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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**

**PETITION FOR LAND USE DISTRICT  
BOUNDARY AMENDMENT;  
AFFIDAVIT OF DEREK B. SIMON;  
PETITIONERS' EXHIBITS "1" - "16";  
VERIFICATION OF MONICA S. BARRY;  
AFFIDAVIT OF DEREK B. SIMON  
ATTESTING TO SERVICE OF  
PETITION; AFFIDAVIT OF DEREK B.  
SIMON ATTESTING TO MAILING OF  
THE NOTIFICATION OF PETITION  
FILING; EXHIBITS "A"-"B";  
CERTIFICATE OF SERVICE**

**AMENDED PETITION FOR LAND USE DISTRICT BOUNDARY AMENDMENT;  
AFFIDAVIT OF DEREK B. SIMON; PETITIONERS' EXHIBITS "1" - "16";  
VERIFICATION OF MONICA S. BARRY; AFFIDAVIT OF DEREK B. SIMON  
ATTESTING TO SERVICE OF PETITION; AFFIDAVIT OF DEREK B. SIMON  
ATTESTING TO MAILING OF THE NOTIFICATION OF PETITION FILING;  
EXHIBITS "A" AND "B"; CERTIFICATE OF SERVICE**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION & BACKGROUND.....	1
II. CHAPTER 343 ENVIRONMENTAL REVIEW.....	4
III. DBA PETITION - AUTHORITY FOR RELIEF SOUGHT, PETITIONER, PETITION AREA, NOTIFICATION, SERVICE.....	6
A. Identification of Petitioner.....	7
B. Authorized Representatives.....	7
C. Description of Petition Area.....	7
IV. BOUNDARY AMENDMENT SOUGHT.....	8
V. PETITIONERS' PROPERTY INTEREST; AFFIDAVIT; EASEMENTS.....	9
A. Description of Easements.....	10
VI. THE PROJECT.....	10
A. Proposed Development.....	10
B. Development Projections.....	12
C. Financial Condition.....	13
VII. PETITION AREA.....	13
A. Description of Petition Area and Surrounding Area.....	13
1. Soil Classification.....	13
2. Agricultural Lands of Importance to the State of Hawai'i.....	14
3. Land Study Bureau.....	14
4. Flood and Drainage.....	14
5. Topography.....	15
VIII. ASSESSMENT OF IMPACTS.....	15
A. Flora and Fauna.....	16
B. Archaeological Resources.....	16
C. Cultural Resources.....	17
D. Recreational Resources.....	18
E. Scenic Resources.....	19
F. Agricultural Resources.....	19
IX. AVAILABILITY OF PUBLIC SERVICES AND FACILITIES.....	20
A. Educational Facilities.....	20
B. Parks and Recreational Resources.....	20
C. Wastewater.....	21
D. Solid Waste Disposal.....	21

# TABLE OF CONTENTS

(continued)

	Page
E. Drainage.....	22
F. Water.....	22
G. Transportation Systems .....	22
H. Public Utilities .....	23
I. Police, Fire, and Emergency Medical Services .....	23
J. Civil Defense .....	23
K. Public Agencies .....	24
X. LOCATION AND ADJACENT LAND USE DISTRICTS.....	24
XI. ECONOMIC IMPACTS OF THE PROPOSED BOUNDARY AMENDMENT.....	25
A. Economic Impacts and Agricultural Productivity .....	25
B. Housing Needs of Low Income, Low-Moderate Income and Gap Groups .....	26
XII. ASSESSMENT OF NEED FOR RECLASSIFICATION.....	26
XIII. CONFORMITY OF THE RECLASSIFICATION TO THE GOALS, OBJECTIVES, AND POLICIES OF THE HAWAI'I STATE PLAN, PRIORITY GUIDELINES AND FUNCTIONAL PLANS POLICIES .....	29
A. Goals, Objectives and Policies of the Hawai'i State Plan.....	29
1. HRS § 226-4 – State Goals.....	30
2. HRS § 226-5 – Objectives and Policies for Population.....	30
3. HRS § 226-6 – Objective and Policies for the Economy in General.....	30
4. HRS § 226-11 – Objectives and Policies for the Physical Environment - Land-based, Shoreline, and Marine Resources .....	31
5. HRS § 226-12 – Objective and Policies for the Physical Environment - Scenic, Natural Beauty, and Historic Resources .....	31
B. Hawaii State Plan Priority Guidelines .....	32
1. HRS § 226-103 – Economic Priority Guidelines .....	32
2. HRS § 226-104 – Population Growth and Land Resources Priority Guidelines.....	33
C. State Functional Plans.....	33
1. Energy Functional Plan.....	34
2. Agricultural Functional Plan.....	34
XIV. CONFORMITY OF THE RECLASSIFICATION TO THE OBJECTIVES AND POLICIES OF THE COASTAL ZONE MANAGEMENT PROGRAM .....	35
A. Recreational Resources.....	35

## TABLE OF CONTENTS

(continued)

	Page
B. Historic Resources .....	37
C. Scenic and Open Space Resources .....	37
D. Coastal Ecosystems .....	38
E. Economic Uses .....	39
F. Coastal Hazard.....	40
G. Managing Development.....	41
H. Public Participation.....	41
I. Beach Protection .....	42
J. Marine Resources .....	43
XV. CONFORMITY OF THE RECLASSIFICATION TO THE COUNTY GENERAL PLAN, COMMUNITY PLANS, AND ZONING DESIGNATIONS AND POLICIES .....	44
A. County General Plan.....	44
1. Economic Goals.....	45
2. Environmental Quality Goals .....	46
3. Environmental Quality Policies .....	46
4. Environmental Quality Standards.....	46
5. Historic Sites Goals .....	46
6. Historic Sites Policies .....	47
7. Flood Control And Drainage Goals .....	47
8. Flood Control and Drainage Policies.....	48
9. Flood Control and Drainage Standards.....	48
10. Natural Beauty Goals.....	49
11. Natural Beauty Policies .....	49
12. Natural Resources and Shoreline Goals .....	49
13. Natural Resources and Shoreline Policies .....	50
B. THE PUNA CDP .....	51
1. Managing Growth.....	51
2. Shoreline Area .....	52
C. County Zoning.....	53
XVI. HAWAIIAN CUSTOMARY AND TRADITIONAL RIGHTS .....	53
XVII. WRITTEN COMMENTS.....	54

## TABLE OF CONTENTS

(continued)

	Page
XVIII. NOTIFICATION OF PETITION FILING .....	54
XIX. CLIMATE CHANGE AND SUSTAINABILITY .....	54
A. Analysis Pursuant to HRS § 226-109 .....	54
B. Analysis Pursuant to HRS § 226-108 .....	56
XX. CONCLUSION.....	57

## TABLE OF AUTHORITIES

### Page(s)

#### Cases

<i>Ka Pa'akai 'O Ka 'Āina v. Land Use Comm'n</i> , 94 Hawai'i 31, 7 P.3d 1068 (2000).....	<i>passim</i>
--	---------------

#### Statutes

Haw. R. Stat. § 205 .....	2, 4, 6, 29
Haw. R. Stat. § 205-2.....	6
Haw. R. Stat. § 205-4.....	6
Haw. R. Stat. § 205-4(a) .....	9
Haw. R. Stat. § 205-5.....	28
Haw. R. Stat. § 205-5(a) .....	28
Haw. R. Stat. § 205-5(b).....	29
Haw. R. Stat. § 205A .....	3, 27, 35
Haw. R. Stat. § 205A-2.....	35
Haw. R. Stat. § 226-108.....	56
Haw. R. Stat. § 226-109.....	54, 55
Haw. R. Stat. § 226-11 .....	31, 32
Haw. R. Stat. § 226-12.....	32
Haw. R. Stat. § 226-4.....	30, 31
Haw. R. Stat. § 226-5.....	31
Haw. R. Stat. § 226-6.....	31
Haw. R. Stat. § 226-56.....	33
Haw. R. Stat. § 343 .....	<i>passim</i>
Haw. R. Stat. § 343-2.....	16

Haw. R. Stat. § 343-5(a)(7) .....	5
Haw. R. Stat. § 46-4.....	28
Haw. R. Stat. § 46-4(a) .....	28

#### **Other Authorities**

Haw. Admin. R. § 11-200.1-22(b).....	16
Haw. Admin. R. § 15-15-19 .....	8, 9, 57
Haw. Admin. R. § 15-15-35(b).....	7
Haw. Admin. R. § 15-15-46(3).....	9
Haw. Admin. R. § 15-15-48 .....	9
Haw. Admin. R. § 15-15-48(b).....	9
Haw. Admin. R. § 15-15-50(a)(1) .....	6
Haw. Admin. R. § 15-15-50(b).....	6
Haw. Admin. R. § 15-15-50(c)(1) .....	7
Haw. Admin. R. § 15-15-50(c)(2) .....	7
Haw. Admin. R. § 15-15-50(c)(3) .....	7
Haw. Admin. R. § 15-15-50(c)(4) .....	8
Haw. Admin. R. § 15-15-50(c)(5) .....	9
Haw. Admin. R. § 15-15-50(c)(6) .....	10
Haw. Admin. R. § 15-15-50(c)(7) .....	10
Haw. Admin. R. § 15-15-50(c)(8) .....	12
Haw. Admin. R. § 15-15-50(c)(9) .....	13
Haw. Admin. R. § 15-15-50(c)(10) .....	13
Haw. Admin. R. § 15-15-50(c)(11) .....	15
Haw. Admin. R. § 15-15-50(c)(12) .....	20
Haw. Admin. R. § 15-15-50(c)(13) .....	24

Haw. Admin. R. § 15-15-50(c)(14) .....	25
Haw. Admin. R. § 15-15-50(c)(15) .....	26
Haw. Admin. R. § 15-15-50(c)(16) .....	26
Haw. Admin. R. § 15-15-50(c)(17) .....	29
Haw. Admin. R. § 15-15-50(c)(18) .....	35
Haw. Admin. R. § 15-15-50(c)(19) .....	44
Haw. Admin. R. § 15-15-50(c)(20) .....	12
Haw. Admin. R. § 15-15-50(c)(21) .....	53
Haw. Admin. R. § 15-15-50(c)(22) .....	54
Haw. Admin. R. § 15-15-50(c)(23) .....	54
Haw. Admin. R. § 15-15-50(c)(24) .....	54
Haw. Admin. R. § 15-15-50(c)(25) .....	56
Haw. Admin. R. § 15-15-50(d) .....	54
Haw. Admin. R. § 15-15-52(b) .....	9
Haw. Cnty. Charter § 3-15 .....	44
Haw. Cnty. Code § 11-4(a)-(b) .....	26
Haw. Const. art. XII § 7 .....	17, 53
<a href="http://www.hawaiicounty.gov/pl-shoreline-access-big-island">http://www.hawaiicounty.gov/pl-shoreline-access-big-island</a> .....	19
<a href="https://www.pacioos.hawaii.edu/shoreline-slr-hawaii/">https://www.pacioos.hawaii.edu/shoreline-slr-hawaii/</a> .....	55



**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 Conservation Land Use District  
Boundary Into the Agricultural Land Use  
District For Approximately 0.51 Acres of  
Land, consisting of Tax Map Key No. (3) 1-5-  
059:059, situated at Kea'au, Puna, County and  
State of Hawai'i

**DOCKET NO. A18-806**

AMENDED PETITION FOR LAND USE  
DISTRICT BOUNDARY AMENDMENT

**AMENDED PETITION FOR LAND USE DISTRICT  
BOUNDARY AMENDMENT**

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, hereby respectfully petition this Honorable Land Use Commission of the State of Hawai'i (the "**Commission**") to amend the Land Use District Boundary of certain lands consisting of approximately 0.51 acres, situate at Kea'au, Puna, Island, County and State of Hawai'i, currently identified by Tax Map Key ("**TMK**") No. (3) 1-5-059:059 (the "**Petition Area**"), from the State Land Use ("**SLU**") Conservation District to the SLU Agricultural District ("**Proposed DBA**").

**I. INTRODUCTION & BACKGROUND**

Petitioners purchased the Petition Area in 2007 with the hopes of one day retiring amongst their many neighbors along the coastline of the Island of Hawai'i. Now retired, Petitioners are ready to fulfill that dream. Petitioners are pursuing the Proposed DBA to allow for

the construction of a modest dwelling with an associated, income-producing agricultural use that Petitioners will use as their primary personal residence (the “**Project**”).

The Petition Area has a very unique land-use planning history. The Petition Area is located within the Hawaiian Paradise Park subdivision on the shoreline in Kea’au. Consisting of 8,835 lots, Hawaiian Paradise Park is the second largest private subdivision in the United States and the second largest population center in the County of Hawai’i (“**County**”). See **Petitioners’ Exhibit 1** at 5, 12 (County Resolution No. 284-15, adopting 2015 Hawaiian Paradise Park Community Master Plan), attached hereto. Hawaiian Paradise Park was established in 1959, prior to the enactment of Hawai’i Revised Statutes (“**HRS**”) Chapter 205 and the County of Hawai’i Zoning Code. See **Petitioners’ Exhibit 2** at 4 (Planning Department’s Testimony in Support of Petitioner in Docket A7-419), attached hereto; **Petitioners’ Exhibit 3** at 2 (Department of Planning and Economic Development’s Testimony in Support of Petitioner in Docket A7-419).

