

2010 DEC 20 A 9:28

CARLSMITH BALL LLP

STEVEN S.C. LIM 2505  
DEREK B. SIMON 10612  
ASB Tower, Suite 2100  
1001 Bishop Street  
Honolulu, Hawai'i 96813  
Tel. No.: (808) 523-2500  
Facsimile No.: (808) 523-0842

Attorneys for Petitioners  
KEVIN M. BARRY AND MONICA S. BARRY, TRUSTEES OF  
THE BARRY FAMILY TRUST DATED NOVEMBER 15, 2006

**BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII**

**In the Matter of the Petition of**  
  
KEVIN M. BARRY AND MONICA S.  
BARRY, TRUSTEES OF THE BARRY  
FAMILY TRUST DATED NOVEMBER 15,  
2006  
  
To Amend the Land Use District Boundary of  
Certain Lands Situated at Kea'au, Puna,  
County and State of Hawai'i, Consisting of  
0.51 Acres from the Conservation District to  
the Agricultural District, Tax Map Key No. (3)  
1-5-059:059

**DOCKET NO. A18-806**  
  
**PETITIONERS' MOTION  
REQUESTING THE LAND USE  
COMMISSION TO BE THE  
APPROVING AGENCY FOR AN  
ENVIRONMENTAL ASSESSMENT;  
MEMORANDUM IN SUPPORT OF  
MOTION; CERTIFICATE OF SERVICE**

**PETITIONERS' MOTION REQUESTING THE LAND USE COMMISSION TO BE THE  
APPROVING AGENCY FOR AN ENVIRONMENTAL ASSESSMENT**

**I. RELIEF SOUGHT**

Petitioners KEVIN M. BARRY AND MONICA S. BARRY, TRUSTEES OF THE  
BARRY FAMILY TRUST DATED NOVEMBER 15, 2006 ("Petitioners"), by and through  
their legal counsel, CARLSMITH BALL LLP, respectfully asks this honorable Land Use  
Commission of the State of Hawai'i (the "Commission") to determine that it will be the

Approving Agency for an Environmental Assessment (“EA”) under Chapter 343, Hawai‘i Revised Statutes (“HRS”).

**II.  GROUNDS FOR RELIEF**

This Motion is brought pursuant to Chapter 205, HRS, and Hawai‘i Administrative Rules (“HAR”) §§ 15-15-50(b), 15-15-70, 11-200-6(b)(1)(F), 11-200-9, and HRS §§ 343-5(a)(7), 343-5(e). In this Docket, Petitioners will seek to amend the State Land Use (“SLU”) Conservation District boundary into the SLU Agricultural District boundary.

Pursuant to HAR § 15-15-70(c), Petitioners respectfully request that the Commission hold a hearing on this Motion.

DATED: Honolulu, Hawai‘i, December 19, 2018.



---

STEVEN S.C. LIM  
DEREK B. SIMON

Attorneys for Petitioners  
KEVIN M. BARRY AND MONICA S.  
BARRY, TRUSTEES OF THE BARRY  
FAMILY TRUST DATED NOVEMBER 15,  
2006

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

**In the Matter of the Petition of**

KEVIN M. BARRY AND MONICA S.  
BARRY, TRUSTEES OF THE BARRY  
FAMILY TRUST DATED NOVEMBER 15,  
2006

To Amend the Land Use District Boundary of  
Certain Lands Situated at Kea'au, Puna,  
County and State of Hawai'i, Consisting of  
0.51 Acres from the Conservation District to  
the Agricultural District, Tax Map Key No. (3)  
1-5-059:059

**DOCKET NO. A15-799**

**MEMORANDUM IN SUPPORT OF  
MOTION**

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

As more fully described in Petitioners KEVIN M. BARRY AND MONICA S. BARRY, TRUSTEES OF THE BARRY FAMILY TRUST DATED NOVEMBER 15, 2006 (“**Petitioners**”) Petition for Land Use District Boundary Amendment (the “**Petition**”), filed concurrently with this Motion, Petitioners are requesting to amend the State Land Use (“**SLU**”) District Boundary of certain lands consisting of approximately 0.51 acres situated at Kea'au, Puna, County and State of Hawai'i, presently identified as Tax Map Key No. (3) 1-5-059:059 (the “**Petition Area**”), from the SLU Conservation District to the SLU Agricultural District, to allow for Petitioners to develop a dwelling, related agricultural uses, and other accessory uses and improvements (the “**Project**”). However, prior to implementing the proposed District Boundary Amendment (“**DBA**”), Petitioners must first comply with the environmental review process established under Chapter 343, Hawai'i Revised Statutes (“**HRS**”).

Through this Motion, Petitioners are respectfully requesting that the Land Use

Commission of the State of Hawai'i (the "**Commission**") agree to be the Approving Agency to determine the acceptability of an Environmental Assessment ("EA") that Petitioners shall prepare to assess the environmental effects of the proposed DBA and Project.

