

CARLSMITH BALL LLP

STEVEN S.C. LIM 2505
DEREK B. SIMON 10612
MARIA F. FAGERSTROEM-RYDER 11024
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 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. A18-806

**PETITIONERS' MOTION FOR
ISSUANCE OF NEGATIVE
DECLARATION OR FINDING OF NO
SIGNIFICANT IMPACT;
MEMORANDUM IN SUPPORT OF
MOTION; EXHIBIT 1; CERTIFICATE OF
SERVICE**

**PETITIONERS' MOTION FOR ISSUANCE OF NEGATIVE DECLARATION
OR FINDING OF NO SIGNIFICANT IMPACT**

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 move this honorable Land Use

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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. BARRYS', TRUSTEES OF THE BARRY FAMILY TRUST DATED NOVEMBER 15, 2006 ("Petitioners"), Petition for Land Use District Boundary Amendment (the "Petition"), filed December 19, 2018, 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, from the SLU Conservation District to the SLU Agricultural District. Petitioners are pursuing the proposed District Boundary Amendment ("DBA") to allow for the development of a dwelling, related agricultural uses, and other accessory uses and improvements (the "Project"). However, prior to implementing DBA, Petitioners must first comply with the environmental review process established under Chapter 343, Hawai'i Revised Statutes ("HRS").

At its meeting of January 23, 2019, the Land Use Commission of the State of Hawai'i

(the “**Commission**”) voted to be the approving agency for the purposes of Petitioners’ compliance with Chapter 343, HRS. At its meeting on August 29, 2019, the Commission found that an anticipated negative declaration or anticipated finding of no significant impact (“**AFONSI**”) was warranted for the Project and directed Petitioners to file a notice thereof together with a draft environmental assessment (the “**Draft EA**”) with the State of Hawai‘i Department of Health, Office Environmental Quality Control (“**OEQC**”).

The Draft EA was published in the October 23, 2019 OEQC Environmental Notice, and republished in the November 8, 2019 OEQC Environmental Notice.¹ After reviewing the comments received on the Draft EA, Petitioners prepared a final environmental assessment (the “**Final EA**”), a copy of which is attached hereto as **Exhibit 1**. All substantive additions and revisions made to the Draft EA in response to the public comments received are shown as underlined text in the Final EA.

Through this Motion, and based upon the information and materials previously provided to the Commission and those attached hereto, Petitioners respectfully request that the Commission: (a) determine that a negative declaration or finding of no significant impact (“**FONSI**”) is warranted for the Project; and (b) direct Petitioners to file notice thereof together with the Final EA with OEQC pursuant to Hawaii Administrative Rules (“**HAR**”) §§ 11-200.1-5, 11-200.1-21 and 11-200.1-22.

II. ENVIRONMENTAL REVIEW IS REQUIRED.

Because the DBA proposes to reclassify land from the SLU Conservation District into the SLU Agricultural District, an environmental assessment is required pursuant to HRS §343-

¹ Out of an abundance of caution, Petitioners republished the Draft EA after experiencing some difficulties in directly notifying the early consultation parties regarding publication of the Draft EA prior to OEQC publishing the October 23, 2019 Environmental Notice.

5(a)(7)² and HAR § 11-200.1-9. 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. A FONSI IS WARRANTED FOR THE PROJECT.

On July 16, 2019, Petitioners submitted to the Commission their Memorandum Regarding Chapter 343, Hawai'i Revised Statutes Significance Criteria, which analyzed the Project under the significance criteria set forth in HAR § 11-200.1-13(b) (the “**Significance Memorandum**”). That analysis was based on, and supported by, the Draft EA. The Draft EA and the Significance Memorandum both concluded that the Project will not have significant impacts on the environment. Following publication of the Draft EA, Petitioners received seven (7) responses with minimal substantive comments, none of which objected to, contradicted or otherwise called into question the findings and conclusions in the Draft EA or the Significance Memorandum.

Based on the Final EA, Petitioners hereby request that the Commission: (a) determine that that the Project will likely not have significant impacts on the environment and that a FONSI is warranted for the Project pursuant to HAR § 11-200.1-13(b); and (b) file notice thereof

² “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).

together with the Final EA with OEQC pursuant to HAR §§ 11-200.1-5, 11-200.1-21 and 11-200.1-22.

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Motion be granted.

DATED: Honolulu, Hawai'i, March 13, 2020.



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