Like the Petition Area, virtually all of the lots within Hawaiian Paradise Park are zoned A1-a (Agricultural with a minimum lot size of one acre) by the County. See **Petitioners’ Exhibit 4a** (Zoning Map – Hawaiian Paradise Park) & **Petitioners’ Exhibit 4b** (Zoning Map – Petition Area), attached hereto. Also like the Petition Area, virtually all of the privately-owned lots makai of Beach Road are approximately a half acre in size and zoned A1-a by the County. **Petitioners’ Exhibit 4c**, attached hereto. “Although zoned for agricultural, the most significant use of land [in Hawaiian Paradise Park] has been for residential purposes.” **Petitioners’ Exhibit 1** at 7.

When the SLU district boundaries were originally drawn, all of Hawaiian Paradise Park was placed in the SLU Agricultural District. However, as part of the Commission’s 1969 Five-

Year Boundary Review, all of the coastal parcels in Hawaiian Paradise Park, including the Petition Area, were reclassified into the SLU Conservation District (“**1969 Reclassification**”). See **Petitioners’ Exhibit 5** at 4, ¶12 (Decision and Order, Docket No. A76-419, dated August 17, 1977), attached hereto. The stated purpose of the 1969 Reclassification was to protect the shoreline from development, as it was initiated by the Commission before the enactment of HRS Chapter 205A, Hawai‘i’s Coastal Zone Management Program (“**CZMP**”). *Id.* at 7, ¶18.

In 1976, after the CZMP was enacted, the owners of virtually all of the coastal parcels in Hawaiian Paradise Park formed the Paradise Hui Hanalike Association and filed a *Petition for Boundary Amendment* in Commission Docket No. A76-419 (“**1976 Petition**”). See **Petitioners’ Exhibit 6**, attached hereto. Prior to filing the 1976 Petition, a number of the landowners were denied permits to develop single-family dwellings on their parcels by the State of Hawai‘i Department of Land and Natural Resources (“**DLNR**”). See **Petitioners’ Exhibit 5** at 5, ¶13. The 1976 Petition sought to reclassify the coastal parcels back into SLU Agricultural District to allow for the development of dwellings. The Petition Area was initially included in the 1976 Petition, but was subsequently removed after its then-owner could not be located. See **Petitioners’ Exhibit 6** at 5-6.

On August 17, 1977, the Commission issued its *Decision and Order* (“**1977 D&O**”) and reclassified the virtually all of the coastal parcels back to their original designation in the SLU Agricultural District. See **Petitioners’ Exhibit 5**. In doing so, the Commission found that coastal parcels were:

reclassified from Agricultural to Conservation by the Commission in 1969 in order to **protect the shoreline from development**. Since then, the Hawaii State Legislature has enacted the Coastal Zone Management Act, Chapter 205 A [sic], HRS, to **accomplish the same purpose**. In that the surrounding land is within the **Agricultural District**, in the subject property has **no special conservation value**, and in that the **Coastal Zone Management Act provides**

the protection for Hawaii's shoreline that the Commission intended to provide by classifying the subject property as within the Conservation District, the Commission finds that it would be unjust and inequitable to cause those landowners represented by Petitioner to continue to suffer limitations on their use of their property that the other landowners within the same subdivision and throughout the Puna District are not subject to and which are no longer necessary for the protection of the shoreline.

*Id.* at 7, ¶18 (emphases added). A significant number of the parcels reclassified under the 1977 D&O have since been developed with dwellings similar to that proposed by Petitioners, including the parcel immediately to the north of the Petition Area.

This *Amended Petition for Land Use District Boundary Amendment* (“**Amended Petition**”) seeks nothing more than to place Petitioners on par with their neighbors, and allow them enjoy their land in the same manner their neighbors are able to. This Amended Petition also seeks to correct what is essentially a land-use planning anomaly by placing the Petition Area back into the SLU Agricultural District – the Petition Area’s original and only appropriate SLU district designation. Moreover, unlike most, if not all of the numerous coastal parcels that have been developed with dwellings since being reclassified under the 1977 D&O, Petitioners have committed to implementing an appropriate agricultural use, as required under Chapter 205.

For all of the reasons set forth herein, Petitioners respectfully request that the Commission grant this Amended Petition and place the Petition Area back into the SLU Agricultural District – its original and only appropriate SLU district.

## **II. CHAPTER 343 ENVIRONMENTAL REVIEW**

Because the Proposed DBA seeks to reclassify SLU Conservation District land, this Amended Petition must comply with Hawai'i Administrative Rules (“**HAR**”) 15-15-50(b), which 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.

(Emphasis added).

On December 19, 2018, Petitioners filed their *Petition for Land Use District Boundary Amendment* with the Commission (the “**Original Petition**”). The Original Petition acknowledged that because Petitioners are proposing to reclassify the Petition Area from the SLU Conservation District to the SLU Agricultural District, environmental review under Hawai‘i Revised Statutes (“**HRS**”) Chapter 343 was triggered. *See* HRS § 343-5(a)(7). The Original Petition also acknowledged that this Amended Petition would be filed upon completion of the Chapter 343 process.

At its meeting of January 23, 2019, the Commission voted to be the approving agency for the purpose of Petitioners’ compliance with Chapter 343. On August 29, 2019, after being provided with a proposed draft environmental assessment (“**Draft EA**”), the Commission voted to find that an anticipated finding of no significant impact (“**AFONSI**”) was warranted. The Commission directed Petitioners to file a notice thereof together with the Draft EA with the State of Hawai‘i Department of Health, Office of Environmental Quality Control (“**OEQC**”). Notice of the Commission’s AFONSI and the Draft EA were published in the November 8, 2019 edition of OEQC’s *The Environmental Notice*.

After reviewing and responding to the public comments received on the Draft EA, Petitioners prepared and filed a proposed final environmental assessment (“**Final EA**”) with the Commission. On June 25, 2020, the Commission voted to issue a finding of no significant impact (“**FONSI**”) and directed Petitioners’ to file a notice thereof together with the Final EA

with OEQC. Notice of the Commission's FONSI and the Final EA were published in the July 8, 2020 edition of *The Environmental Notice*, copies of which are attached hereto as **Petitioners' Exhibit 7.**

Petitioners have therefore completed the Chapter 343 environmental review process and satisfied HAR § 15-15-50(b).

**III. DBA PETITION - AUTHORITY FOR RELIEF SOUGHT, PETITIONER, PETITION AREA, NOTIFICATION, SERVICE**

*HAR § 15-15-50(a)(1): State clearly and concisely the authorization or relief sought; and (2) Cite by appropriate reference the statutory provision or other authority under which commission authorization or relief is sought;*

The Commission is authorized to grant the relief sought herein pursuant to Chapter 205. Under HRS § 205-2, the Commission is charged with the classification of land into one of four SLU districts – Conservation, Agricultural, Rural, and Urban. The Commission is also specifically charged with considering requests to amend district boundaries that involve lands within the SLU Conservation District.

HRS § 205-4 provides, in pertinent part, that:

[A]ny person with a property interest in the land sought to be reclassified, may petition the **land use commission** for a change in the boundary of a district. This section applies to **all petitions** for changes in district boundaries of lands within **conservation districts**[.]

(Emphasis added). This Amended Petition seeks to reclassify approximately 0.51 acres of land currently within the SLU Conservation District into the SLU Agricultural District. Therefore, the Commission has the necessary statutory authority to consider this Amended Petition and grant the relief requested herein.

A. Identification of Petitioner.

*HAR § 15-15-50(c)(1): The exact legal name of each petitioner and the location of the principal place of business and if applicant is a corporation, trust, or association, or other organized group, the state in which the petitioner was organized or incorporated;*

Petitioners are KEVIN M. BARRY AND MONICA S. BARRY, TRUSTEES OF THE BARRY FAMILY TRUST DATED NOVEMBER 15, 2006, whose mailing address is P.O. Box 247, Kea'au, Hawai'i 96749. The Barry Family Trust was formed under the laws of the State of California and is the fee-simple owner of the Petition Area. See Petitioners' Exhibit 8 (Warranty Deed, dated June 25, 2007), attached hereto.

B. Authorized Representatives.

*HAR § 15-15-50(c)(2): The name, title, and address of the person to whom correspondence or communications in regard to the application are to be addressed.*

The law firm of CARLSMITH BALL LLP has been appointed to represent Petitioners on this Amended Petition and in the proceedings thereon pursuant to HAR § 15-15-35(b). Pursuant to HAR § 15-15-50(c)(2), all correspondences and communications in regard to this Amended Petition and Docket shall be addressed to and served upon:

Carlsmith Ball LLP  
Attn: Derek B. Simon, Esq.  
ASB Tower, Suite 2100  
1001 Bishop Street  
Honolulu, Hawai'i 96813

C. Description of Petition Area.

*HAR § 15-15-50(c)(3): Description of the subject property, acreage, and tax map key number, with maps, including the tax map, that identify the area stated in the petition. If the subject property is a portion of one or more tax map key parcels, or the petition proposes incremental development of the subject property on both increments of development, the petitioner shall include a map and description of the subject property and each increment in*

*metes and bounds prepared by a registered professional land surveyor.*

The Petition Area is a single tax map parcel located within the Hawaiian Paradise Park subdivision on the shoreline in Kea'au, Puna, County and State of Hawai'i, and consists approximately 0.51 acres of land. The Petition Area is currently identified by TMK No. (3) 1-5-059:059. Attached hereto as **Petitioners' Exhibit 9** is a tax map showing the Petition Area.

#### **IV. BOUNDARY AMENDMENT SOUGHT**

*HAR § 15-15-50(c)(4): The boundary amendment sought and present use of the property, including an assessment of conformity of the boundary amendment to the standards for determining the requested district boundary amendment.*

Petitioners are seeking to reclassify approximately 0.51 acres of land from the SLU Conservation District to the SLU Agricultural District. The Petition Area is currently undeveloped and vacant, and has not been used for any purpose since being purchased by Petitioners in 2007.

HAR § 15-15-19 sets forth the standards used by the Commission for determining SLU Agricultural District boundaries. HAR § 15-15-19 provides, in pertinent part, that the SLU Agricultural District "may include lands **surrounded by or contiguous to agricultural lands or which are not suited to agricultural and ancillary activities by reason of topography, soils, and other related characteristics[.]**" (Emphasis added). The Petition Area is contiguous with and surrounded entirely by SLU Agricultural District lands. See **Petitioners' Exhibit 10a** (SLU Map – Hawaiian Paradise Park), attached hereto; **Petitioners' Exhibit 10b** (SLU Map – Petition Area), attached hereto. All of the surrounding lands within Hawaiian Paradise Park were included within the SLU Agricultural District when the boundaries were first drawn, and the immediately adjacent coastal parcels were again placed in the SLU Agricultural District by the



Commission under the 1977 D&O. Thus, the Commission has twice determined that the general area surrounding the Petition Area meets the standards for the SLU Agricultural District.

Furthermore, as discussed in greater detail *infra*, the soils within the Petition Area are very poorly suited for agricultural purposes, as indicated by all relevant soil rating systems. See Section VII(A), *infra*. The Petition Area therefore meets the standards for the SLU Agricultural District under HAR § 15-15-19.

**V. PETITIONERS' PROPERTY INTEREST; AFFIDAVIT; EASEMENTS**

*HAR § 15-15-50(c)(5): The petitioner's property interest in the subject property. The petitioner shall attach as exhibits to the petition the following: (A) A true copy of the deed, lease, option agreement, development, or other document conveying to the petitioner a property interest in the subject property or a certified copy of a nonappealable final judgment of a court of competent jurisdiction quieting title in the petitioner; (B) If the petitioner is not the owner in fee simple of the subject property, or any part thereof, written authorization of all fee owners to file the petition and a true copy of the deed to the subject property; and (C) An affidavit of the petitioner or its agent attesting to its compliance with section 15-15-48.*

Petitioners have standing to file this Amended Petition pursuant to HRS § 205-4(a) and HAR § 15-15-46(3), which entitle any person with a property interest in the land sought to be reclassified to petition the Commission for a SLU district boundary amendment. Petitioners are the sole trustees of the fee-simple owner of the Petition Area and therefore have standing to file this Amended Petition. See Petitioners' Exhibit 8.

The Affidavit of Derek B. Simon, attorney with Carlsmith Ball LLP, attesting to Petitioners' compliance with HAR § 15-15-48 (Service of Petition) is filed with this Amended Petition. In accordance with HAR § 15-15-48(b), copies of this Amended Petition will also be served on any potential intervenors upon receipt of a notice of intent to intervene pursuant to HAR § 15-15-52(b).