## **II. ENVIRONMENTAL REVIEW IS REQUIRED**

Because the DBA proposes to reclassify land from the SLU Conservation District into the SLU Agricultural District, an EA is required pursuant to HRS §343-5(a)(7)<sup>1</sup> and HAR § 11-200-6(b)(1)(F).<sup>2</sup> Further, HAR § 15-15-50(b) provides that:

For petitions to reclassify properties from the conservation district to any other district, the petition shall not be deemed a proper filing *unless* an approved environmental impact statement or **finding of no significant impact is approved or accepted by the commission for the proposed boundary amendment request.** Such approved or accepted environmental impact statement or finding of no significant impact ***shall be filed with and be part of the petition for boundary amendment.*** Notwithstanding any rule to the contrary, the processes provided by subsections (e) and (f) shall not commence until this subsection is satisfied.

(Emphases added).

## **III. THE COMMISSION IS THE APPROPRIATE APPROVING AGENCY**

The necessary first step for developing the Project is the processing of the DBA through the Commission, which, as discussed *supra*, triggers compliance with Chapter 343, HRS. HRS § 343-5(e) provides, in pertinent part, that:

Whenever an applicant proposes an action specified by [HRS §343-5](a) that requires approval of an agency . . . , **the agency initially receiving and agreeing to process the request for approval shall require the applicant to prepare an environmental assessment of the proposed action at the earliest practicable time**

---

<sup>1</sup> "Except as otherwise provided, an environmental assessment shall be required for actions that . . . [p]ropose any reclassification of any land classified as a conservation district by the state land use commission under chapter 205[.]" HRS § 343-5(a)(7).

<sup>2</sup> Requiring the processing of an EA for "[a]ny reclassification of any land classified as conservation district by the state land use commission under chapter 205, HRS[.]" HAR § 11-200-6(b)(1)(F).


*to determine whether an environmental impact statement shall be required[.]*

(Emphases added). An “Approving Agency” is the “agency that issues an approval prior to actual implementation of an action.” HAR § 11-200-2. Therefore, the Commission is the appropriate Approving Agency for Petitioners’ EA.

IV. CONCLUSION

Petitioners respectfully request that this Commission agree to be the Approving Agency for the EA that Petitioners shall prepare to assess the environmental effects of the DBA and the development of the Project.

DATED: Honolulu, Hawai‘i, December 19, 2018.



---

STEVEN S.C. LIM  
DEREK B. SIMON

Attorney for Petitioner  
KEVIN M. BARRY AND MONICA S.  
BARRY, TRUSTEES OF THE BARRY  
FAMILY TRUST DATED NOVEMBER 15,  
2006

**BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII**

**In the Matter of the Petition of**

KEVIN M. BARRY AND MONICA S.  
BARRY, TRUSTEES OF THE BARRY  
FAMILY TRUST DATED NOVEMBER 15,  
2006

To Amend the Land Use District Boundary of  
Certain Lands Situated at Kea'au, Puna,  
County of Hawai'i, State of Hawai'i,  
Consisting of 0.51 Acres from the  
Conservation District to the Agricultural  
District, Tax Map Key No. (3) 1-5-059:059.

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I hereby certify that due service of the within document was made by depositing the same with the United States Mail, postage prepaid, or by hand delivery, on December 19, 2018, addressed to:

LEO R. ASUNCION, JR., AICP  
Acting Director  
Office of Planning  
State of Hawai'i  
235 South Beretania Street, 6th Floor  
Honolulu, HI 96813

[Via Hand Delivery]

DAWN TAKEUCHI-APUNA, ESQ.  
Deputy Attorney General  
Department of the Attorney General  
425 Queen Street  
Honolulu, HI 96813

[Via Hand Delivery]

Attorney for State of Hawai'i Office of  
Planning

MICHAEL YEE, DIRECTOR  
Department of Planning, County of Hawai'i  
Aupuni Center  
101 Pauahi Street, Suite 3

[Via U.S. Mail, postage prepaid]

Hilo, HI 96720

JOSEPH K. KAMELAMELA, ESQ.  
Corporation Counsel  
Department of Corporation Counsel  
County of Hawai'i  
Hilo Lagoon Centre  
101 Aupuni Street, Unit 325  
Hilo, HI 96720

[Via U.S. Mail, postage prepaid]

Attorney for County of Hawai'i Planning  
Department

JOSEPH CLARKSON, CHAIR  
Windward Planning Commission  
County of Hawai'i  
Aupuni Center  
101 Pauahi Street, Suite 3  
Hilo, HI 96720

[Via U.S. Mail, postage prepaid]

ANGELIC MALIA HALL, ESQ.  
Deputy Corporation Counsel  
Department of Corporation Counsel  
County of Hawai'i  
Hilo Lagoon Centre  
101 Aupuni Street, Unit 325  
Hilo, HI 96720

[Via U.S. Mail, postage prepaid]

Attorney for County of Hawai'i Windward  
Planning Commission

DATED: Honolulu, Hawai'i, December 19, 2018.



---

DEREK B. Simon

Attorneys for Petitioners  
KEVIN M. BARRY AND MONICA S.  
BARRY, TRUSTEES OF THE BARRY  
FAMILY TRUST DATED NOVEMBER 15,  
2006