

**Exhibit 8**

LAND USE COMMISSION  
STATE OF HAWAII

2021 APR 21 P 1:50



ORIGINAL

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

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND DECISION AND ORDER  
AND  
CERTIFICATE OF SERVICE

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

Petitioners KEVIN M. BARRY AND MONICA S. BARRY, TRUSTEES OF THE BARRY FAMILY TRUST DATED NOVEMBER 15, 2006 ("**Petitioners**"), filed a Petition for District Boundary Amendment ("**Original Petition**") on December 19, 2018 pursuant to Chapter 205, Hawai'i Revised Statutes ("**HRS**"), and Chapter 15-15, Hawai'i Administrative Rules ("**HAR**") to amend the State Land Use District Boundary to reclassify approximately 0.51 acres of land situate at Kea'au, Puna, County, Islands and State of Hawai'i, identified as Tax Map Key No: (3) 1-5-059:059 ("**Petition Area**"), from the State Land Use Conservation District ("**Conservation District**") to the State Land Use Agricultural District ("**Agricultural District**") to allow for the construction of a single-family dwelling and associated agricultural use.

The Land Use Commission of the State of Hawai'i (the "**Commission**"), having heard and examined the testimony, evidence, and arguments of counsel presented during the hearing,

A18-806 BARRY FAMILY TRUST  
Findings of Fact, Conclusions of Law, and Decision and Order

and the pleadings filed herein, hereby makes the following Findings of Fact, Conclusions of Law and Decision and Order:

## **FINDINGS OF FACT**

### **PROCEDURAL MATTERS**

1. On December 19, 2018, Petitioners filed the Original Petition, Petitioners' Exhibits 1 to 9, and submitted a cashier's check for the filing fee in the amount of \$5,000.00.
2. At its meeting of January 23, 2019, the Commission voted to be the approving agency for the purpose of Petitioners' compliance with Chapter 343, HRS.
3. 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 ("**DOH**"), Office of Environmental Quality Control ("**OEQC**").
4. Notice of the Commission's AFONSI and the Draft EA were published in the October 23, 2019 edition of OEQC's The Environmental Notice, and again in the November 8, 2019 edition of The Environmental Notice.
5. 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 notice thereof together with the Final EA with OEQC.

6. Notice of the Commission's FONSI and the Final EA were published in the July 8, 2020 edition of The Environmental Notice and no appeals were filed. [Petitioners' Exhibit<sup>1</sup> ("Pet. Ex.") 7]

7. On November 4, 2020, Petitioners filed their 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" - "B"; Certification of Service (the "**Amended Petition**").

8. By letter dated November 27, 2020, the Executive Officer of the Commission notified Petitioners that the Amended Petition was deemed a proper filing and accepted for processing as of November 25, 2020.

9. On January 21, 2021, a notice of hearing was published statewide. [Affidavit of Derek B. Simon, filed February 23, 2021 ("**Simon Aff.**") at ¶¶3-4]

10. On January 26, 2021, a notice of hearing was mailed to the recipients listed on the Commission's statewide and County of Hawai'i mailings lists, and the Commission electronic mail distribution list. [Simon Aff. at ¶2]

11. A notice of hearing was deposited with the Lieutenant Governor's Office by way of email on February 9, 2021, and again by way of facsimile on February 16, 2021. [Simon Aff. at ¶5]

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<sup>1</sup> Unless otherwise noted, all citations to Petitioners' Exhibits are to the exhibits filed with the Amended Petition on November 4, 2020.

12. On February 19, 2021, Petitioners filed their Exhibit List and Witness List.
13. On February 23, 2021, Petitioners filed the Affidavit of Derek B. Simon and Exhibits “A” - “E” attesting Petitioners compliance with HAR § 15-15-51.
14. On or about February 23, 2021, the State of Hawai‘i Office of Planning (“**OP**”) filed its Testimony of the Office of Planning in Support of the Petition with Conditions.
15. On or about February 23, 2021, the County of Hawai‘i (“**County**”) Planning Department filed its Response of the Planning Director, County of Hawai‘i, to Petitioner’s [sic] Amended Petition for Land Use District Boundary Amendment.
16. On February 24, 2021, OP filed a Memorandum from the State of Hawai‘i Department of Land and Natural Resources (“**DLNR**”) re the Division of Forestry and Wildlife Comments for the Petition for a Land Use District Boundary Amendment: Land Use Commission Docket No. A18-806, Barry Family Trust.
17. The Commission held evidentiary hearings in this Docket on February 24, 2021.
18. The Commission closed the evidentiary portion of the proceedings on February 24, 2021. [2/24/21 Hearing (“**Hr.**”) Transcript (“**Trans.**”) at 100:10-15.

#### **DESCRIPTION OF THE PETITION AREA**

19. The Petition Area is located in Kea‘au, Puna, Island, County and State of Hawai‘i, and is comprised of approximately 0.51 acres of land. [Pet. Ex. 9]
20. The Petition Area is currently undeveloped and vacant, and has not been used for

any purpose since being purchased by Petitioners in 2007. [Pet. Ex. 7 at 1; 2/24/21 Hr. Tr. at 34:17-22]

21. The Petition Area is flat to low-sloping, with no surrounding steeper slopes. [Pet. Ex. 7 at 11]

22. Annual rainfall in the region is approximately 124 inches. [Pet. Ex. 7 at 10]

23. The 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. "Unclassified" or soils without an ALISH classification are not considered agriculturally important lands. The soils within the Petition Area are "unclassified." [Pet. Ex. 12]

24. The Land Study Bureau overall master productivity rating system is used to designate soils within the State as Class A, B, C, D or E, with Class A representing the most productive soils and Class E representing the least productive soils or "very poor" for agricultural production. The soils within the Petition Area are rated Class "E." [Pet. Ex. 13]

25. The vast majority of the Petition Area is in the Flood Insurance Rate Map ("FIRM") Zone X, meaning that this portion of the Petition Area is outside the 0.2 percent-annual-chance (500-year) flood zone. A very small portion along the shoreline area is in FIRM Zone VE with a base flood elevation of fifteen (15) feet. [Pet. Ex. 14]

26. The Petition Area is within the County's tsunami inundation zone and subject to tsunami evacuation. [Pet. Ex. 7 at 43]

27. The Petition Area is within volcanic hazard Zone 3, which indicates that only 1-

5% of the area has been covered in lava since 1800, and 15-75% of the area has been covered in lava in the last 750 years. [Pet. Ex. 7 at 11]

28. Almost the entire Petition Area is designated as Rural on the County General Plan Land Use Pattern Allocation Guide (“LUPAG”) Map. The most makai portion of Petition Area is designated as Open on the LUPAG Map, which the County interpret as covering only the forty- (40) foot shoreline setback area. [Pet. Ex. 7 at 49]

29. The Petition Area is zoned A1-a Agricultural by the County. [Pet. Exs. 4a-4c]

30. The Petition Area is within the Special Management Area (“SMA”). [Pet. Ex. 16]

#### **PROPOSAL FOR RECLASSIFICATION**

31. Petitioners seek reclassification of the Petition Area from the Conservation District to the Agricultural District in order to construct a single-family dwelling and associated agricultural use that Petitioners will use as their primary personal residence.