A. Description of Easements.

*HAR § 15-15-50(c)(6): A description of any easements on the subject property, together with identification of the owners of the easements; a description of any other ownership interests shown on the tax maps.*

The Petition Area is not subject to any easements or other ownership interests.

VI. THE PROJECT

A. Proposed Development.

*HAR § 15-15-50(c)(7): Type of use or development being proposed, including without limitation, a description of any planned development, residential, golf course, open space, resort, commercial, or industrial use;*

The Project consists of a modest single-story dwelling, with an appropriate income-producing agricultural use, that Petitioners will use as their primary personal residence.

The potential range of agricultural uses for the Petition Area is significantly constrained by a number of factors, including the Petition Area's proximity to the ocean (and salt spray), size, and its very poor soils (discussed *infra*). With these constraints in mind, and recognizing that no agricultural use could be implemented if Petitioners were not permitted to construct a dwelling on the Petition Area, Petitioners will implement an apiary or bee colony. The apiary will be of appropriate size for the Petition Area and will produce honey and other products from bees wax and pollen for sale. Petitioners intend to use top-bar style hives because they are more convenient to use, create a more gentle habitat for the bees, and reduce the need to use chemicals to avoid and manage pests. Petitioners will initially begin with two hives, as it is suggested to begin with two hives so that each hive creates a model to compare the health of one hive to the other. As the colonies grow, more hives may be installed. Petitioners intend to sell honey, pollen, and wax products through a roadside stand, at local farmers' markets, and/or online.

Petitioners' hives will be contained within a "bee yard" that will include a garden of insectary plants, with an emphasis on native species, to supplement the bees' natural foraging habitat. Depending on availability, native plants used in the bee yard may include Pohinahina, Beach Naupaka, Drawf Naupaka, Ohia, Ulei, Maiapilo, Polynesian Heliotrope, or Shoreline Seapurslane. In addition, the bee garden will also include common herbs allowed to "bolt" in order to create more sources of pollen from the flowering herbs.

Petitioners' apiary will benefit local agriculture beyond the honey, pollen and wax products produced and sold by Petitioners. According to the University of Hawai'i Honeybee Project, "introduced pollinators, especially the honeybee (*Apis mellifera*), play a crucial role in the sustainability and diversification of the local agriculture" in Hawai'i, and "honeybees are the most abundant social insect in Hawaii, and their contribution to crop pollination is undeniable."<sup>1</sup> According to the United States Department of Agriculture, National Agricultural Statistics Service, Hawai'i is one of the top three states across the nation in honey production, per colony, due in large measure to year round optimal weather conditions and an abundance of different plant types.<sup>2</sup>

The dwelling will include a two-car garage, a lanai on its makai side facing the Pacific Ocean, a courtyard on the mauka side fronting Paradise Ala Kai Drive, possibly a small swimming pool in the future, infrastructure, and landscaping. Access to and from the nearest government road and the Petition Area is provided via Paradise Ala Kai Drive.

The dwelling will be sited towards the ocean, but well behind the shoreline. The style of the dwelling will be contemporary Hawaiian consistent with the overall style of homes in Hawaiian Paradise Park. The landscaping plan for the Project will also be consistent with the

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<sup>1</sup> See <https://kohalacenter.org/docs/resources/hpsi/PollinatorsInHawaii.pdf>.

<sup>2</sup> Honey production statistics compiled and released by the United States Department of Agriculture, National Agricultural Statistics Service on March 19, 2020 through ISSN 1949-1492.

existing Hawaiian Paradise Park neighborhood, and will leave some exposed lava (if permitted by the Petition Area's topography) and include appropriate salt-tolerant ground cover and tropical plants. Although some common non-native species may be removed, appropriate native species may be planted and a narrow trail to the shoreline may be established, taking care to minimize any potential harm to native species.

The intent is that the Project will receive its potable water from a well drilled on site with treatment through a reverse-osmosis or similar purification system, although the Project will alternatively utilize a catchment system if necessary. Wastewater will be processed through a modern underground individual wastewater system ("IWS") designed by a licensed engineer and approved by the State of Hawai'i Department of Health ("DOH"). Electrical service is available in the area from Hawai'i Electric Light Company, Inc. ("HELCO"), although Petitioners intend to install a photovoltaic solar system that will allow the Project to be powered completely, or at least partially, "off-grid."

B. Development Projections.

*HAR § 15-15-50(c)(8): A statement of projected number of lots, lot size, number of units, densities, selling price, intended market, and development timetables.*

As discussed *supra*, the Project will consist of a dwelling and agricultural use on the approximately 0.51-acre Petition Area, to be used by Petitioners as their primary residence. The Project does not involve the subdivision of the Petition Area or multiple lots. Upon obtaining the Proposed DBA, and assuming issuance of the required permit(s) by the County, Petitioners expect the Project to be completed within approximately 18-24 months.<sup>3</sup>

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<sup>3</sup> Although not applicable because the Proposed DBA does not seek to reclassify the Petition Area into the SLU Urban District, pursuant to HAR § 15-15-50(c)(20), development of the Project will be completed in less than ten years.

C. Financial Condition.

*HAR § 15-15-50(c)(9): A statement describing the financial condition together with a current certified balance sheet and income statement as of the last calendar year, or if the petitioner is on a fiscal year basis, as of the end of the petitioner's last fiscal year, and a clear description of the manner in which the petitioner proposes to finance the proposed use or development.*

Petitioners have the financial ability to develop the Project. Petitioners' budget for the Project is \$400,000. Petitioners will utilize conventional lending to finance the Project.

Attached hereto as Petitioners' Exhibit 11 is a letter from HFS Federal Credit Union dated September 16, 2020, pre-approving Petitioners for a \$500,000 construction/permanent loan for the Project.

VII. PETITION AREA

A. Description of Petition Area and Surrounding Area.

*HAR § 15-15-50(c)(10): Description of the subject property and surrounding areas including the use of the property over the past two years, the present use, the soil classification, the agricultural lands of importance to the State of Hawai'i classification (ALISH), the Land Study Bureau productivity rating, the flood and drainage conditions, and the topography of the subject property.*

The Petition Area is located on the shoreline in the Puna District of the Island of Hawai'i. The Petition Area is currently undeveloped and vacant. Since being acquired by Petitioners in 2007, the Petition Area has not been utilized for any purpose.

1. Soil Classification.

The soil in and around the Petition Area is classified as Opihikao highly decomposed plant material. This is a well-drained, thin organic soil developed over pahoe-hoe bedrock. It is found from sea level to 1,000 feet in elevation and is rapidly permeable, with slow run-off and a slight erosion hazard. This soil is within subclass VIIc, which means it has **limitations making it unsuitable for cultivation and restrict its use for pasture, range, woodland, or wildlife.**

2. Agricultural Lands of Importance to the State of Hawai'i.

The State of Hawai'i Department of Agriculture has established three categories of Agricultural Lands of Importance to the State of Hawai'i ("ALISH"): Prime; Unique; and Other. Lands that do not fall into one of the three ALISH categories are listed as Unclassified. "Prime" land is the best suited for the production of food, feed, forage, and fiber crops. "Unique" land is used for the production of specific high-value food crops. "Other" land does not qualify as Prime or Unique, but is still of Statewide or local importance for the production of food, feed, fiber, and forage crops. "Unclassified" or soils without an ALISH classification are **not** considered agriculturally important lands.

The soils within the Petition Area are **Unclassified**. See Petitioners' Exhibit 12 (ALISH Map), attached hereto.

3. Land Study Bureau.

The Land Study Bureau ("LSB") overall master productivity rating system is based on the agricultural productivity of soils throughout the State, accounting for characteristics such as texture, slope, salinity, erodibility, and rainfall. The productivity ratings are used to designate each area as Class A, B, C, D or E, with Class A representing the most productive soils and Class E representing the least productive soils. Class E soils are considered "very poor" for agricultural production.

The soils within the Petition Area are classified "E" or "very poor" by the LSB rating system. See Petitioners' Exhibit 13 (LSB Map), attached hereto.

4. Flood and Drainage.

The Puna District receives an average of approximately 124 inches of rain annually, with most falling during the winter. According to the Flood Insurance Rate Map prepared by the Federal Emergency Management Agency ("FEMA"), National Flood Insurance Program, the

vast majority of the Petition Area is within the “X” Flood Zone. See **Petitioners’ Exhibit 14**, attached hereto. This means that this portion of the Petition Area is outside the 0.2 percent-annual-chance (500-year) flood zone. All Project improvements will be located within this portion of the Petition Area.

A small portion of the Petition Area along the shoreline is within the “VE” Flood Zone, with a base flood elevation of fifteen feet. See *id.* The “VE” Flood Zone, also known as the Coastal High Hazard Area, is the area subject to high velocity water, including waves and tsunamis, and is defined by the 1% annual chance (base) flood limits and wave effects of three feet or greater. No Project improvements will be located within this portion of the Petition Area.

5. Topography.

U.S. Geological Survey maps and Google Earth images indicate that elevations within the Petition Area range from 12 to 25 feet above mean sea level. The Petition Area is flat and grading can easily be conducted to balance cut and fill material for the graded area in order to avoid the need to import or export soils to and from the site. The Petition Area’s topography does not present any constraints on development of the Project.

**VIII. ASSESSMENT OF IMPACTS**

*HAR § 15-15-50(c)(11): An assessment of the impacts of the proposed use or development upon the environment, agriculture, recreational, cultural, historic, scenic, flora and fauna, groundwater, or other resources of the area. If required by chapter 343, HRS, either a finding of no significant impact after a review of an environmental assessment or an environmental impact statement conforming to the requirements of chapter 343, HRS, must be filed.*

As discussed *supra*, Petitioners have complied with Chapter 343. The Commission’s FONSI and the Final EA were published in the July 8, 2020 edition of OEQC’s *The Environmental Notice*. See Petitioners’ Exhibit 7. The Commission’s FONSI represents its

“determination based on an environmental assessment that the [Project] will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.” HRS § 343-2 (defining a FONSI as “determination based on an environmental assessment that the subject action will not have a significant effect[.]”); *see also* HAR § 11-200.1-22(b) (“If the . . . approving agency determines that a proposed action is not likely to have a significant effect, it shall issue a notice of a FONSI.”). The following summarizes the findings of the Final EA that supported the Commission’s determination the Project will not have a significant effects or impacts on the environment.

A. Flora and Fauna.

The Final EA determined that the Project will not adversely impact flora or fauna on or near the Petition Area. The Petition Area was systematically inspected for biological resources by Dr. Ron Terry of Geometrician Associates, LLC in May 2018. Dr. Terry’s findings were documented in a *General Botanical Survey and Vertebrate Fauna Assessment* dated May 2018 (“**Biological Survey**”), which was appended to the Final EA as Appendix 3 and summarized in Section 3.1.4.

The Biological Survey concluded that other than the hoary bat (which has previously been observed in Hawaiian Paradise Park, but **not** the Petition Area), no rare, threatened or endangered species of flora or fauna are known to exist on or near the Petition Area, and none will be affected by any Project activities. *See* Petitioners’ Exhibit 7, Appendix 3. Therefore, the Project will not adversely affect flora or fauna.

B. Archaeological Resources.

The Final EA determined that the Project will not adversely impact archaeological resources. To address potential impacts to archaeological resources, Petitioners retained ASM



Affiliates (“ASM”) to prepare an *Archaeological Filed Inspection* for the Petition Area, which was appended to the Final EA as Appendix 4 and summarized in Section 3.2.2.

ASM surveyed the Petition Area for archaeological resources on June 6, 2018. The survey revealed that no archaeological features are present on the surface of the Petition Area. ASM further determined that the likelihood of encountering subsurface resources is extremely remote given the exposed bedrock ground surface.

ASM also reviewed records on file with the DLNR’s State Historic Preservation Division (“SHPD”). SHPD’s records indicates that twenty-two properties within Hawaiian Paradise Park (totaling twenty-two acres) have previously been surveyed for archaeological resources. Each of those studies, all conducted at locations mauka of the Petition Area, reported negative findings with regards to the presence of archaeological sites and features. Therefore, the Project will not adversely affect archaeological resources.

C. Cultural Resources.

The Final EA determined that the Project will not adversely impact cultural resources or the exercise of Native Hawaiian customary and traditional rights protected under Article XII, section 7 of the Hawai’i State Constitution. As part of the Chapter 343 process, ASM prepared a *Ka Pa’akai Analysis*, which analyzed the potential for the Project to impact Native Hawaiian customary and traditional rights under the framework set forth in the Hawaii Supreme Court’s decision in *Ka Pa’akai ‘O Ka ‘Āina v. Land Use Comm’n*, 94 Hawai’i 31, 47, 7 P.3d 1068, 1084 (2000) (“*Ka Pa’akai*”). The *Ka Pa’akai Analysis* was appended to the Final EA as Appendix 5 and summarized in Section 3.2.3.

