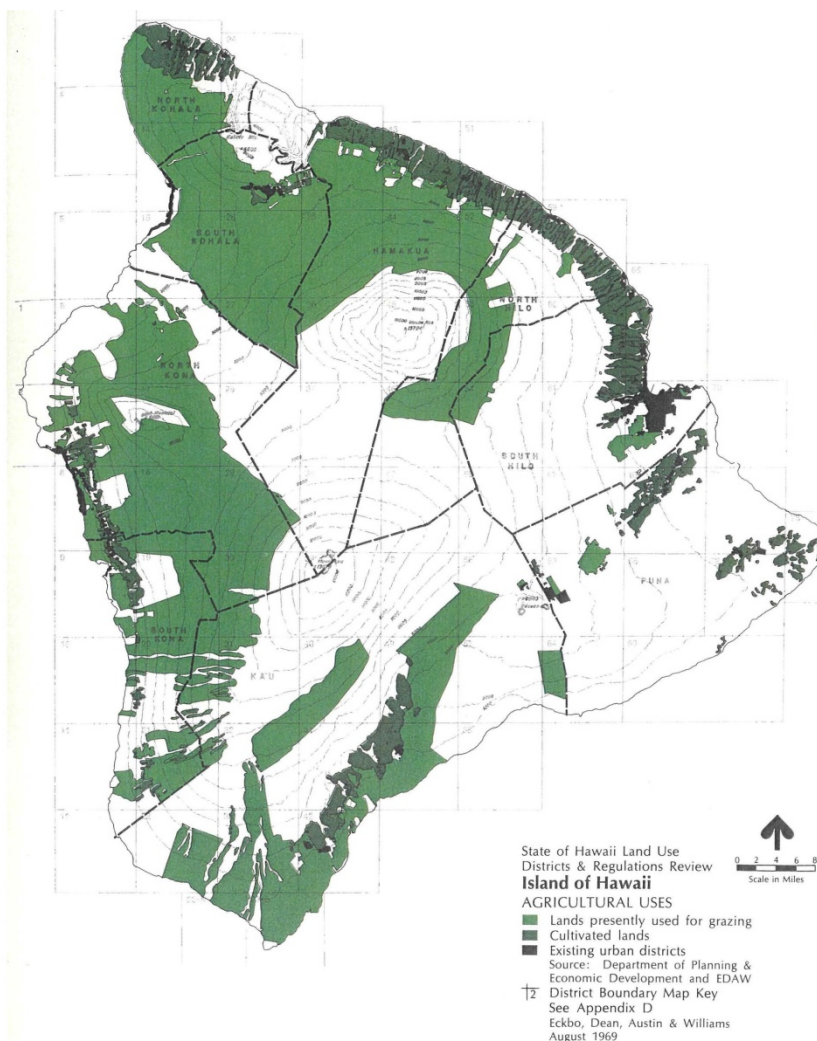


1974 LUC Map

The error on the 1964 LUC map is significant because it impacts the location of the Conservation district boundary line on the 1969 LUC map. It is evident that the drafters of the 1969 map intended the Conservation boundary line to follow the Road—land makai of the Road was placed in the Conservation district, and land mauka of the Road was retained in the Agricultural district. If the Road had been drawn in the correct location on the original 1964 LUC map, the district boundary line drawn on the 1969 LUC map would have followed the Road. In that case, the Conservation district boundary line would not have included land mauka of the Road. The error was not remedied on the 1974 LUC map, which for the Mahukona area, appears to be a republication of the 1969 LUC map.

The conclusion that the district boundary line would have followed the Road had the Road been properly mapped is supported by the State of Hawai'i Land Use Districts and Regulations Review prepared for the LUC in 1969. Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE REGULATIONS REVIEW 86 (1969) ("**1969 Review**"), relevant excerpts attached as Exhibit P. The "most extensive phase of the study" was the "review of district boundaries." *Id.* at 11. In explaining how district boundaries were initially drawn and making further recommendations, the authors noted:

Map of Agricultural Uses on Hawai'i Island



Four major **conditions have been recognized** and recommendations based upon these conditions have been made for the new Conservation District boundaries.

1. **Where a plantation road, farm road, access way or public road exists at the edge of the agricultural use within reasonable proximity to the shoreline, it was used as the boundary between the Agriculture and Conservation Districts.**

Id. at 86 (emphases added). A map of the island of Hawai'i within the 1969 Review clearly shows that the area encompassing the Property was "presently

used for grazing." *Id.* at 43.

As acknowledged in the 1969 Review, the Road existed at the edge of land used for grazing, which is a recognized agricultural use. Moreover, the Road was, and remains, within a reasonable proximity to the shoreline. Consequently, if the Road

had been properly mapped at the time the district boundary was first drawn in 1964 or redrawn in 1969, the Conservation district boundary line would have followed the Road. As noted above, the Conservation district boundary line running through the Property did not change from the 1969 LUC map to the 1974 LUC map.