32. The dwelling will include a two- (2) 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.

33. The style of the dwelling will be contemporary Hawaiian consistent with the overall style of homes in Hawaiian Paradise Park.

34. The landscaping plan will also be consistent with the 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. Some

common non-native species may be removed, appropriate native species may be planted, and a narrow trail to the shoreline may be established. [Pet. Ex. 7 at 1-2]

35. The dwelling will receive its potable water from either a well drilled on site, with treatment through a reverse-osmosis or similar purification system, or a catchment system. [Pet. Ex. 7 at 1-2, 33]

36. Wastewater will be processed through a modern underground individual wastewater system designed by a licensed engineer and approved by DOH. [Pet. Ex. 7 at 1, 33]

37. Electrical service is available in the area from Hawai'i Electric Light Company, Inc., although Petitioners intend to install a photovoltaic solar system that will allow the dwelling to be powered completely, or at least partially, "off-grid." [Pet. Ex. 7 at 1-2]

38. Access to and from the nearest government road and the Petition Area is provided via Paradise Ala Kai Drive. [Pet. Ex. 7 at 1, 33]

39. 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. [Pet. Exs. 12 & 13; 2/24/21 Hr. Trans. at 38:21-24]

40. Petitioners will implement an apiary or bee colony as their agricultural use. [2/24/21 Hr. Trans. at 38:4-40:16]

41. Petitioners intend to sell honey, pollen, and wax products through a roadside stand, at local farmers' markets, and/or online. [2/24/21 Hr. Trans. at 40:12-21]



42. 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. The bee garden will also include common herbs allowed to "bolt" in order to create more sources of pollen from the flowering herbs. [2/24/21 Hr. Trans. at 39:3-6]

43. In the event that Petitioners' apiary proves unsuited for the Petition Area or unsuccessful for any reason, Petitioners will implement an alternative agricultural use appropriate for the Petition Area in conformance with Chapter 205, HRS, the Commission's Rules found at Chapter 15-15, HAR, and the Hawai'i County Code. [2/24/21 Hr. Trans. at 41:10-21]

44. Upon receipt of necessary land use entitlements and permits from the County, Petitioners expect the project to be completed within approximately 18-24 months. [2/24/21 Hr. Trans. at 41:23-42:11]

#### **PETITIONERS' FINANCIAL CAPABILITY TO COMPLETE THE PROJECT**

45. Petitioners own the Petition Area in fee simple. [Pet. Ex. 8]

46. Petitioners' budget for the project is \$400,000.

47. Petitioners will utilize conventional lending and have been pre-approved for a construction/permanent loan in the amount of \$500,000. [Pet. Ex. 11; 2/24/21 Hr. Trans. at 42:12-24]

48. Petitioners have has the necessary economic ability to carry out their representations and commitments. [Pet. Ex. 11; 2/24/21 Trans at 42:12-24]

**NEED FOR THE PROPOSED DEVELOPMENT**

49. The Petition Area is located within the Hawaiian Paradise Park subdivision.

50. Hawaiian Paradise Park consists of approximately 8,835 lots and is the second largest private subdivision in the United States and the second largest population center in the County. [Pet. Ex. 1 at 5, 12]

51. Hawaiian Paradise Park is within the Puna District, which has been the County's fastest-growing district over the last thirty years. [Pet. Ex. 7 at 25]

52. 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. [Pet. Ex. 7 at 4 (Figure 2a) & 53; 2/24/21 Trans at 36:21-37:5]

53. Although zoned for agricultural, the most significant use of land in Hawaiian Paradise Park is for residential purposes. [Pet. Ex. 1 at 7; 2/24/21 Trans at 52:18-53:9].

54. Like the Petition Area, virtually all of the lots within Hawaiian Paradise Park are zoned A1-a by the County. [Pet. Exs. 4a & 4b]

55. 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. [Pet. Ex. 4c]

56. Hawaiian Paradise Park was established in 1959 prior to the enactment of Chapter 205, HRS and the County of Hawai‘i Zoning Code. [Pet. Ex. 2 at 4]

57. When the State Land Use district boundaries were first drawn , all of Hawaiian Paradise Park was placed in the Agricultural District. [Pet. Ex. 5 at 2, ¶3]

58. 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 Conservation District (“**1969 Reclassification**”). [Pet. Ex. 5 at 4, ¶12]

59. 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 Chapter 205A, HRS, Hawai‘i’s Coastal Zone Management Program (“**CZMP**”). [Pet. Ex. 5 at 7, ¶18]

60. 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**”). [Pet. Ex. 6]

61. Prior to filing the 1976 Petition, a number of the landowners were denied permits to develop single-family dwellings on their parcels by DLNR. The 1976 Petition sought to reclassify the coastal parcels back into Agricultural District to allow for the development of residential dwellings. [Pet. Ex. 5 at 5-6, ¶¶13, 17]

62. The Petition Area was initially included in the 1976 Petition, but was subsequently removed after its then-owner could not be located. [Pet. Ex. 6 at 5-6]

63. 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 Agricultural District. [Pet. Ex. 5]

64. The Commission found, *inter alia*, 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. In that the surrounding land is within the Agricultural District, in that 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.” [Pet. Ex. 5 at 7, ¶18]

65. 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. [Pet. Ex. 7 at 4 (Figure 2a); 2/24/21 Trans at 52:16-53:2]

## **IMPACTS OF THE PROJECT**

### **FLORA AND FAUNA**

66. The Petition Area was systematically inspected for biological resources by Dr.

Ron Terry of Geometrician Associates, LLC in May 2018. [Pet. Ex. 7 at 21-24 & Appendix (“**App.**”) 3]

67. Dr. Terry’s findings were documented in a General Botanical Survey and Vertebrate Fauna Assessment dated May 2018 (“**Biological Survey**”). [Pet. Ex. 7 at 21 & App. 3]

68. 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. [Pet. Ex. 7 at 21 & App. 3].