In *Ka Pa’akai*, the Hawai’i Supreme Court held that every State agency has a duty to preserve and protect native Hawaiian traditional and customary practices while reasonably accommodating competing private interests. Under the three-step *Ka Pa’akai* framework, prior

to an agency taking action that may impact native Hawaiian traditional and customary practices, the agency must make specific findings of fact and conclusions of law as to: “(1) the identity and scope of ‘valued cultural, historical, or natural resources’ in the affected area, including the extent to which traditional and customary native Hawaiian rights are exercised in the affected area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.” *Id.*, 7 P.3d at 1084.

Under the first step, ASM concluded that the Petition Area is located a considerable distance from any valued cultural, historical, or natural resources, other than the shoreline. The shoreline near the Petition Area is accessed by local fishermen to procure a variety of marine resources, and the collection of marine resources for subsistence purposes is a traditional and customary practice. Under the second step, ASM concluded that, while marine resources may be collected near the Petition Area for subsistence purposes, the Project will not adversely affect the exercise of that traditional and customary practices because it will not impact access to or the use of the shoreline. Because no impacts are expected, ASM did not recommend any mitigation measures under the third *Ka Pa'akai* step. Therefore, the Project will not adversely affect cultural resources or the exercise of traditional and customary practices.

D. Recreational Resources.

The Project will not adversely impact recreational resources. Despite the long coastline, there are few beaches in Puna, and none in the vicinity of the Petition Area. Along most of the Puna shoreline, ocean recreation consists primarily of fishing from the cliffs, with fisherman and opihi pickers access fishing and gathering spots all along the coast. Maps of public accesses produced by the County do not indicate any nearby official mauka-makai shoreline public

accesses along Paradise Ala Kai Drive.<sup>4</sup> However, an unpaved road located at the north end of Paradise Ala Kai Drive provides pedestrian access to the coast where one can then walk south along the coastline. There are also two County-owned parcels within a quarter mile of the Petition Area that also provide access to the coast. The Petition Area itself does not have an official or unofficial shoreline trail either above or below the sea cliff.

The Proposed DBA will not adversely affect any recreational resources, as access to and use of the shoreline will not be impacted. Petitioners are Hawai'i residents who are well aware of the rights of the public to utilize these areas and the cultural and subsistence importance of these practices.

E. Scenic Resources.

The County of Hawai'i General Plan contains Goals, Policies and Standards intended to preserve areas of natural beauty and scenic vistas from encroachment. The General Plan discusses view of Mauna Kea and Mauna Loa from various subdivisions as noted features of natural beauty in Puna, but among specific examples of natural beauty, it does not identify any features or views in or from the Hawaiian Paradise Park area.

No designated scenic vistas or viewplanes will be affected by the Project. Currently, heavy vegetation blocks all views through the Petition Area; development of a dwelling on the site will likely open up at least some coastal views. Construction and occupation of the Project will be in harmony with the rural-agricultural landscape of Hawaiian Paradise Park and will not adversely impact scenic resources.

F. Agricultural Resources.

The Proposed DBA will not adversely impact agricultural resources. The Petition Area is currently vacant and not being used for any agricultural purpose. Petitioners are unaware of the

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<sup>4</sup> See <http://www.hawaiicounty.gov/pl-shoreline-access-big-island>.

Petition Area ever having been used for agriculture, although the general area of Hawaiian Paradise Park was once used for ranch/grazing land until the late 1950s, when it was subdivided and sold as individual lots. Today, the neighborhood immediately surrounding the Petition Area consists primarily of existing dwellings and undeveloped lots with minimal, if any, agricultural activities occurring.

The Project will include an agricultural use (an apiary, as discussed *supra*), where none currently exist, and will therefore result in a relative increase in agricultural activities in the area. Given its small scale and the lack of intensive agriculture in the area, the Project will not impact any agricultural resources or impede potential future agricultural uses in Hawaiian Paradise Park.

#### **IX. AVAILABILITY OF PUBLIC SERVICES AND FACILITIES**

*HAR § 15-15-50(c)(12): Availability or adequacy of public services and facilities such as schools, parks, wastewater systems, solid waste disposal, drainage, water, transportation systems, public utilities, police and fire protection, civil defense, emergency medical service and medical facilities, and to what extent any public agency would be impacted by the proposed development or reclassification.*

##### **A. Educational Facilities.**

The Hawai'i State Department of Education ("DOE") operates the following public schools in the vicinity of the Petition Area: (a) Kea'au Elementary School; (b) Kea'au Intermediate/Middle School; and (c) Kea'au High School. In its public comment letter submitted as part of the Chapter 343 process, the DOE indicated that the Project is not anticipated to impact DOE schools or facilities. *See* Petitioners' Exhibit 7, Appendix 1b.

##### **B. Parks and Recreational Resources.**

The Puna District experiences a high demand for coastal recreation, especially in calmer shoreline areas near population centers. Despite the long coastline, there are few beaches in Puna and none in the vicinity of the Petition Area. Along most of the Puna shoreline, there is

moderate use of the rough and irregular shoreline, with ocean recreation near the Petition Area consisting primarily of fishing from the cliffs. The Project will not impact the public's right to access and utilize these areas for recreational purposes.

Existing parks and other recreational resources in close proximity to the Petition Area include two undeveloped shoreline park sites within Hawaiian Paradise Park. Within the greater Puna District, recreational opportunities include, *inter alia*, Hawai'i Volcanoes National Park, MacKenzie State Recreation Area, Lava Tree State Monument, and an undeveloped State parcel located adjacent to Honolulu Landing. The County-owned Isaac Kepo'okalani Hale Beach Park reopened in December 2018 after being affected by the Kilauea eruptions.

Maps of public access produced by the County do not indicate any nearby official mauka-makai shoreline public accesses along Paradise Ala Kai Drive.<sup>5</sup> However, an unpaved road located at the north end of Paradise Ala Kai Drive provides pedestrian access to the coast where one can then walk south along the coastline. There are also two County-owned parcels within a quarter mile of the Petition Area that also provide access to the coast. Fisherman and *opihi* pickers access fishing and gathering spots all along the coast. The Project will not impact access to or use of any recreational resources.

C. Wastewater.

The Petition Area is not serviced by a public wastewater utility. As a result, wastewater will be processed through a modern IWS. The system will be designed by a licensed engineer and approved by DOH.

D. Solid Waste Disposal.

During construction of the Project, all solid waste will be disposed of either directly by the contractor or through a private waste-hauling service. Upon completion, solid waste disposal

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<sup>5</sup> See <http://www.hawaiicounty.gov/pl-shoreline-access-big-island>.

and recycling will be provided by a private collection service, as the County does not offer curbside collection for the Petition Area. Given the size and scope of the Project, its construction and use will not adversely impact existing solid waste collection and disposal services/facilities.

E. Drainage.

At the time development is proposed, Petitioners and their engineer will determine whether the area of disturbance is sufficiently large to require a County grading permit or National Pollutant Discharge Elimination System permit. Minimal grading will be conducted to balance cut and fill material for the graded area in order to avoid the need to import or export soils to and from the site. Plans for grading will seek to minimize the potential for sedimentation, erosion, and pollution of coastal waters.

The general shoreline area in Hawaiian Paradise Park already supports a significant number of dwellings and is utilized by residents and the public to park vehicles and fish, and there are no reported water quality problems from these existing uses. Upon completion, Petitioners' dwelling will be similar to the existing dwellings on shoreline lots in the area and is not expected to contribute to sedimentation, erosion, or pollution of coastal waters.

F. Water.

Petitioners' intent is that the Project will receive its potable water from a well drilled on site, with treatment through a reverse-osmosis or similar purification system. If an on-site well proves to be impracticable or unfeasible, Petitioners will alternatively utilize a catchment system similar to the ones used throughout Hawaiian Paradise Park.

G. Transportation Systems.

The Petition Area is in relatively close proximity to Highway 130/Kea'au-Pahoa Road, which falls under the jurisdiction of the State of Hawai'i Department of Transportation. Access to the Petition Area is provided via Paradise Ala Kai Drive, which can be reached directly from

Highway 130 via Paradise Drive, as well as indirectly via Kaloli Drive. The Petition Area is not currently served directly by Hele-On Bus, the County's public bus service. The Project will not adversely impact any public transportation systems.

H. Public Utilities.

Electrical power to all of the lots in the vicinity of the Petition Area is provided by HELCO on overhead poles, which also support landline telephone service. However, Petitioners intend to install a photovoltaic solar system that will allow the Project to be powered completely, or at least partially, "off-grid." The Project will not adversely impact any public utilities.

I. Police, Fire, and Emergency Medical Services.

Police services are provided to the Petition Area via the Hawai'i County Police Department's Pahoa Station, which is located approximately 9.3 miles from the Petition Area at 15-2615 Kea'au-Pāhoa Road, Pāhoa, Hawai'i 96778. Hawai'i County Fire Department Station 18 is located within Hawaiian Paradise Park, approximately 3.7 miles from the Petition Area at 151575 Paradise Drive, Kea'au, Hawai'i 96749.

The closest hospital is the Hilo Medical Center, which is located approximately 20.6 miles from the Petition Area. Medical services are also available at the Puna Community Medical Center, located approximately 9.6 miles from the Petition Area. Emergency medical services are provided through the Hawai'i County Fire Department and American Medical Response. The Project will not adversely impact police, fire or emergency medical services.

J. Civil Defense.

The County of Hawai'i Civil Defense Agency ("CHCDA") is responsible for administering and operating various local, state, and federal civil defense programs for the County. This includes planning, preparing, and coordinating civil defense operations in meeting disaster situations and coordinating post-disaster recovery operations. The Project is not

anticipated to result in any specific civil defense concerns, and CHCDA did not respond to either Petitioners' requests for early consultation or for comments on the Draft EA as part of the Chapter 343 process.

K. Public Agencies.

The Proposed DBA will not affect population parameters in such a way as to have significant effects on public agencies. The Final EA concluded that the addition of one dwelling will result in no measurable adverse impact to or additional demand on public agencies or facilities such as schools, police or fire services, or recreational areas. *See* Petitioners' Exhibit 7 at 34.

X. LOCATION AND ADJACENT LAND USE DISTRICTS

*HAR § 15-15-50(c)(13): Location of the proposed use or development in relation to adjacent land use districts and any centers of trading and employment.*

The Petition Area is located on the flank of Kilauea in the ahupua'a of Kea'au within the Puna District. The Petition Area is flanked by similarly sized parcels, one of which contains an existing dwelling, and is adjacent to Paradise Ala Kai Drive on its mauka side and the Pacific Ocean on its makai side. With only a few rare exceptions, the Petition Area is surrounded entirely by with lands already within the SLU Agricultural District. *See* Petitioners' Exhibit 10a.

Hawaiian Paradise Park is the County's second largest population center and the Puna District has been the County's fastest-growing district over the last thirty years. According to the 2010 U.S. Census, the population in Puna was 45,326, a 66% increase over the 2000 count of 27,232. The basis of the economy of Puna has evolved from cattle ranching and sugar to diversified agriculture, various services for the growing populations commuting to Hilo, and tourism, which has been stimulated by being home to Kilauea, one of the world's most active



volcanoes. Many Puna subdivisions, including Hawaiian Paradise Park, are now partially bedroom communities for Hilo's workforce.

**XI. ECONOMIC IMPACTS OF THE PROPOSED BOUNDARY AMENDMENT**

*HAR § 15-15-50(c)(14): Economic impacts of the proposed reclassification, use, or development including, without limitation, the provision of any impact on employment opportunities, and the potential impact to agricultural production in the vicinity of the subject property, and in the county and State.*

**A. Economic Impacts and Agricultural Productivity.**

The Project will have a small but positive economic impact for the County. Development of the Project will increase the tax base, create temporary construction jobs for local residents, and boost the economy through construction industry purchases from local suppliers. When a multiplier effect is taken into consideration, this positive impact will be magnified, as construction employees will spend their construction-related income for food, housing, and other living expenses in the retail sector of the economy. These activities are consistent with and in furtherance of the overall economic development of the County.

The Project will not adversely impact agricultural production in the vicinity of the Petition Area, the County, or the State. The neighborhood surrounding the Petition Area consists primarily of existing dwellings and undeveloped lots, with minimal, if any, agricultural activities occurring. The Project consists of a single dwelling that will include an agricultural component (an apiary, as discussed *supra*), where none currently exists, and will therefore result in a relative increase in agricultural activities in the area. Given its small scale and the lack of intensive agriculture in the area, the Proposed DBA will not disturb any existing agricultural uses or impede or limit any potential future agricultural uses.

B. Housing Needs of Low Income, Low-Moderate Income and Gap Groups.

*HAR § 15-15-50(c)(15): A description of the manner in which the petitioner addresses the housing needs of low income, low-moderate income, and gap groups.*

As the Project consists of one dwelling and an agricultural use, its development will neither create a need for additional affordable housing, nor adversely impact the existing affordable housing stock. The Project is not subject to the County's affordable housing requirements under Section 11-4(a)-(b) of the Hawai'i County Code.