Locating the Conservation district boundary line along the Road—except in areas where the land is of historical, recreational or other significance—comports with the purpose and standards of the Conservation district. *See* HRS § 205-2(e); Hawaii Administrative Rules (“**HAR**”) § 15-15-20. *See also* GIS Map, attached as Exhibit Q. Because a drafting error did not depict the actual location of the Road on the Property, the current Conservation district boundary line does not follow the intent of the district.

GIS Map 2020



III. Analysis

A plain interpretation of the relevant information confirms that the Conservation district boundary line follows the Road through the Property. The boundary line follows the Road, but the Road is not shown in the correct location on the LUC maps. As the actual location is controlling, the LUC should interpret the line to follow the actual curve of the Road at the time the maps were prepared. *See* HAR § 15-15-22 (explaining that where “the **actual location of the street, . . . varies slightly from the location as shown on the district map, then the actual location shall be controlling.**” (emphasis added)). *Cf. Coppola v. Zoning Bd. of Appeals of City of Derby*, 23 Conn. App. 636, 642, 583 A.2d 650, 653 (1990) (reversing trial court’s dismissal of appeal from zoning board where statute provided property is not intended to be divided by zoning boundaries and the zoning map erroneously showed district boundary line dividing property). Consequently, land mauka of the Road on the Property is properly in the Agricultural district rather than the Conservation district.

Alternatively, the scrivener’s error is plain and should be corrected. The 1969 and 1974 LUC maps show that the drafter’s intent was for the boundary line to follow the Road down the coast, excepting areas of historical or cultural significance. The 1969 Review solidifies this conclusion. Because of an error in the mapping of the Road, the drafter’s intent was not carried out. However, the LUC has the authority to interpret the district boundary lines to ensure the intent of the lines is uniform. *See* HAR § 15-15-22. The LUC should exercise its authority and interpret the Conservation district boundary line to comport with the intent to follow the Road.

The maps and documents explained above show that the LUC maps are incorrect regarding the location of the Road. The maps appear to be modeled after the USGS 1957 Map of Mahukona, which was accurate when drafted, but did not correctly depict the Road after 1961. The district boundary lines were first drawn in 1964, and the Conservation district boundary line in Mahukona first appeared on the 1969 LUC map. Consequently, the LUC maps were inaccurate at the time the district boundary lines were drawn.

From these maps, it is evident the drafters of the district boundary lines intended the Conservation line to follow the Road. On both the 1969 and 1974 maps, the line clearly follows the Road as it runs along the shoreline, excepting areas of historical or cultural significance. However, the land mauka of the Road currently within the Conservation district does not have ecological, historical, cultural, scenic or archeological significance that requires its designation remain conservation.⁵ Instead, the land was previously used for agriculture.

⁵ HAR § 15-15-20 provides the standards for determining the conservation district boundaries. The regulation states:

Except as otherwise provided in this chapter, in determining the boundaries for the “C” conservation district, the following standards shall apply:

(1) It shall include lands necessary for protecting watersheds, water resources, and water supplies;

(2) It may include lands susceptible to floods and soil erosion, lands undergoing major erosion damage and requiring corrective attention by the state and federal government, and lands necessary for the protection of the health and welfare of the public by reason of the land's susceptibility to inundation by tsunami and flooding, to volcanic activity, and landslides;

(3) It may include lands used for national or state parks;

(4) It shall include lands necessary for the conservation, preservation, and enhancement of scenic, cultural, historic, or archaeologic sites and sites of unique physiographic or ecologic significance;

(5) It shall include lands necessary for providing and preserving parklands, wilderness and beach reserves, for conserving natural ecosystems of indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered, and for forestry and other related activities to these uses;

The conclusion that the line was incorrectly mapped is further supported by the observations and recommendations made in the 1969 Review prepared for the LUC. There, the authors noted that where there was a road adjacent to an agricultural use and within a reasonable proximity to the shoreline, the road was used as the Conservation boundary line. Here, the land adjacent to the Road was designated for grazing in the 1960s and was, and continues to be, reasonably close to the shoreline. Thus, had the Road been properly mapped on the initial 1964 LUC map, the conservation district boundary line would have followed the Road.

Due to no fault of the LUC, the prior interpretation that the entire 4.794 acres was within the Conservation district did not take into account the incorrect location of the Road as mapped on the 1974 LUC map. To comport with the intent of the drafters of the district boundary lines, we respectfully request the LUC re-interpret the Conservation district boundary line on the Property consistent with a plain interpretation of the available maps and supporting evidence. Alternatively, this LUC should interpret the boundary line to correct the scrivener's error.

(6) It shall include lands having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps. All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps;

(7) It shall include lands with topography, soils, climate, or other related environmental factors that may not be normally adaptable or presently needed for urban, rural, or agricultural use, except when those lands constitute areas not contiguous to the conservation district;

(8) It may include lands with a general slope of twenty per cent or more which provide for open space amenities or scenic values; and

(9) It may include lands suitable for farming, flower gardening, operation of nurseries or orchards, growing of commercial timber, grazing, hunting, and recreational uses including facilities accessory to those uses when the facilities are compatible with the natural physical environment.

HAR § 15-15-20.