69. The project will not adversely affect flora or fauna. [Pet. Ex. 7 at 23-24 & App. 3]

#### **ARCHAEOLOGICAL RESOURCES**

70. Petitioners retained ASM Affiliates (“**ASM**”) to prepare an Archaeological Filed Inspection for the Petition Area. [Pet. Ex. 7, App. 4]

71. ASM surveyed the Petition Area for archaeological resources on June 6, 2018. [Pet. Ex. 7 at 27 & App. 4]

72. The survey revealed that no archaeological features are present on the surface of the Petition Area, and ASM determined that the likelihood of encountering subsurface resources is extremely remote given the exposed bedrock ground surface. [Pet. Ex. 7 at 27 & App. 4]

73. ASM also reviewed records on file with the DLNR’s State Historic Preservation Division (“**SHPD**”). [Pet. Ex. 7 at 27 & App. 4]

74. SHPD's records indicate that twenty-two (22) properties within Hawaiian Paradise Park (totaling twenty-two (22) 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. [Pet. Ex. 7 at 27 & App. 4]

75. The project will not adversely affect archaeological resources. [Pet. Ex. 7 at 27 & App. 4]

#### **CULTURAL RESOURCES**

76. 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 Hawai'i Supreme Court's decision in *Ka Pa'akai 'O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000) ("*Ka Pa'akai*"). [Pet. Ex. 7, App. 5].

77. 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. [Pet. Ex. 7 at 33 & App. 5]

78. ASM further 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. [Pet. Ex. 7 at 33 & App. 5]

79. Because no impacts are expected, ASM did not recommend any mitigation measures. [Pet. Ex. 7 at 33 & App. 5]

80. The project will not adversely affect cultural resources or the exercise of traditional and customary practices. [Pet. Ex. 7 at 33 & App. 5]

### **RECREATIONAL RESOURCES**

81. Despite the long coastline, there are few beaches in Puna, and none in the vicinity of the Petition Area. [Pet. Ex. 7 at 26]

82. Along most of the Puna shoreline, ocean recreation consists primarily of fishing from the cliffs, with fisherman and opihi pickers accessing fishing and gathering spots all along the coast. [Pet. Ex. 7 at 26]

83. Maps of public accesses produced by the County do not indicate any nearby official mauka-makai shoreline public accesses along Paradise Ala Kai Drive. 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. [Pet. Ex. 7 at 26; 2/24/21 Hr. Trans. at 45:23-47:6, 59:18-60:11]

84. The project will not adversely affect any recreational resources, as access to and use of the shoreline will not be impacted. [Pet. Ex. 7 at 26]

### **SCENIC RESOURCES**

85. 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 views 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. [Pet. Ex. 7 at 24]

86. No designated scenic vistas or viewplanes will be affected by the project. [Pet. Ex. 7 at 24]

87. 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. [Pet. Ex. 7 at 24]

88. 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.

#### **AGRICULTURAL RESOURCES**

89. The Petition Area is currently vacant and not being used for any agricultural purpose. [2/24/21 Hr. Trans. at 34:17-35:2]

90. Petitioners are unaware of the 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. [Pet. Ex. 7 at 31; 2/24/21 Hr. Trans. at 34:17-35:2]

91. The neighborhood immediately surrounding the Petition Area consists primarily



of existing dwellings and undeveloped lots with minimal, if any, agricultural activities occurring. [Pet. Ex. 7 at 4 (Figure 2a); 2/24/21 Hr. Trans. at 36:21-37:5, 52:16-53:9]

92. The project will include an agricultural use (an apiary), where none currently exist, and will therefore result in a relative increase in agricultural activities in the area. [2/24/21 Hr. Trans. at 38:4-40:16, 53:3-9]

93. 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.

#### **ECONOMIC AND SOCIAL IMPACTS**

94. 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. [Pet. Ex. 7 at 26]

95. The project will have a small but positive economic impact for the County. [Pet. Ex. 7 at 26]

#### **ADEQUACY OF PUBLIC SERVICES AND FACILITIES**

##### **EDUCATIONAL FACILITIES**

96. 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.

97. In its public comment letter submitted as part of the Chapter 343 process, DOE indicated that the project is not anticipated to impact DOE schools or facilities. [Pet. Ex. 7, App. 1b]

#### **PARKS AND RECREATIONAL RESOURCES**

98. 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 recent Kilauea eruptions.

99. 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. [Pet. Ex. 7 at 26]

100. Existing parks and other recreational resources in close proximity to the Petition Area include two undeveloped shoreline park sites within Hawaiian Paradise Park. [2/24/21 Hr. Tr. at 46:20-25]

101. Maps of public access produced by the County do not indicate any nearby official mauka-makai shoreline public accesses along Paradise Ala Kai Drive. 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. [Pet. Ex. 7 at 26; 2/24/21 Hr. Trans. at 45:23-47:6, 59:18-60:11]

102. Fisherman and opihi pickers access fishing and gathering spots all along the coast.  
[Pet. Ex. 7 at 26]

103. The project will not impact access to or use of any recreational resources. [Pet.  
Ex. 7 at 26]

#### **WASTEWATER**

104. The Petition Area is not serviced by a public wastewater utility. [Pet. Ex. 7 at 33]

105. Wastewater will be processed through a modern individual wastewater system  
designed by a licensed engineer and approved by DOH. [Pet. Ex. 7 at 33]

106. The project will not impact wastewater services or facilities. [Pet. Ex. 7 at 33-34]

#### **SOLID WASTE DISPOSAL**

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

108. Upon completion, solid waste disposal and recycling will be provided by a private  
collection service, as the County does not offer curbside collection for the Petition Area.

109. Given the size and scope of the project, its construction and use will not adversely  
impact existing solid waste collection and disposal services/facilities.

#### **DRAINAGE AND WATER QUALITY**

110. 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. [Pet. Ex. 7 at 20]

111. 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. [Pet. Ex. 7 at 20]

112. 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. [Pet. Ex. 7 at 20]

113. Upon completion, the 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. [Pet. Ex. 7 at 20]

## **WATER**

114. The dwelling will receive its potable water from either a well drilled on site, with treatment through a reverse-osmosis or similar purification system, or a catchment system. [Pet. Ex. 7 at 33]

115. The project will not adversely impact any public water systems. [Pet. Ex. 7 at 34]

## **TRANSPORTATION SYSTEMS**

116. 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.

117. 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.