XII. ASSESSMENT OF NEED FOR RECLASSIFICATION

*HAR § 15-15-50(c)(16): An assessment of need for the reclassification based upon the relationship between the use or development proposed and other projects existing or proposed for the area and consideration of other similarly designated land in the area;*

HAR § 15-15-50(c)(16) requires an analysis of the "need" for the Proposed DBA based upon: (a) the relationship between the Project and "other projects existing or proposed for the area;" and (b) "consideration of other similarly designated land" – *i.e.*, SLU Agricultural District land – "in the area." See HAR § 15-15-50(c)(16). Both considerations make clear that the SLU Agricultural District is the only appropriate SLU district for the Petition Area.

First, as discussed *supra*, the Petition Area is within Hawaiian Paradise Park – the County's second largest population center. Existing development within Hawaiian Paradise Park in general, and immediate neighborhood surrounding the Petition Area in particular, consists of dwellings similar in size, style, and nature to that proposed by Petitioners. Petitioners expect that many of the currently vacant lots in Hawaiian Paradise Park will eventually be developed with similar dwellings. Thus, the Project is entirely consistent with the existing and anticipated future uses "in the area."

Second, virtually all of Hawaiian Paradise Park is within the SLU Agricultural District and zoned A1-a by the County. *See* Petitioners' Exhibit 10a; Petitioners' Exhibit 4a. When the SLU district boundaries were first drawn, all of Hawaiian Paradise Park was within the SLU Agricultural District. Today, out of the approximately 8,835 lots in Hawaiian Paradise Park, only seven lots are not within the SLU Agricultural District. That equates to 0.000792% of the lots in Hawaiian Paradise Park.<sup>6</sup> There is no basis, in sound land-use planning or otherwise, to either keep the Petition Area in the SLU Conservation District or require the Petition Area to be reclassified to any SLU district other than Agricultural, including the SLU Rural District.

The 1977 D&O notes that the coastal parcels were "reclassified from Agricultural to Conservation by the Commission in 1969 in order to protect the shoreline from development. Since then, the Hawaii State Legislature has enacted the Coastal Zone Management Act, Chapter 205 A [sic], HRS, to accomplish the same purpose." Petitioners' Exhibit 5 at 7. ¶18 (emphases added). In reclassifying the parcels, the Commission found that:

In that the surrounding land is within the Agricultural District, in the subject property has no special conservation value, and in that the Coastal Zone Management Act provides the protection for Hawaii's shoreline that the Commission intended to provide by classifying the subject property as within the Conservation District, the Commission finds that it would be unjust and inequitable to cause those landowners represented by Petitioner to continue to suffer limitations on their use of their property that the other landowners within the same subdivision and throughout the Puna District are not subject to and which are no longer necessary for the protection of the shoreline.

*Id.* (emphases added). A significant number of the parcels reclassified under the 1977 D&O have since been developed with dwellings similar to that proposed by Petitioners.

Critically, at the time the Commission reclassified the coastal parcels, the applicable land use regulations were substantially similar to those applicable today. For

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<sup>6</sup> Those seven lots were taken out of the SLU Agricultural District by the Commission during its 1969 Five-Year Boundary Review and not placed back into the SLU Agricultural District under the 1977 D&O.

example, like today, any dwelling located within the SLU Agricultural District had to be a farm dwelling used in connection with an agricultural use. *See id.* at 6, ¶17 (noting requirements of farm dwellings). Notwithstanding limitation, however, the 1977 D&O expressly notes that “[t]he landowners represented by the Petitioner do not intended to use their property for any agricultural use.” *Id.* Unlike the petitioners under the 1977 D&O, Petitioners here have committed to implementing an agricultural use.

Also like today, at the time of the 1977 D&O, Chapter 205 prohibited **the County** from allowing the subdivision or creation of lots smaller than one acre within the SLU Agricultural District. The Commission in 1977 appears to have rightly recognized that that limitation applies specifically to the County’s zoning powers, and **not** the Commission ability reclassify land, particularly where doing so is necessary to correct land-use planning anomalies and maintain consistency.

Today, HRS § 205-5 still does not restrict the Commission’s ability to reclassify the Petition Area to the SLU Agricultural District because it remains a limitation on the County’s zoning authority, and not the Commission redistricting authority. HRS § 205-5 – entitled “Zoning” – begins by referencing HRS § 46-4: “Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts.” HRS § 205-5(a) (emphases added). HRS § 46-4, also known as the Zoning Enabling Act,<sup>7</sup> is the State’s delegation of zoning authority to the counties.

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<sup>7</sup> HRS § 46-4(a) provides, in pertinent part, that “[z]oning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. . . . The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole.” HRS § 46-4.

With respect to County zoning within the SLU Agricultural District, HRS § 205-5(b) provides that “[t]he **minimum lot size** in agricultural districts **shall be determined by each county** by zoning ordinance, subdivision ordinance, or other lawful means; provided that the minimum lot size for any agricultural use shall not be less than one acre, except as provided herein.” (Emphasis added). In other words, HRS § 205-5(b) empowers the County to determine the minimum lot size in the Agricultural District, but prohibits **the County** from creating **new** lots smaller than one acre. Petitioners are not asking the County to create a new lot of less than one acre because the Petition Area has been a legally subdivided tax map parcel since 1959 and has been zoned A1-a by the County since its Zoning Code was first enacted. Petitioners are only asking the Commission to place the Petition Area **back into** the SLU Agricultural District, its original SLU district. Nothing in Chapter 205 prohibits the Commission from doing so.

**XIII. CONFORMITY OF THE RECLASSIFICATION TO THE GOALS, OBJECTIVES, AND POLICIES OF THE HAWAI'I STATE PLAN, PRIORITY GUIDELINES AND FUNCTIONAL PLANS POLICIES**

*HAR § 15-15-50(c)(17): An assessment of conformity of the boundary amendment to applicable goals, objectives, and policies of the Hawai'i state plan, chapter 226, HRS, and applicable priority guidelines and functional plan policies.*

A. Goals, Objectives and Policies of the Hawai'i State Plan.

The Hawai'i State Planning Act, found in HRS Chapter 226 (the “**State Plan**”), is a comprehensive guide for the future long-range development of the State of Hawai'i. Among other things, the State Plan's purposes are to identify the goals, objectives, policies and priorities for the State, provide a basis for allocating limited resources, and improve coordination between Federal, State and County agencies. The three themes underlying the State Plan are: (a)

individual and family self-sufficiency; (b) social and economic mobility; and (c) community or social well-being. *See* HRS § 226-3.

The State Plan also provides numerous State goals and specific objectives and policies to achieve its goals. The State goals include a strong, viable, stable and diverse economy, the development of physical environments that are beautiful, clean and unique, and that enhance the mental and physical well-being of the residents, and the physical, social, and economic well-being for the people of Hawai'i that nourishes a sense of community responsibility and participation. *See* HRS § 226-4. The Proposed DBA is consistent with the followings goals, objectives, and policies of the State Plan.

1. HRS § 226-4 – State Goals.

*(1) A strong, viable economy, characterized by stability, diversity, and growth, that enables the fulfillment of the needs and expectations of Hawaii's present and future generations.*

*(2) A desired physical environment, characterized by beauty, cleanliness, quiet, stable natural systems, and uniqueness, that enhances the mental and physical well-being of the people.*

*(3) Physical, social, and economic well-being, for individuals and families in Hawaii, that nourishes a sense of community responsibility, of caring, and of participation in community life.*

2. HRS § 226-5 – Objectives and Policies for Population.

*(b)(2) Encourage an increase in economic activities and employment opportunities on the neighbor islands consistent with community needs and desires.*

*(b)(3) Promote increased opportunities for Hawai'i 's people to pursue their socio-economic aspirations throughout the islands.*

3. HRS § 226-6 – Objective and Policies for the Economy in General.

*(a)(1) Increased and diversified employment opportunities to achieve full employment, increased income and job choice, and improved living standards for Hawaii's people, while at the same time stimulating the development and expansion of economic activities capitalizing on defense, dual-use, and science and*

*technology assets, particularly on the neighbor islands where employment opportunities may be limited.*

*(b)(9) Strive to achieve a level of construction activity responsive to, and consistent with, state growth objectives.*

*(b)(11) Encourage labor-intensive activities that are economically satisfying and which offer opportunities for upward mobility.*

*(b)(14) Stimulate the development and expansion of economic activities which will benefit areas with substantial or expected employment problems.*

4. HRS § 226-11 – Objectives and Policies for the Physical Environment - Land-based, Shoreline, and Marine Resources.

*(a)(1) Prudent use of Hawaii's land-based, shoreline, and marine resources.*

*(a)(2) Effective protection of Hawaii's unique and fragile environmental resources.*

*(b)(3) Take into account the physical attributes of areas when planning and designing activities and facilities.*

5. HRS § 226-12 – Objective and Policies for the Physical Environment - Scenic, Natural Beauty, and Historic Resources.

*(b)(3) Promote the preservation of views and vistas to enhance the visual and aesthetic enjoyment of mountains, ocean, scenic landscapes, and other natural features.*

*(b)(5) Encourage the design of developments and activities that complement the natural beauty of the islands.*

The Proposed DBA is in conformance with the above-quoted goals, objectives, and policies of the State Plan. HRS §§ 226-4, 226-5, 226-6, 226-11, and 226-12 in several respects. First, with respect to HRS § 226-4, the Project involves the construction of a modest dwelling and related agricultural use that will be in harmony with and maintain an existing physical environment that is beautiful, clean, quiet, and unique.

Second, with respect to HRS §§ 226-5 and 226-6, the Project will have a positive economic impact for the County through an increase in the tax base and the employment and

sales generated by construction. When a multiplier effect is taken into consideration, this positive impact will be magnified.

Third, with respect to HRS § 226-11, the Project's design and planning takes into account the physical attributes of the Petition Area and neighboring lands. The dwelling will be sited towards the ocean, but well behind the shoreline. Once completed, the Project will be in harmony with the existing homes along the coast in Hawaiian Paradise Park.

Finally, with respect to HRS § 226-12, no designated scenic vistas or viewplanes will be affected by the Project. There are some intermittent scenic views of the shoreline and sea along Paradise Ala Kai between the numerous existing homes. Currently, heavy vegetation blocks all views through the Petition Area and development of the Project will likely open up at least some coastal views.

B. Hawaii State Plan Priority Guidelines.

The proposed DBA conforms to the following goals, objectives and policies of the State Plan Priority Guidelines:

1. HRS § 226-103 – Economic Priority Guidelines.

*(a)(1) Seek a variety of means to increase the availability of investment capital for new and expanding enterprises.*

*(A) Encourage investments which:*

*(i) Reflect long term commitments to the State;*

*(ii) Rely on economic linkages within the local economy;*

*(iii) Diversify the economy;*

*(iv) Re-invest in the local economy;*

*(v) Are sensitive to community needs and priorities; and*

*(vi) Demonstrate a commitment to management opportunities to Hawai'i residents.*



2. HRS § 226-104 – Population Growth and Land Resources Priority Guidelines.

*(a)(1) Encourage planning and resource management to insure that population growth rates throughout the State are consistent with available and planned resource capacities and reflect the needs and desires of Hawai'i's people.*

*(b)(1) Encourage urban growth primarily to existing urban areas where adequate public facilities are already available or can be provided with reasonable public expenditures and away from areas where other important benefits are present, such as protection of important agricultural land or preservation of lifestyles.*

*(b)(2) Make available marginal or non-essential agricultural lands for appropriate urban uses while maintaining agricultural lands of importance in the agricultural district.*

*(b)(12) Utilize Hawaii's limited land resources wisely, providing adequate land to accommodate projected population and economic growth needs while ensuring the protection of the environment and the availability of the shoreline conservation lands, and other limited resources for future generations.*

The Proposed DBA is consistent with the State Plan Priority Guidelines in several respects. First, the Puna District has been the County's fastest-growing district over the last thirty years and Hawaiian Paradise Park is the County's second largest population center. Second, Hawaiian Paradise Park already has a significant number of existing dwellings, including along the coastline, and new dwellings continue to be built. Third, as discussed *supra*, the Petition Area's soils are very poorly suited for agricultural uses, thereby making the Petition Area marginal, non-essential agricultural land that is appropriate for the Project.

C. State Functional Plans.

The State Plan calls for the creation of functional plans to further define and implement the statewide goals, objectives, and policies set forth under the State Plan. *See* HRS § 226-56. Developed in the late 1980s and early 1990s, the State Functional Plans (the "SFPs") are the primary guidance tools for implementing the State Plan. While the State Plan establishes long-

term objectives for the State, the SFPs are intended to identify major State-wide concerns, define current strategies, identify major relationships, and provide strategies for departmental policies, programs, and priorities. The Proposed DBA is consistent with the following SFPs.

1. Energy Functional Plan.

The current Energy Functional Plan (“**EFP**”) was prepared by the State of Hawai‘i Department of Business, Economic Development and Tourism in 1991. The EFP recognizes the “[d]evelopment of alternative and renewable energy resources is essential for the displacement of oil and other fossil fuels as Hawaii’s primary energy source.” To that end, the EFP sets as an objective the “displace[ment of] oil and fossil fuels through alternate and renewable energy sources” (Objective B).

As discussed above, Petitioners intend to install a photovoltaic solar system that will allow the Project to be powered completely, or at least partially, “off-grid.” Therefore, Proposed DBA is consistent with the policies and objectives of the EFP.

2. Agricultural Functional Plan.

The current Agricultural Functional Plan (“**AFP**”) was prepared by the State of Hawai‘i, Department of Agriculture in 1991. The AFP set as an objective the “achievement of optimal contribution by agriculture to the state’s economy” (Objective D). More specifically, the AFP calls for the determination of “alternative agricultural uses of the land, water, infrastructure, and human resources presently committed to sugarcane and pineapple production” (Action D(1)(c)).

Although the Petition Area has never been used for commercial sugar or pineapple production, the Proposed DBA will support an “alternative agricultural use” of the land by providing a dwelling lot and agricultural use (an apiary) were none previously existed. Therefore, Proposed DBA is consistent with the policies and objectives of the AFP.

**XIV. CONFORMITY OF THE RECLASSIFICATION TO THE OBJECTIVES AND POLICIES OF THE COASTAL ZONE MANAGEMENT PROGRAM**

*HAR § 15-15-50(c)(18): An assessment of the conformity of the boundary amendment to objectives and policies of the coastal zone management program, chapter 205A, HRS.*

The CZMP, codified at HRS Chapter 205A establishes objectives and policies for the preservation, protection, and restoration of natural resources of the Coastal Zone Management Area. The Coastal Zone Management Area is defined as lands of the State and the area extending seaward from the shoreline to the limit of the State's police power and management authority, including the United States territorial sea.

The Special Management Area Rules of the County of Hawai'i ("SMA Rules") were established to implement the CZMP for the County. SMA Rule 9-6 adopts and implements the objectives and policies of the CZMP set forth in HRS § 205A-2. The Proposed DBA is consistent with the objectives and policies of the CZMP.<sup>8</sup>

A. Recreational Resources.

**Objective:** *Provide coastal recreational opportunities accessible to the public.*

**Policies:** *(a) Improve coordination and funding of coastal recreational planning and management; and*

*(b) Provide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by:*

*(i) Protecting coastal resources uniquely suited for recreational activities that cannot be provided in other areas;*

*(ii) Requiring replacement of coastal resources having significant recreational value including, but not limited to surfing sites, fishponds, and sand beaches, when such*

<sup>8</sup> Should the Commission grant the Proposed DBA and reclassify the Petition Area, Petitioners will process a Special Management Area Assessment with the County of Hawai'i Planning Department in compliance with Chapter 205A and SMA Rule 9. See Petitioners' Exhibit 16 (July 10, 2020 letter from Planning Department), attached hereto.

*resources will be unavoidably damaged by development; or requiring reasonable monetary compensation to the State for recreation when replacement is not feasible or desirable;*

*(iii) Providing and managing adequate public access, consistent with conservation of natural resources, to and along shorelines with recreational value;*

*(iv) Providing an adequate supply of shoreline parks and other recreational facilities suitable for public recreation;*

*(v) Ensuring public recreational uses of county, state, and federally owned or controlled shoreline lands and waters having recreational value consistent with public safety standards and conservation of natural resources;*

*(vi) Adopting water quality standards and regulating point and nonpoint sources of pollution to protect, and where feasible, restore the recreational value of coastal waters;*

*(vii) Developing new shoreline recreational opportunities, where appropriate, such as artificial lagoons, artificial beaches, and artificial reefs for surfing and fishing; and*

*(viii) Encouraging reasonable dedication of shoreline areas with recreational value for public use as part of discretionary approvals or permits by the land use commission, board of land and natural resources, and county authorities; and crediting such dedication against the requirements of section 46-6;*

The Proposed DBA is consistent with the objectives and policies related to recreational resources. The Proposed DBA will not adversely affect recreational opportunities accessible to the public, as access to and use of the shoreline will not be affected. The Petition Area does not have an official or unofficial shoreline trail either above or below the sea cliff; the area below the cliff is topographically difficult and no continuous access is possible. The pahoehoe shelf mauka of the sea cliff is easily walkable and is occasionally used by fishermen who are traversing the coast looking for ulua fishing or opihi gathering sites. Petitioners are Hawai'i residents who are

well aware of the rights of the public to utilize these areas and the cultural and subsistence importance of these practices.

B. Historic Resources.

**Objective:** *Protect, preserve and, where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture.*

**Policies:** (a) *Identify and analyze significant archeological resources;*

(b) *Maximize information retention through preservation of remains and artifacts or salvage operations; and*

(c) *Support state goals for protection, restoration, interpretation, and display of historic resources.*

The Proposed DBA is consistent with the objectives and policies related to historic resources. As discussed *supra*, ASM conducted an archaeological field inspection of the Petition Area. The field inspection revealed that no archaeological features are present on the surface of the Petition Area, and determined that the likelihood of encountering subsurface resources is extremely remote given the exposed bedrock ground surface. In the unlikely event that unanticipated archaeological resources are unearthed within the Petition Area, work in the immediate vicinity of those resources will be halted and the appropriate authorities notified. The Project is not expected to have an adverse effect on historical or archaeological resources.

C. Scenic and Open Space Resources.

**Objective:** *Protect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources.*

**Policies:** (a) *Identify valued scenic resources in the coastal zone management area;*

(b) *Ensure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;*

*(c) Preserve, maintain, and, where desirable, improve and restore shoreline open space and scenic resources; and*

*(d) Encourage those developments that are not coastal dependent to locate in inland areas.*

The Proposed DBA is consistent with the objectives and policies related to scenic and open space resources. No designated scenic vistas or view planes will be affected by the Project. Currently, heavy vegetation blocks all views through the Petition Area; development of a dwelling will likely open up at least some coastal views.

D. Coastal Ecosystems.

**Objective:** *Protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems.*

**Policies:** *(a) Exercise an overall conservation ethic, and practice stewardship in the protection, use, and development of marine and coastal resources;*

*(b) Improve the technical basis for natural resource management;*

*(c) Preserve valuable coastal ecosystems, including reefs, of significant biological or economic importance;*

*(d) Minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs; and*

*(e) Promote water quantity and quality planning and management practices that reflect the tolerance of fresh water and marine ecosystems and maintain and enhance water quality through the development and implementation of point and nonpoint source water pollution control measures.*

The Proposed DBA is consistent with the objectives and policies related to coastal ecosystems. The general coastal area in Hawaiian Paradise Park already supports hundreds of dwellings and is utilized by residents and property owners to park vehicles and fish, and there are no reported water quality problems from these uses. Upon completion, the Project will be similar to the existing dwellings on shoreline lots in the area, and is not be expected to contribute

to sedimentation, erosion, and pollution of coastal waters.

At the time development is proposed, Petitioners and their engineer will determine whether the area of disturbance is sufficiently large to require a County grading permit or National Pollutant Discharge Elimination System permit. Grading for the driveway and dwelling site will include practices to minimize the potential for sedimentation, erosion, and pollution of coastal waters.

E. Economic Uses.

**Objective:** *Provide public or private facilities and improvements to the State's economy in suitable locations.*

**Policies:** *(a) Concentrate coastal development in appropriate areas;*

*(b) Ensure that coastal development such as harbors and ports, and coastal related development such as visitor facilities and energy generating facilities, are located, designed, and constructed to minimize adverse social, visual, and environmental impacts in the coastal zone management area; and*

*(c) Direct the location and expansion of coastal dependent developments to areas presently designated and used for such developments and permit reasonable long-terms growth at such areas, and permit coastal dependent development outside of presently designated areas when:*

*(i) Use of presently designated locations is not feasible;*

*(ii) Adverse environmental effects are minimized; and*

*(iii) The development is important to the State's economy.*

The Proposed DBA is consistent with the objectives and policies related to economic uses. The Petition Area is situated along the coastline in Hawaiian Paradise Park. Hawaiian Paradise Park has been in continual stages of development for decades and a significant number of shoreline lots within Hawaiian Paradise Park already have dwellings of similar size to that proposed by Petitioners. In addition, the Project will provide a small, but positive economic

benefits to the County through an increase in the tax base and employment and sales generated by construction of the Project. When a multiplier effect is taken into consideration, this positive impact will be magnified.

F. Coastal Hazard.

**Objectives:** *Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence and pollution.*

**Policies:** *(a) Develop and communicate adequate information about storm wave, tsunami, flood, erosion, subsidence, and non-point source pollution hazards;*

*(b) Control development in areas subject to storm wave, tsunami, flood, erosion, hurricane, wind, subsidence, point and non-point pollution hazards;*

*(c) Ensure that developments comply with requirements of the Federal Flood Insurance Program; and*

*(d) Prevent coastal flooding from inland projects.*

The Proposed DBA is consistent with the objectives and policies related to coastal hazards. The majority of the Petition Area is located in Flood Zone "X," which represents areas outside of the 0.2% annual chance flood plain. A small portion of the Petition Area along the shoreline is within the "VE" Flood Zone, which is the area subject to high velocity water including waves and tsunamis, and is defined by the 1% annual chance (base) flood limits and wave effects of three (3) feet or greater. All Project improvements will be appropriately sited within the "X" Flood Zone and none will be located within the "VE" Flood Zone.

Petitioners commissioned a Coastal Erosion and Volcanic Hazard Report as part of the Chapter 343 process, which was appended to the Final EA as Appendix 2 and summarized in Section 3.1.1. See Petitioners' Exhibit 7, Appendix 2. The Coastal Erosion and Volcanic Hazard Report concluded that the Petition Area is suitable for the Project.



The Petition Area is within the County's tsunami inundation zone and is subject to tsunami evacuation. However, dwellings are very common along this portion of the coastline and the Project does not present any extraordinary or unusual tsunami risks.

G. Managing Development.

**Objective:** *Improve the development review process, communication, and public participation in the management of coastal resources and hazards.*

**Policies:** *(a) Use, implement, and enforce existing law effectively to the maximum extent possible in managing present and future coastal zone development;*

*(b) Facilitate timely processing of applications for development permits and resolve overlapping or conflicting permit requirements; and*

*(c) Communicate the potential short and long-term impacts of proposed significant coastal developments early in their life cycle and in terms understandable to the public to facilitate public participation in the planning and review process;*

The Proposed DBA is consistent with the objectives and policies related to managing development. Through the Chapter 343 process, as well as these proceedings, the Proposed DBA has and will continue to undergo review and decision by the Commission. Both processes provide opportunity for public review and comment. In addition, through these processes, the potential short- and long-term impacts of the Project have been identified and analyzed and, to the extent necessary, appropriate mitigation measures have been identified.

H. Public Participation.

**Objective:** *Stimulate public awareness, education, and participation in coastal management.*

**Policies:** *(a) Promote public involvement in coastal zone management processes;*

*(b) Disseminate information on coastal management issues by means of educational materials, published reports, staff contact, and public workshops for persons and organizations concerned*

*with coastal-related issues, developments, and government activities; and*

*(c) Organize workshops, policy dialogues, and site-specific mediations to respond to coastal issues and conflicts.*

The Proposed DBA is consistent with the objectives and policies related to public participation. As a part of the Chapter 343 process, Petitioners engaged in outreach efforts with community organizations, groups, interested individuals, and County and State agencies. That outreach started with the early consultation process and continued through the publication and dissemination of the Draft EA for comment to all relevant County, State and Federal agencies and organizations, as well as community organizations, interested individuals, and elected officials.

I. Beach Protection.

**Objective:** *Protect beaches for public use and recreation.*

**Policies:** *(a) Locate structures inland from the shoreline setback to conserve open space and to minimize loss of improvements due to erosion;*

*(b) Prohibit construction of private erosion-protection structures seaward of the shoreline, except when they result in improved aesthetic and engineering solutions to erosion at the sites and do not interfere with existing recreational and waterline activities;*

*(c) Minimize the construction of public erosion-protection structures seaward of the shoreline; and*

*(d) Prohibit private property owners from creating a public nuisance by inducing or cultivating the private property owner's vegetation in a beach transit corridor; and*

*(E) Prohibit private property owners from creating a public nuisance by allowing the private property owner's unmaintained vegetation to interfere or encroach upon a beach transit corridor.*

The Proposed DBA is consistent with the objectives and policies related to beach protection and recreation. The Petition Area does not have an official or unofficial shoreline trail

either above or below the sea cliff; the area below the cliff is topographically difficult and no continuous access is possible. The pahoehoe shelf mauka of the sea cliff is easily walkable and is occasionally used by fishermen who are traversing the coast looking for ulua fishing or opihi gathering sites. Petitioners are Hawai'i residents who are well aware of the rights of the public to utilize these areas and the cultural and subsistence importance of these practices. The Project will not impact public access to or use of the shoreline

The Project also does not involve the construction of erosion-protection structures and will not result in the creation of nuisances, through uncontrolled vegetation or otherwise. The future dwelling and all other Project improvements will be appropriately sited well behind the shoreline in order to protect them from coastal hazards, including erosion.