[Pet. Ex. 7 at 33]

118. The Petition Area is not currently served directly by Hele-On Bus, the County's public bus service.

119. The project will not adversely impact any public transportation systems. [Pet. Ex. 7 at 33]

#### **PUBLIC UTILITIES**

120. 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." [Pet. Ex. 7 at 2, 33-34]

121. The project will not adversely impact any public utilities. [Pet. Ex. 7 at 33-34]

#### **POLICE, FIRE, AND EMERGENCY MEDICAL SERVICES**

122. Police services are provided to the Petition Area via the Hawai'i County Police Department's Pāhoa Station, which is located approximately 9.3 miles from the Petition Area at 15-2615 Kea'au-Pāhoa Road, Pāhoa, Hawai'i 96778. [Pet. Ex. 7 at 34]

123. 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.

124. 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. [Pet. Ex. 7 at 34]

125. The project will not adversely impact police, fire or emergency medical services. [Pet. Ex. 7 at 33-34]

### **CIVIL DEFENSE**

126. 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.

127. 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. [Pet. Ex. 7, Apps. 1a & 1b]

### **PUBLIC AGENCIES**

128. The project will not affect population parameters in such a way as to have significant effects on public facilities or agencies. [Pet. Ex. 7 at 34]

129. 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. [Pet. Ex. 7 at 34]

### **STATE LAND USE DESIGNATION**

130. The Petition Area is presently classified in the Conservation District. [Pet. Exs. 10a & 10b]

131. According to the 2017 State of Hawai‘i Data Book, published by the State of Hawai‘i Department of Business, Economic Development and Tourism, there are approximately 1,973,846 acres of land classified within the Conservation District. [Pet. Ex. 7 at 47]

132. The proposed boundary amendment involves the reclassification of approximately 0.51 acres of privately-owned Conservation District land and will not impact the public’s access to or beneficial use of Conservation District lands or resources. [Pet. Ex. 7 at 47]

#### **CONFORMANCE WITH AGRICULTURAL DISTRICT STANDARDS**

133. The proposed reclassification of the Petition Area is in conformance with the standards set forth in HAR § 15-15-19 for determining “A” Agricultural District boundaries.

134. HAR § 15-15-19(3) provides that the 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.”

135. The Petition Area is contiguous with and surrounded entirely by Agricultural District lands. [Pet. Exs. 10a & 10b]

136. All of the surrounding lands within Hawaiian Paradise Park were included within the Agricultural District when the boundaries were first drawn, and the immediately adjacent coastal parcels were again placed in the Agricultural District again by the Commission under the 1977 D&O. The Commission has thus twice previously determined that the general area

surrounding the Petition Area meets the standards for the Agricultural District. [Pet. Ex. 5]

137. The soils within the Petition Area are very poorly suited for agricultural purposes.  
[Pet. Exs. 12 & 13; 2/24/21 Hr. Trans. at 35:7-36:4]

138. The Petition Area meets the standards for the Agricultural District under HAR § 15-15-19.

**CONFORMANCE WITH THE GOALS, OBJECTIVES AND POLICIES OF THE HAWAII STATE PLAN**

139. Reclassification of the Petition Area generally conforms to the following applicable goals, objectives, policies and guidelines of the Hawai'i State Planning Act, HRS Chapter 226.

140. HRS § 226-4 (State Goals) Provides that:

*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.*

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.

141. HRS § 226-5 (Objectives and Policies for Population) provides that:



*(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.*

HRS § 226-6 (Objective and Policies for the Economy in General) further provides that:

*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.*

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.

142. HRS § 226-11 (Objectives and Policies for the Physical Environment -- Land-based, Shoreline, and Marine Resources) provides that:

*(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.*

The project's design and planning takes into account the physical attributes of the Petition Area and neighboring lands. The dwelling will be located towards the ocean, but appropriately sited behind the shoreline. Once completed, the project will be in harmony with the existing homes along the coast in Hawaiian Paradise Park.

143. HRS § 226-12 (Objective and Policies for the Physical Environment -- Scenic, Natural Beauty, and Historic Resources) provides that:

*(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.*

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.

#### **RELATIONSHIP WITH APPLICABLE PRIORITY GUIDELINES**

144. The project 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.*

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 project 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, 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.

**RELATIONSHIP WITH APPLICABLE FUNCTIONAL PLANS**

145. The project is consistent with the State of Hawai‘i Functional Plans as follows:

Energy Functional Plan. Petitioners intend to install a photovoltaic solar system that will allow the project to be powered completely, or at least partially, “off-grid.” [Pet. Ex. 7 at 1-2]

Agricultural Functional Plan. Although the Petition Area has never been used for commercial sugar or pineapple production, the project will support an “alternative agricultural use” of the land by providing a dwelling lot and agricultural use (an apiary) were none previously existed. [2/24/21 Hr. Trans. at 38:4-40:16]

#### **CONFORMANCE WITH THE COASTAL ZONE MANAGEMENT PROGRAM**

146. The Petition Area is within the SMA, as designated by the County. [Pet. Ex. 16]

147. Reclassification is consistent with the applicable objectives of the Coastal Zone Management Program, found in HRS Chapter 205A, which established ten (10) objectives with related policies and standards, to guide and regulate public and private uses in the Coastal Zone Management Area.

148. Recreational Resources Objective & Policies - HRS § 205A-2.

**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 restoration of coastal resources that have significant recreational and ecosystem value, including but not limited to coral*

*reefs, surfing sites, fishponds, sand beaches, and coastal dunes, when these resources will be unavoidably damaged by development; or requiring monetary compensation to the State for recreation when restoration 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 that dedication against the requirements of section 46-6.*

The project will not adversely affect recreational resources or 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. [Pet. Ex. 7 at 25-26, 39-40]

149. Historic Resources Objective & Policies - HRS § 205A-2.

**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 archaeological 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;*

ASM's 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. [Pet. Ex. 7 at 27, 40-41 & App. 4]

150. Scenic Resources Objective & Policies - HRS § 205A-2.

**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 those 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.*

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 may open up at least some coastal views. [Pet. Ex. 7 at 24, 41]

151. Coastal Ecosystems Objective & Policies - HRS § 205A-2.

**Objective:** *Protect valuable coastal ecosystems, including reefs, beaches, and coastal dunes, 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 of significant biological or economic importance, including reefs, beaches, and dunes;*

*(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 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. Grading will include practices to minimize the potential for sedimentation, erosion, and pollution of coastal waters. [Pet. Ex. 7 at 20, 41-42]

152. Economic Uses Objective & Policies - HRS § 205A-2.

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

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

(B) Ensure that coastal dependent development and coastal related development are located, designed, and constructed to minimize exposure to coastal hazards and adverse social, visual, and environmental impacts in the coastal zone management area; and

(C) Direct the location and expansion of coastal development to areas designated and used for that development and permit reasonable long-term growth at those areas, and permit coastal development outside of designated areas when:

(i) Use of designated locations is not feasible;

(ii) Adverse environmental effects and risks from coastal hazards are minimized; and

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

The Petition Area is situated along the coastline in Hawaiian Paradise Park, which 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. 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. [Pet. Ex. 7 at 26, 43]

153. Coastal Hazards Objective & Policies - HRS § 205A-2.

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

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

(B) Ensure that coastal dependent development and coastal related development are located, designed, and constructed to minimize exposure to coastal hazards and adverse social, visual, and



*environmental impacts in the coastal zone management area; and*

*(C) Direct the location and expansion of coastal development to areas designated and used for that development and permit reasonable long-term growth at those areas, and permit coastal development outside of designated areas when:*

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

*(ii) Adverse environmental effects and risks from coastal hazards are minimized; and*

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

The majority of the Petition Area is located in FIRM Flood Zone “X,” which represents areas outside of the 0.2% annual chance flood plain, while a small portion along the shoreline is within the FIRM “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. The Petition Area is within the County’s tsunami inundation zone and is subject to tsunami evacuation, but dwellings are very common along this portion of the coastline and the project does not present any extraordinary or unusual tsunami risks. [Pet. Ex. 7 at 12, 43-44 & App. 2]

Petitioners’ Coastal Erosion and Volcanic Hazard Report concluded that the Petition Area is suitable for the project. [Pet. Ex. 7 at 10-11 & App. 2]

154. Managing Development Objective & Policies - HRS § 205A-2.

**Objectives:** *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.*

Through the Chapter 343 environmental review process, as well as the proceedings on the Amended Petition, the project underwent review and decision by the Commission. Both processes provided 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. [Pet. Ex. 7 at 44]

155. Public Participation Objective & Policies - HRS § 205A-2.

**Objectives:** *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 issues, developments, and government activities; and*

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

As a part of the Chapter 343 environmental review 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. Public testimony was also welcomed by the Commission on the Amended Petition at its February 24, 2021 hearing, although none was provided. [Pet. Ex. 7 at 44-45 & Apps. 1a-1b]

156. Beach and Coastal Dune Protection Objective & Policies - HRS § 205A-2.

**Objectives:** *(A) Protect beaches and coastal dunes for:*

*(i) Public use and recreation;*

*(ii) The benefit of coastal ecosystems; and*

*(iii) Use as natural buffers against coastal hazards; and*

*(B) Coordinate and fund beach management and protection.*

**Policies:** *(A) Locate new structures inland from the shoreline setback to conserve open space, minimize interference with natural shoreline processes, and minimize loss of improvements due to erosion;*

*(B) Prohibit construction of private shoreline hardening structures, including seawalls and revetments, at sites having sand beaches and at sites where shoreline hardening structures interfere with existing recreational and waterline activities;*

*(C) Minimize the construction of public shoreline hardening structures, including seawalls and revetments, at sites having sand beaches and at sites where shoreline hardening structures interfere with existing recreational and waterline activities;*

*(D) Minimize grading of and damage to coastal dunes;*

*(E) 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*

*(F) 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;*

*and*

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. The project will not impact public access to or use of the shoreline. [Pet. Ex. 7 at 26, 45]

The project also does not involve the construction of erosion-protection structures, will not result in the creation of nuisances (through uncontrolled vegetation or otherwise), and will not interfere with natural shoreline processes. The future dwelling and all other project improvements will be appropriately sited behind the shoreline in order to protect them from coastal hazards, including erosion. [Pet. Ex. 7 at 45-46 & App. 2]

157. Marine and Coastal Resources Objective & Policies - HRS § 205A-2.

**Objectives:** *Promote the protection, use, and development of marine and coastal resources to assure their sustainability.*

**Policies:** *(A) Ensure that the use and development of marine and coastal resources are ecologically and environmentally sound and economically beneficial;*

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

*(C) 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;*

*(D) Promote research, study, and understanding of ocean and coastal processes, impacts of climate change and sea level rise, marine life, and other ocean resources to acquire and inventory information necessary to understand how coastal development activities relate to and impact ocean and coastal resources; and*

*(E) Encourage research and development of new, innovative technologies for exploring, using, or protecting marine and coastal 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. Grading will include practices to minimize the potential for sedimentation, erosion and pollution of coastal waters.

[Pet. Ex. 7 at 20, 46]

#### **CONFORMANCE WITH THE COUNTY GENERAL PLAN**

158. 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. [Hawai'i County Charter § 3-15]

159. 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 lots, the County interprets the portion designated as Open as covering only the forty-foot shoreline setback area.

160. 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. [Pet. Ex. 7 at 4 (Figure 2a),

161. The project is consistent with the General Plan land use designation. [Pet. Ex. 7 at

49; Response of the Planning Director, County of Hawai‘i, to Petitioner’s [sic] Amended Petition for Land Use District Boundary Amendment]

162. The project actively supports many of the relevant goals and policies of the County General Plan as follows:

163. 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.*

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. [Pet. Ex. 7 at 26, 49-50]

164. 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.*

Environmental Quality Policies.

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

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 project 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. [Pet Ex. 7]

165. Historic 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.*

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.*

ASM prepared both an Archaeological Filed Inspection and a Ka Pa‘akai Analysis.

Based on ASM’s findings, the Final EA determined that the project will not adversely affect archaeological and cultural resources, and will not adversely impact cultural resources or the exercise of traditional and customary practices. [Pet. Ex. 7 at 26-27, 51 & App. 4-5]

166. 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.*

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.*

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 project is consistent with the foregoing goals, policies and standards of the General Plan related to flood control and drainage. The dwelling will be located towards the ocean, but appropriately sited 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 FIRM maps. The project will conform to all applicable County drainage regulations and policies.

[Pet. Ex. 14; Pet. Ex. 7 at 12, 51]

167. 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.*

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 project 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. [Pet. Ex. 7 at 24, 52]

168. 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.*

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.*

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

The project is consistent with the foregoing goals and policies of the General Plan related to natural resources and the shoreline. The proposed dwelling will be located towards the ocean, but appropriately sited 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. No rare native vegetation, rare or endangered species, coastal resources, or historic sites will be adversely affected by the project. [Pet. Ex. 7]

#### **CONFORMANCE WITH THE PUNA COMMUNITY DEVELOPMENT PLAN**

169. The Puna Community Development Plan (“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.

170. The Puna CDP does not specify a land use or uses for the Petition Area. [Pet. Ex. 7 at 53]

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

172. 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 project is consistent with the Puna CDP's goals, objectives, and policies related to land use and managing growth. 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. The dwelling will be set back from the shoreline in order to reduce its exposure to coastal hazards. No rare native vegetation, rare or endangered species, coastal resources, or historic sites will be adversely affected. [Pet. Ex. 7]

173. 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 project 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, the proposed dwelling will be appropriately sited to reduce the risk of shoreline subsidence, coastal flooding, and other

related hazards. [Pet. Ex. 7]

## **II. COUNTY ZONING**

1. The County zoning designation for the Petition Area is Agricultural (A1-a). [Pet. Exs. 4a-4c]

2. Development of the project is consistent with the A-1a zoning district. [Pet. Ex. 7 at 53; Response of the Planning Director, County of Hawai‘i, to Petitioner’s *[sic]* Amended Petition for Land Use District Boundary Amendment]

### **RULING ON PROPOSED FINDINGS OF FACT**

Any of the proposed findings of fact submitted by Petitioners or any other party not already ruled upon by the Commission or adopted herein, or rejected by clearly contrary findings of fact, are hereby denied and rejected.

Any conclusions of law improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

### **CONCLUSIONS OF LAW**

1. Pursuant to Chapter 205, HRS, and the Commission’s Rules under Chapter 15-15, HAR, and upon consideration of the Commission’s decision-making criteria under HRS § 205-17, this Commission finds upon a clear preponderance of the evidence that the reclassification of the Petition Area, consisting of approximately 0.51 acres of land situate at Kea‘au, Puna, Island, County and State of Hawai‘i, State of Hawai‘i, and further identified as Tax Map Key No: (3) 1-5-059:059, from the State Land Use Conservation District to the State Land Use Agricultural for

development of the a dwelling and associated agricultural use, subject to the conditions in the Order below, conforms to the standards for establishing the Agricultural District boundaries, is reasonable, is not violative of Section 205-2, HRS, and is consistent with the Hawai‘i State Plan as set forth in chapter 226, HRS, and with the policies and criteria established pursuant to HRS §§ 205-16, 205-17 and 205A-2.

2. Article XII, Section 7, of the Hawai‘i Constitution requires the Commission to protect native Hawaiian traditional and customary rights. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. The State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised native Hawaiian rights to the extent feasible. *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425, certiorari denied, 517 U.S. 1163 (1996).

3. The Commission is empowered to preserve and protect customary and traditional rights of Native Hawaiians. *Ka Pa ‘akai O Ka ‘Aina v. Land Use Commission*, 94 Hawai‘i 31 (2000).

4. Article XI, Section 1, of the Hawai‘i Constitution requires the State to conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and to promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

5. Article XI, Section 3, of the Hawai'i Constitution requires the State to conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency, and assure the availability of agriculturally suitable lands.

6. The Petition Area is not classified as Important Agricultural Land under Part III of Chapter 205, HRS.

7. Article XI, Section 7, of the Hawai'i Constitution states that the State has an obligation to protect the use of Hawai'i's water resources for the benefit of its people.

8. The Commission concludes that it has observed and complied with its duties arising from Article XI, Section 1; Article XI, Section 3; Article XI, Section 7; and Article XII, Section 7 of the Hawai'i State Constitution.

9. H.R.S. Sec. 205-2(d) provides:

(d) Agricultural districts shall include:

(1) Activities or uses as characterized by the cultivation of crops, crops for bioenergy, orchards, forage, and forestry;

(2) Farming activities or uses related to animal husbandry and game and fish propagation;

(3) Aquaculture, which means the production of aquatic plant and animal life within ponds and other bodies of water;

(4) Wind-generated energy production for public, private, and commercial use;

(5) Biofuel production, as described in section 205-4.5(a)(16), for public, private, and commercial use;

(6) Solar energy facilities; provided that:

(A) This paragraph shall apply only to land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class B, C, D, or E; and

(B) Solar energy facilities placed within land with soil classified as overall productivity rating class B or C shall not occupy more than ten per cent of the acreage of the parcel, or twenty acres of land, whichever is lesser, unless a special use permit is granted pursuant to section 205-6;

(7) Bona fide agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, regardless of whether conducted on the same premises as the agricultural activities to which they are accessory, including farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, agricultural-energy facilities as defined in section 205-4.5(a)(17), vehicle and equipment storage areas, and plantation community subdivisions as defined in section 205-4.5(a)(12);

(8) Wind machines and wind farms;

(9) Small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land; provided that these facilities shall not be used as or equipped for use as living quarters or dwellings;

(10) Agricultural parks;

(11) Agricultural tourism conducted on a working farm, or a farming operation as defined in section 165-2, for the enjoyment, education, or involvement of visitors; provided that the agricultural tourism activity is accessory and secondary to the principal agricultural use and does not interfere with surrounding farm operations; and provided further that this paragraph shall apply only to a county that has adopted ordinances regulating agricultural tourism under section 205-5;

(12) Agricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2;

(13) Open area recreational facilities;

(14) Geothermal resources exploration and geothermal resources development, as defined under section 182-1;

(15) Agricultural-based commercial operations registered in Hawaii, including:



- (A) A roadside stand that is not an enclosed structure, owned and operated by a producer for the display and sale of agricultural products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii;
- (B) Retail activities in an enclosed structure owned and operated by a producer for the display and sale of agricultural products grown in Hawaii, value-added products that were produced using agricultural products grown in Hawaii, logo items related to the producer's agricultural operations, and other food items;
- (C) A retail food establishment owned and operated by a producer and permitted under chapter 11-50, Hawaii administrative rules, that prepares and serves food at retail using products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii;
- (D) A farmers' market, which is an outdoor market limited to producers selling agricultural products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii; and
- (E) A food hub, which is a facility that may contain a commercial kitchen and provides for the storage, processing, distribution, and sale of agricultural products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii. The owner of an agricultural-based commercial operation shall certify, upon request of an officer or agent charged with enforcement of this chapter under section 205-12, that the agricultural products displayed or sold by the operation meet the requirements of this paragraph; and

(16) Hydroelectric facilities as described in section 205-4.5(a)(23).