J. Marine Resources.

**Objective:** *Implement the State's ocean resources management plan.*

**Policies:** *(a) Exercise an overall conservation ethic, and practice stewardship in the protection, use, and development of marine and coastal resources;*

*(b) Assure the use and development of marine and coastal resources are ecologically and environmentally sound and economically beneficial;*

*(c) Coordinate the management of marine and coastal resources and activities management to improve effectiveness and efficiency;*

*(d) Assert and articulate the interests of the State as a partner with federal agencies in the sound management of ocean resources within the United States exclusive economic zone;*

*(e) Promote research, study, and understanding of ocean processes, marine life, and other ocean resources in order to acquire and inventory information necessary to understand how ocean development activities relate to and impact upon ocean and coastal resources; and*

(f) *Encourage research and development of new, innovative technologies for exploring, using, or protecting marine and coastal resources.*

The Proposed DBA is consistent with the objectives and policies related to marine resources. The general shoreline area in Hawaiian Paradise Park already supports hundreds of dwellings and is utilized by residents and property owners to park vehicles and fish, and there are no reported water quality problems from these uses. Upon completion, the Project will be similar to the existing dwellings on shoreline lots in the area, and will not be expected to contribute to sedimentation, erosion, or pollution of coastal waters.

At the time development is proposed, the Petitioners and their engineer will determine whether the area of disturbance is sufficiently large to require a County grading permit or National Pollutant Discharge Elimination System permit. Grading will include practices to minimize the potential for sedimentation, erosion and pollution of coastal waters.

**XV. CONFORMITY OF THE RECLASSIFICATION TO THE COUNTY GENERAL PLAN, COMMUNITY PLANS, AND ZONING DESIGNATIONS AND POLICIES**

*HAR § 15-15-50(c)(19): An assessment of conformity of the boundary amendment to the applicable county general plans, development or community plans, zoning designations and policies, and proposed amendments required.;*

The relevant County plans are the Hawai'i County General Plan (the "**General Plan**") and Puna Community Development Plan (the "**Puna CDP**"). The Proposed DBA is consistent with both the General Plan and the Puna CDP.

**A. County General Plan.**

The General Plan sets forth the County's long range policy for the comprehensive physical, economic, environmental, and socio-cultural well-being of the County. *See* Hawai'i County Charter § 3-15. The General Plan was adopted in 1989 and most recently revised in 2005. The General Plan's Land Use Allocation Guide Map designates the majority of the

Petition Area as Rural, as it does for virtually all of Hawaiian Paradise Park, with the Petition Area's makai-most portion designated as Open. For shoreline parcels, the County has consistently interpreted the portion designated as Open as covering only the forty-foot shoreline setback area. As discussed *supra*, there is already a significant number of dwellings along this stretch of the coastline and the Project will be in harmony with these existing dwellings.

The General Plan is organized into thirteen elements, each with its own set of policies, objectives, standards, and principles. The General Plan also includes discussions of the specific applicability of each element to the County's nine judicial districts. The Proposed DBA is consistent with the following objectives and policies.

1. Economic Goals.

*(a) Provide residents with opportunities to improve their quality of life through economic development that enhances the County's natural and social environments.*

*(b) Economic development and improvement shall be in balance with the physical, social, and cultural environments of the island of Hawaii.*

...

*(d) Provide an economic environment that allows new, expanded, or improved economic opportunities that are compatible with the County's cultural, natural, and social environment.*

The Proposed DBA is consistent with the foregoing economic goals of the General Plan. Development of the Project will increase the tax base, create temporary construction jobs for local residents, and boost the economy through construction industry purchases from local suppliers. When a multiplier effect is taken into consideration, this positive impact will be magnified, as construction employees will spend their construction-related income for food, housing, and other living expenses in the retail sector of the economy. These activities are consistent with and in furtherance of the overall economic development of the County.

2. Environmental Quality Goals.

*(a) Define the most desirable use of land within the County that achieves an ecological balance providing residents and visitors the quality of life and an environment in which the natural resources of the island are viable and sustainable.*

*(b) Maintain and, if feasible, improve the existing environmental quality of the island.*

*(c) Control pollution.*

3. Environmental Quality Policies.

*(a) Take positive action to further maintain the quality of the environment.*

4. Environmental Quality Standards.

*(a) Pollution shall be prevented, abated, and controlled at levels that will protect and preserve the public health and well being, through the enforcement of appropriate Federal, State and County standards.*

*(b) Incorporate environmental quality controls either as standards in appropriate ordinances or as conditions of approval.*

*(c) Federal and State environmental regulations shall be adhered to.*

The Proposed DBA is consistent with the foregoing environmental goals, policies, and standards of the General Plan, and will not have a substantial adverse effect on the environment or diminish the valuable natural resources of the region. The proposed dwelling, related agricultural use, and associated improvements will be compatible with the existing dwellings and uses throughout Hawaiian Paradise Park and the greater Puna community. All pertinent environmental regulations will be followed, including those relating to the mitigation of any potential water quality impacts.

5. Historic Sites Goals.

*(a) Protect, restore, and enhance the sites, buildings, and objects of significant historical and cultural importance to Hawaii.*

*(b) Appropriate access to significant historic sites, buildings, and objects of public interest should be made available.*

6. Historic Sites Policies.

*(a) Agencies and organizations, either public or private, pursuing knowledge about historic sites should keep the public apprised of projects.*

*(b) Amend appropriate ordinances to incorporate the stewardship and protection of historic sites, buildings and objects.*

*(c) Require both public and private developers of land to provide historical and archaeological surveys and cultural assessments, where appropriate, prior to the clearing or development of land when there are indications that the land under consideration has historical significance.*

*(d) Public access to significant historic sites and objects shall be acquired, where appropriate.*

The Proposed DBA is consistent with the foregoing goals and policies of the General Plan related to historic sites. As discussed *supra*, ASM prepared an Archaeological Filed Inspection as part of the 343 process, which included both a survey of the Petition Area and a review of records on file with SHPD. Based on the Archaeological Filed Inspection, the Final EA determined that the Project will not adversely affect archaeological and cultural resources. As also discussed *supra*, based on ASM's Ka Pa'akai Analysis, the Final EA concluded that the Project will not adversely impact cultural resources or the exercise of traditional and customary practices.

7. Flood Control And Drainage Goals.

*(a) Protect human life.*

*(b) Prevent damage to man-made improvements.*

*(c) Control pollution.*

*(d) Prevent damage from inundation.*

*(e) Reduce surface water and sediment runoff.*

*(f) Maximize soil and water conservation.*

8. Flood Control and Drainage Policies.

*(a) Enact restrictive land use and building structure regulations in areas vulnerable to severe damage due to the impact of wave action. Only uses that cannot be located elsewhere due to public necessity and character, such as maritime activities and the necessary public facilities and utilities, shall be allowed in these areas.*

...

*(g) Development-generated runoff shall be disposed of in a manner acceptable to the Department of Public Works and in compliance with all State and Federal laws.*

9. Flood Control and Drainage Standards.

*(a) "Storm Drainage Standards," County of Hawaii, October, 1970, and as revised.*

*(b) Applicable standards and regulations of Chapter 27, "Flood Control," of the Hawaii County Code.*

*(c) Applicable standards and regulations of the Federal Emergency Management Agency (FEMA).*

*(d) Applicable standards and regulations of Chapter 10, "Erosion and Sedimentation Control," of the Hawaii County Code.*

*(e) Applicable standards and regulations of the Natural Resources Conservation Service and the Soil and Water Conservation Districts.*

The Proposed DBA is consistent with the foregoing goals, policies and standards of the General Plan related to flood control and drainage. The dwelling will be sited towards the ocean, but well behind the shoreline. This will keep the Project entirely within the portion of the Petition Area in the "X" Flood Zone or outside of the 500-year floodplain as determined by FEMA's Flood Insurance Rate Maps. See Petitioners' Exhibit 14. The Project will conform to all applicable County drainage regulations and policies.



10. Natural Beauty Goals.

*(a) Protect, preserve and enhance the quality of areas endowed with natural beauty, including the quality of coastal scenic resources.*

*(b) Protect scenic vistas and view planes from becoming obstructed.*

*(c) Maximize opportunities for present and future generations to appreciate and enjoy natural and scenic beauty.*

11. Natural Beauty Policies.

*(a) Increase public pedestrian access opportunities to scenic places and vistas.*

*(b) Develop and establish view plane regulations to preserve and enhance views of scenic or prominent landscapes from specific locations, and coastal aesthetic values.*

The Proposed DBA is consistent with the foregoing goals and policies of the General Plan related to natural beauty. The Project will be consistent with the long-standing uses and developments within Hawaiian Paradise Park, and will not cause any adverse impacts to its scenic value and natural beauty, or impede public access.

12. Natural Resources and Shoreline Goals.

*(a) Protect and conserve the natural resources from undue exploitation, encroachment and damage.*

*(b) Provide opportunities for recreational, economic, and educational needs without despoiling or endangering natural resources.*

*(c) Protect and promote the prudent use of Hawaii's unique, fragile, and significant environmental and natural resources.*

*(d) Protect rare or endangered species and habitats native to Hawaii.*

*(e) Protect and effectively manage Hawaii's open space, watersheds, shoreline, and natural areas.*

*(f) Ensure that alterations to existing land forms, vegetation, and construction of structures cause minimum adverse effect to water resources, and scenic and recreational amenities and minimum danger of floods, landslides, erosion, siltation, or failure in the event of an earthquake.*

13. Natural Resources and Shoreline Policies.

*(a) Require users of natural resources to conduct their activities in a manner that avoids or minimizes adverse effects on the environment.*

*(c) Maintain the shoreline for recreational, cultural, educational, and/or scientific uses in a manner that is protective of resources and is of the maximum benefit to the general public.*

*(d) Protect the shoreline from the encroachment of man-made improvements and structures.*

*(h) Encourage public and private agencies to manage the natural resources in a manner that avoids or minimizes adverse effects on the environment and depletion of energy and natural resources to the fullest extent.*

*(p) Encourage the use of native plants for screening and landscaping.*

*(r) Ensure public access is provided to the shoreline, public trails and hunting areas, including free public parking where appropriate.*

*(u) Ensure that activities authorized or funded by the County do not damage important natural resources.*

The Proposed DBA is consistent with the foregoing goals and policies of the General Plan related to natural resources and the shoreline. The proposed dwelling will be sited towards the ocean, but well behind the shoreline. This location and orientation will ensure that the dwelling and associated facilities will not affect shoreline resources or be damaged by waves or tides. As detailed in the Final EA, no rare native vegetation, rare or endangered species, coastal resources, or historic sites will be adversely affected by the Project.

B. THE PUNA CDP.

The Puna CDP was first adopted as Ordinance No. 08-116 on September 10, 2008, and later amended by successive actions through Ordinance No. 10-104 on November 4, 2010, Ordinance Nos. 11-51, 11-52, and 11-53 on June 8, 2011, and Ordinance Nos. 11-117 and 11-118 on December 6, 2011.

Through an extensive public involvement process, the Puna CDP identifies the following three overarching themes that correspond with the top three issues faced in the region:

- **Mālama I Ka ‘Āina** establishes how the contextual natural, historic and cultural features of Puna should be preserved and respected. The goals, objectives and implementing actions under this theme address cultural and historic sites and districts; forest lands and unique geological features; scenic resources; and drainage, aquifers and coastal water quality.
- **Growth Management** addresses how the future pattern of human settlement and land use should be shaped to respect that context and support the desired quality of life for Puna’s residents. The goals, objectives and implementing actions under this theme address the land use pattern; agricultural and economic development; public services, social services and housing; parks and recreation; and renewable energy and energy efficiency.
- **Transportation** focuses on sustainable approaches to transportation to support the goals of the two above themes. The goals, objectives and implementing actions under this theme address mass transit and alternative travel modes, travel demand management and roadway connectivity and safety.

The Proposed DBA is consistent with the following goals, objectives, policies and standards of the Puna CDP.

I. Managing Growth.

*Goal: Puna retains a rural character while it protects its native natural and cultural resources . . . . The quality of life improves and economic opportunity expands for Puna’s residents . . . . Exposure to high risk from natural hazards situations is reduced . . . . Native vegetation, coastal and historic resources are provide new forms of protection . . . . Inappropriate and disproportionate County zoning can be adjusted in order to maintain and increase the quality of life and to preserve valued natural and cultural resources in the district.*

Objectives and Policies: *Limit the size of dwellings and accessory uses that are allowed in non-conforming, agriculturally-zoned subdivisions to discourage excessive lot clearance and speculative building practices.*

The Proposed DBA is consistent with the Puna CDP's goals, objectives, and policies related to land use. The Project involves the construction of a modest dwelling that conforms to the objective of limiting the size of dwellings and accessory uses that are allowed in agriculturally-zoned subdivisions to discourage excessive lot clearance and speculative building practices. The Project will not degrade the rural-agricultural character of the area, as the neighborhood is already composed of uses and dwellings of a similar size and style. In addition, the dwelling will be set back from the shoreline in order to reduce its exposure to coastal hazards. As detailed in the Final EA, no rare native vegetation, rare or endangered species, coastal resources, or historic sites will be adversely affected.

2. Shoreline Area.

Goal: *Exposure of development to the risks of shoreline subsidence and coastal flooding is reduced.*

Objectives and Policies: *Expand the scope of regulations and review procedures for shoreline development to consider dynamic and interrelated potential hazards to development . . . . Strengthen the capacity of the County to identify important shoreline resources and evaluate development regulations and proposed developments in the shoreline area.*

The Proposed DBA is consistent with the Puna CDP's goals, objectives, and policies related to the shoreline area. Upon completion, the Project will be similar to the existing dwellings on shoreline lots in Hawaiian Paradise Park and is not anticipated to contribute to any potential hazards that larger shoreline developments may impose. In addition, as discussed *supra*, the proposed dwelling will be appropriately sited to reduce the risk of shoreline subsidence, coastal flooding, and other related hazards.

C. County Zoning.

The Petition Area is zoned A1-a (Agricultural with a minimum lot size of 1 acre) by the County. *See* Petitioners' Exhibit 4b. Development of the Project is consistent with the A-1a zoning district.

**XVI. HAWAIIAN CUSTOMARY AND TRADITIONAL RIGHTS**

*HAR § 15-15-50(c)(21): A statement addressing Hawaiian customary and traditional rights under Article XII, section 7 of the Hawaii State Constitution;*

The Project will not adversely impact cultural resources or the exercise of Native Hawaiian customary and traditional rights protected under Article XII, section 7 of the Hawai'i State Constitution. As discussed *supra*, ASM prepared a Ka Pa'akai Analysis to analyze the potential for the Project to impact Native Hawaiian customary and traditional rights under the three-step framework set forth in the Hawaii Supreme Court's decision in *Ka Pa'akai 'O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 47, 7 P.3d 1068, 1084 (2000).

Under the first *Ka Pa'akai* step, ASM concluded that the Petition Area is located a considerable distance from any valued cultural, historical, or natural resources, other than the shoreline. The shoreline near the Petition Area is accessed by local fishermen to procure a variety of marine resources, and the collection of marine resources for subsistence purposes is a traditional and customary practice. Under the second step, ASM concluded that, while marine resources may be collected near the Petition Area for subsistence purposes, the Project will not adversely affect the exercise of that traditional and customary practices because it will not impact access to or the use of the shoreline. Because no impacts are expected, ASM did not recommend any mitigation measures under the third *Ka Pa'akai* step. Therefore, the Project will not adversely affect cultural resources or the exercise of traditional and customary practices.

## **XVII. WRITTEN COMMENTS**

*HAR § 15-15-50(c)(22): Any written comments received by the petitioner from governmental and non-governmental agencies, organizations, or individuals in regards to the proposed boundary amendment.*

Petitioners' Exhibit 7 is a copy of the Commission's FONSI and the Final EA completed for the Proposed DBA. Appendix 1a to the Final EA contains the early consultation response letters Petitioners received, as well as Petitioners' responses thereto; Appendix 1b contains the public comment letters on the Draft EA that Petitioners received, as well as Petitioners' responses thereto. *See* Petitioners' Exhibit 7, Appendices 1a & 1b.

## **XVIII. NOTIFICATION OF PETITION FILING**

*HAR § 15-15-50(c)(23): A copy of the notification of petition filing pursuant to [HAR § 15-15-50(d)].*

Attached hereto as **Petitioners' Exhibit 15** is a true and correct copy of the Notification of Petition Filing for this Amended Petition, as required under HAR § 15-15-50(d). Copies of said Notification were sent to all persons included on the mailing lists provided by the Commission's Chief Clerk.

## **XIX. CLIMATE CHANGE AND SUSTAINABILITY**

### **A. Analysis Pursuant to HRS § 226-109.**

*HAR § 15-15-50(c)(24): A statement and analysis pursuant to section 226-109, HRS, addressing climate change related threats to the proposed development and proposed mitigation measures. The statement and analysis shall address, but not be limited to, the following issues:*

*(A) The impacts of sea level rise on the proposed development;*

*(B) Infrastructure adaptations to address the impacts of climate change including sewer, water and roadway improvements;*

(C) *The overall carbon footprint of the proposed development and any mitigation measures or carbon footprint reductions proposed; and*

(D) *The location of the proposed development and the threats imposed to the proposed development by sea level rise, based on the maps and information contained in the Hawaii Sea Level Rise Vulnerability Adaptation report and the proposed mitigation measures taken to address those impacts.*

The Project is consistent with HRS § 226-109's priority guidelines related to climate change adaptation. The Final EA included a graphic from the Hawai'i Sea Level Rise Viewer showing the general vicinity of the Petition Area. *See* Petitioners' Exhibit 7 at 15, Figure 4. As noted in the Final EA, based on that graphic, "only the immediate shoreline area would be affected [by the 3.2 feet of sea-level rise predicted by 2100<sup>9</sup>]. In reality, passive flooding would only affect the area *makai* of the cliffs" fronting the Petition Area. *See id.* at 15. As discussed throughout this Amended Petition, the dwelling will be appropriately sited well behind the shoreline.

Petitioners also commissioned a Coastal Erosion and Volcanic Hazard Report as part of the Chapter 343 process, which was appended to the Final EA as Appendix 2 and summarized in Section 3.1.1. *See id.*, Appendix 2. The Coastal Erosion and Volcanic Hazard Report included a detailed assessment of the threat of sea-level rise to the Project, and concluded that:

The high cliff fronting the [Petition Area] mitigates the impact of Sea Level Change, a major concern for low-lying coastlines elsewhere in the State. The durability and height of this cliff shows that [sea-level rise] and land subsidence will not cause significant shoreline transgression in this area, although it will slowly increase the erosive action of storm waves over the next several decades and centuries.

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<sup>9</sup> This prediction is based upon the assumption that greenhouse gas emissions continue to increase at their current rate. *See* <https://www.pacioos.hawaii.edu/shoreline/slr-hawaii/>.

Petitioners' Exhibit 7, Appendix 2 at 16. Based on a site-specific assessment, the Coastal Erosion and Volcanic Hazard Report concluded the relative threat of sea-level rise to the Project is "low." *Id.* at 17.

The Project requires minimal infrastructure as it consists of only a single dwelling and an agricultural use. The dwelling and all Project improvements, including infrastructure, will be appropriately sited behind the shoreline and away from coastal hazards and climate-related threats. Petitioners also intend to install a photovoltaic solar system that will allow the Project to be powered completely, or at least partially, "off-grid," thereby reducing its already negligible carbon footprint.

B. Analysis Pursuant to HRS § 226-108.

*HAR § 15-15-50(c)(25): A statement and analysis addressing the proposed development's adherence to sustainability principles and priority guidelines and climate change issues as contained in section 226-108, HRS, the Hawai'i State Plan (Sustainability), and smart growth principles, including, but not limited to:*

- (A) Walkability;*
- (B) Accessibility to alternate forms of transportation;*
- (C) Transit oriented development opportunities;*
- (D) Green infrastructure, including water recharge and reuse and water recycling;*
- (E) Mitigation of heat island effects; and,*
- (F) Urban agricultural opportunities.*

The Project is consistent with HRS § 226-108's guidelines and priorities related to sustainability. The Project consists of a dwelling and associated agricultural use located in the rural-agricultural community of Hawaiian Paradise Park. For that reason, while the neighborhood immediately surrounding the Petition Area is generally walkable, the Petition Area is not within walkable distance of stores, places of work or other business, and does not present a transit oriented development opportunity.



With respect to green infrastructure, Petitioners will utilize a photovoltaic solar system that will allow the Project to be powered completely, or at least partially, "off-grid. Moreover, because of the rural-agricultural nature of the community, as well as the limited size and scope of the Project, the Project will not contribute to or need to mitigate any heat island effect. Although not an urban development, Petitioners will be implementing an agricultural use (apiary, as discussed *supra*) as part of the Project.

**XX. CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that the Commission find that the Proposed DBA is consistent with Chapter 205 and meets the standards for determining the SLU Agricultural District boundaries pursuant to HAR § 15-15-19, and, therefore, grant the requested reclassification of the Petition Area back into the SLU Agricultural District.

DATED: Honolulu, Hawai'i, November 4, 2020.



STEVEN S.C. LIM  
DEREK B. SIMON

Attorneys 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.

DOCKET NO. A18-806

**AFFIDAVIT OF DEREK B. SIMON**

**AFFIDAVIT OF DEREK B. SIMON**

DEREK B. SIMON, being first duly sworn on oath, deposes and says:

1. Affiant is one of the attorneys for Petitioners KEVIN M. BARRY AND MONICA S. BARRY, TRUSTEES OF THE BARRY FAMILY TRUST DATED NOVEMBER 15, 2006 ("**Petitioners**"), is licensed to practice in the State of Hawaii, is duly authorized to make this affidavit, and does so upon personal knowledge and belief. I have personal knowledge of the matters set forth herein and am qualified and competent to make this affidavit;

2. Attached hereto as Petitioners' Exhibit 1 is a true and correct copy of County of Hawai'i ("**County**") Resolution No. 284-15, adopting the 2015 Hawaiian Paradise Park Community Master Plan, obtained by my office from the County's online records database;

3. Attached hereto as Petitioners' Exhibit 2 is a true and correct copy of the Testimony in Support of Petitioner filed by the County of Hawai'i Planning Department in State of Hawai'i Land Use Commission ("**Commission**") Docket No. A76-419;

4. Attached hereto as Petitioners' Exhibit 3 is a true and correct copy of the

Testimony in Support of Petitioner filed by the State of Hawai'i Department of Planning and Economic Development in Commission Docket No. A76-419;

5. Attached hereto as Petitioners' Exhibit 4a is a true and correct copy of a graphic prepared by my office showing the County zoning designations for the Hawaiian Paradise Park subdivision and surrounding lands;

6. Attached hereto as Petitioners' Exhibit 4b is a true and correct copy of a graphic prepared by my office showing the County zoning designations for Tax Map Key No.: (3) 1-5-059:059 ("**Petition Area**") and surrounding parcels;

7. Attached hereto as Petitioners' Exhibit 4c is a true and correct copy of a graphic prepared by my office showing the County zoning designations for the makai portion of the Hawaiian Paradise Park subdivision;

8. Attached hereto as Petitioners' Exhibit 5 is a true and correct copy of the Commission's Decision and Order in Docket No. A76-419, dated August 12, 1977;

9. Attached hereto as Petitioners' Exhibit 6 is a true and correct copy of a Petition for Boundary Amendment, dated September 28, 1976, filed by the Paradise Hui Hanalike Association in Commission Docket No. A76-419;

10. Attached hereto as Petitioners' Exhibit 7 is a true and correct copy of the Commission's Notice of Finding of No Significant Impact, dated June 30, 2020, and supporting Final Environment Assessment, dated June 2020, prepared by Petitioners;

11. Attached hereto as Petitioners' Exhibit 8 is a true and correct copy of a Warranty Deed, dated June 25, 2007, and recorded on June 2, 2007 in the Office of the Assistant Registrar of the Land Court of the State of Hawai'i as Document No.: 3622615;

12. Attached hereto as Petitioners' Exhibit 9 is a true and correct copy of the County

Tax Map for Zone 3, Section 5, Plat 59, which includes the Petition Area;

13. Attached hereto as Petitioners' Exhibit 10a is a true and correct copy of a graphic prepared by my office showing the State Land Use ("SLU") designations for the Hawaiian Paradise Park subdivision and surrounding lands;

14. Attached hereto as Petitioners' Exhibit 10b is a true and correct copy of a graphic prepared by my office showing the SLU designations for the Petition Area and surrounding parcels;

15. Attached hereto as Petitioners' Exhibit 11 is a true and correct copy of a letter dated September 16, 2020, from HFS Federal Credit Union to Kevin M. Barry and Monica S. Barry;

16. Attached hereto as Petitioners' Exhibit 12 is a true and correct copy of a graphic prepared by my office showing the Agricultural Lands of Importance to the State of Hawai'i soil classifications for the Petition Area and surrounding parcels;

17. Attached hereto as Petitioners' Exhibit 13 is a true and correct copy of a graphic prepared by my office showing the Land Study Bureau soil ratings for the Petition Area and surrounding parcels;

18. Attached hereto as Petitioners' Exhibit 14 is a true and correct copy of a Flood Hazard Assessment Report for the Petition Area;

19. Attached hereto as Petitioners' Exhibit 15 is a true and correct copy of a Notification of Petition Filing, dated November 4, 2020, prepared by my office;

20. Attached hereto as Petitioners' Exhibit 16 is a true and correct copy of a letter dated July 10, 2020, from the County of Hawai'i Planning Department to me.

That further Affiant sayeth naught.

DATED: Honolulu, Hawai'i, November 4, 2020.



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DEREK B. SIMON

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