Agricultural districts shall not include golf courses and golf driving ranges, except as provided in section 205-4.5(d). Agricultural districts include areas that are not used for, or that are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

10. H.R.S. Sec. 205-4.5 provides:

§205-4.5 Permissible uses within the agricultural district. (a) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B and for solar energy facilities, class B or C, shall be restricted to the following permitted uses:

- (1) Cultivation of crops, including crops for bioenergy, flowers, vegetables, foliage, fruits, forage, and timber;
- (2) Game and fish propagation;
- (3) Raising of livestock, including poultry, bees, fish, or other animal or aquatic life that are propagated for economic or personal use;

(4) Farm dwellings, employee housing, farm buildings, or activities or uses related to farming and animal husbandry. "Farm dwelling", as used in this paragraph, means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

(5) Public institutions and buildings that are necessary for agricultural practices;

(6) Public and private open area types of recreational uses, including day camps, picnic grounds, parks, and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;

(7) Public, private, and quasi-public utility lines and roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, treatment plants, corporation yards, or other similar structures;

(8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest;

(9) Agricultural-based commercial operations as described in section 205-2(d)(15);

(10) Buildings and uses, including mills, storage, and processing facilities, maintenance facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, and vehicle and equipment storage areas that are normally considered directly accessory to the above-mentioned uses and are permitted under section 205-2(d);

(11) Agricultural parks;

(12) Plantation community subdivisions, which as used in this chapter means an established subdivision or cluster of employee housing, community buildings, and agricultural support buildings on land currently or formerly owned, leased, or operated by a sugar or pineapple plantation; provided that the existing structures may be used or rehabilitated for use, and new employee housing and agricultural support buildings may be allowed on land within the subdivision as follows:

(A) The employee housing is occupied by employees or former employees of the plantation who have a property interest in the land;

(B) The employee housing units not owned by their occupants shall be rented or leased at affordable rates for agricultural workers; or (C) The agricultural support buildings shall be rented or leased to agricultural business operators or agricultural support services; (13) Agricultural tourism conducted on a working farm, or a farming operation as defined in section 165-2, for the enjoyment, education, or involvement of visitors; provided that the

agricultural tourism activity is accessory and secondary to the principal agricultural use and does not interfere with surrounding farm operations; and provided further that this paragraph shall apply only to a county that has adopted ordinances regulating agricultural tourism under section 205-5;

(14) Agricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, “bona fide agricultural activity” means a farming operation as defined in section 165-2;

(15) Wind energy facilities, including the appurtenances associated with the production and transmission of wind generated energy; provided that the wind energy facilities and appurtenances are compatible with agriculture uses and cause minimal adverse impact on agricultural land;

(16) Biofuel processing facilities, including the appurtenances associated with the production and refining of biofuels that is normally considered directly accessory and secondary to the growing of the energy feedstock; provided that biofuel processing facilities and appurtenances do not adversely impact agricultural land and other agricultural uses in the vicinity.

For the purposes of this paragraph:

“Appurtenances” means operational infrastructure of the appropriate type and scale for economic commercial storage and distribution, and other similar handling of feedstock, fuels, and other products of biofuel processing facilities.

“Biofuel processing facility” means a facility that produces liquid or gaseous fuels from organic sources such as biomass crops, agricultural residues, and oil crops, including palm, canola, soybean, and waste cooking oils; grease; food wastes; and animal residues and wastes that can be used to generate energy;

(17) Agricultural-energy facilities, including appurtenances necessary for an agricultural-energy enterprise; provided that the primary activity of the agricultural-energy enterprise is agricultural activity. To be considered the primary activity of an agricultural-energy enterprise, the total acreage devoted to agricultural activity shall be not less than ninety per cent of the total acreage of the agricultural-energy enterprise. The agricultural-energy facility shall be limited to lands owned, leased, licensed, or operated by the entity conducting the agricultural activity.

As used in this paragraph:

“Agricultural activity” means any activity described in paragraphs (1) to (3) of this subsection.

“Agricultural-energy enterprise” means an enterprise that integrally incorporates an agricultural activity with an agricultural-energy facility.

“Agricultural-energy facility” means a facility that generates, stores, or distributes renewable energy as defined in section 269-91 or renewable fuel including electrical or thermal energy or liquid or gaseous fuels from products of agricultural activities from agricultural lands located in the State.

“Appurtenances” means operational infrastructure of the appropriate type and scale for the economic commercial generation, storage, distribution, and other similar handling of energy, including equipment, feedstock, fuels, and other products of agricultural-energy facilities;

(18) Construction and operation of wireless communication antennas, including small wireless facilities; provided that, for the purposes of this paragraph, “wireless communication antenna” means communications equipment that is either freestanding or placed upon or attached to an already existing structure and that transmits and receives electromagnetic radio signals used in the provision of all types of wireless communications services; provided further that “small wireless facilities” shall have the same meaning as in section 206N-2; provided further that nothing in this paragraph shall be construed to permit the construction of any new structure that is not deemed a permitted use under this subsection;

(19) Agricultural education programs conducted on a farming operation as defined in section 165-2, for the education and participation of the general public; provided that the agricultural education programs are accessory and secondary to the principal agricultural use of the parcels or lots on which the agricultural education programs are to occur and do not interfere with surrounding farm operations. For the purposes of this paragraph, “agricultural education programs” means activities or events designed to promote knowledge and understanding of agricultural activities and practices conducted on a farming operation as defined in section 165-2;

(20) Solar energy facilities that do not occupy more than ten per cent of the acreage of the parcel, or twenty acres of land, whichever is lesser or for which a special use permit is granted pursuant to section 205-6; provided that this use shall not be permitted on lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A;

(21) Solar energy facilities on lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating B or C for which a special use permit is granted pursuant to section 205-6; provided that:

(A) The area occupied by the solar energy facilities is also made available for compatible agricultural activities at a lease rate that is at least fifty per cent below the fair market rent for comparable properties;

- (B) Proof of financial security to decommission the facility is provided to the satisfaction of the appropriate county planning commission prior to date of commencement of commercial generation; and
- (C) Solar energy facilities shall be decommissioned at the owner's expense according to the following requirements:
  - (i) Removal of all equipment related to the solar energy facility within twelve months of the conclusion of operation or useful life; and
  - (ii) Restoration of the disturbed earth to substantially the same physical condition as existed prior to the development of the solar energy facility.

For the purposes of this paragraph, "agricultural activities" means the activities described in paragraphs (1) to (3);

(22) Geothermal resources exploration and geothermal resources development, as defined under section 182-1; or

(23) Hydroelectric facilities, including the appurtenances associated with the production and transmission of hydroelectric energy, subject to section 205-2; provided that the hydroelectric facilities and their appurtenances:

- (A) Shall consist of a small hydropower facility as defined by the United States Department of Energy, including:
  - (i) Impoundment facilities using a dam to store water in a reservoir;
  - (ii) A diversion or run-of-river facility that channels a portion of a river through a canal or channel; and
  - (iii) Pumped storage facilities that store energy by pumping water uphill to a reservoir at higher elevation from a reservoir at a lower elevation to be released to turn a turbine to generate electricity;
- (B) Comply with the state water code, chapter 174C;
- (C) Shall, if over five hundred kilowatts in hydroelectric generating capacity, have the approval of the commission on water resource management, including a new instream flow standard established for any new hydroelectric facility; and
- (D) Do not impact or impede the use of agricultural land or the availability of surface or ground water for all uses on all parcels that are served by the ground water sources or streams for which hydroelectric facilities are considered.

(b) Uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in sections 205-6 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976. Any other law to the contrary notwithstanding, no subdivision of land within the agricultural district with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be approved by a county unless those A and B lands within the subdivision are made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity. Any deed, lease, agreement of sale, mortgage, or other instrument of conveyance covering any land within the agricultural subdivision shall expressly contain the restriction on uses and the condition, as prescribed in this section that these restrictions and

conditions shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district. If the foregoing requirement of encumbrances running with the land jeopardizes the owner or lessee in obtaining mortgage financing from any of the mortgage lending agencies set forth in the following paragraph, and the requirement is the sole reason for failure to obtain mortgage financing, then the requirement of encumbrances shall, insofar as such mortgage financing is jeopardized, be conditionally waived by the appropriate county enforcement officer; provided that the conditional waiver shall become effective only in the event that the property is subjected to foreclosure proceedings by the mortgage lender.

The mortgage lending agencies referred to in the preceding paragraph are the Federal Housing Administration, Federal National Mortgage Association, Department of Veterans Affairs, Small Business Administration, United States Department of Agriculture, Federal Land Bank of Berkeley, Federal Intermediate Credit Bank of Berkeley, Berkeley Bank for Cooperatives, and any other federal, state, or private mortgage lending agency qualified to do business in Hawaii, and their respective successors and assigns.

(c) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

(d) Notwithstanding any other provision of this chapter to the contrary, golf courses and golf driving ranges approved by a county before July 1, 2005, for development within the agricultural district shall be permitted uses within the agricultural district.

(e) Notwithstanding any other provision of this chapter to the contrary, plantation community subdivisions as defined in this section shall be permitted uses within the agricultural district, and section 205-8 shall not apply.

[(f)] Notwithstanding any other law to the contrary, agricultural lands may be subdivided and leased for the agricultural uses or activities permitted in subsection (a); provided that:

(1) The principal use of the leased land is agriculture;

(2) No permanent or temporary dwellings or farm dwellings, including trailers and campers, are constructed on the leased area. This restriction shall not prohibit the construction of storage sheds, equipment sheds, or other structures appropriate to the agricultural activity carried on within the lot; and

(3) The lease term for a subdivided lot shall be for at least as long as the greater of:

(A) The minimum real property tax agricultural dedication period of the county in which the subdivided lot is located; or

(B) Five years.

Lots created and leased pursuant to this section shall be legal lots of record for mortgage lending purposes and shall be exempt from county subdivision standards.

11. H.R.S. Sec. 205-4(h) provides

(h) No amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17. Six affirmative votes of the commission shall be necessary for any boundary amendment under this section.

12. H.R.S. Sec. 205-5 states:

205-5 Zoning. (a) 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. Conservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C.

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Each county shall adopt ordinances setting forth procedures and requirements, including provisions for enforcement, penalties, and administrative oversight, for the review and permitting of agricultural tourism uses and activities as an accessory use on a working farm, or farming operation as defined in section 165-2. Ordinances shall include but not be limited to:

- (1) Requirements for access to a farm, including road width, road surface, and parking;
- (2) Requirements and restrictions for accessory facilities connected with the farming operation, including gift shops and restaurants;
- (3) Activities that may be offered by the farming operation for visitors;
- (4) Days and hours of operation; and
- (5) Automatic termination of the accessory use upon the cessation of the farming operation.

13. The Land Use Commission previously held that “Chapter 205, Hawaii Revised Statutes, does not authorize residential dwellings as a permissible use within an agricultural use district, unless the dwelling is related to an agricultural activity or is a “farm dwelling.”

DECLARATORY ORDER, In the Matter of the Petition of JOHN GODFREY, Docket No. DR94-17. COL 5 at p. 17.

In In the Matter of a Declaratory Ruling to determine whether a single family dwelling may be established within the State Land Use Agricultural District if the agricultural activity proposed to be conducted by the family occupying the dwelling is for personal consumption and use only, DR83-8, the Land Use Commission held that:

Based on the above, the Land Use Commission rules that a single-family dwelling can be defined as a farm dwelling only if the dwelling is used in connection with a farm where agricultural activity provides income to the family occupying the dwelling and that a



single-family dwelling, which use is accessory to an agricultural activity for personal consumption and use only, is not permissible within the Land Use Agricultural District. This ruling is applicable to all lands located within the State Land Use Agricultural District.

In the Matter of a Declaratory Ruling to determine whether a single family dwelling may be established within the State Land Use Agricultural District if the agricultural activity proposed to be conducted by the family occupying the dwelling is for personal consumption and use only, DR83-8, at 3.

The Land Use Commission explained that subsequent history supported its ruling.

8. Senate Bill No. 993 (1983) purported to amend Section 205—4.5 to permit the raising of crops for both commercial and personal use. Governor Ariyoshi's veto of this bill is an expression of the State's policy that the agricultural activity must be commercial to be a permitted use on lands in the Agricultural District having an A or B soil productivity rating.

In the Matter of a Declaratory Ruling to determine whether a single family dwelling may be established within the State Land Use Agricultural District if the agricultural activity proposed to be conducted by the family occupying the dwelling is for personal consumption and use only, DR83-8, at 3.

### **DECISION AND ORDER**

IT IS HEREBY ORDERED that the Petition Area, consisting of approximately 0.51 acres of land in the State Land Use Conservation District situate at Kea'au, Puna, Island, County and State of Hawai'i, and further identified as Tax Map Key No: (3) 1-5-059:059, shall be and is hereby reclassified to the State Land Use Agricultural District and the State Land Use district boundaries shall be amended accordingly.

Based upon the findings of fact and conclusions of law stated herein, it is hereby determined that the reclassification of the Petition Area will not significantly affect or impair the preservation or maintenance of natural systems and habitats or the valued cultural, historical, agricultural, and natural resources of the area.



IT IS HEREBY FURTHER ORDERED that the reclassification of the Petition Area from the State Land Use Conservation District to the State Land Use Agricultural District shall be subject to the following conditions:

1. Compliance with Representations. Petitioners shall develop the Petition Area in substantial compliance with the representations made to the Commission as reflected in the Findings of Fact, Conclusions of Law, and Decision and Order. Absent substantial commencement of use of the land in accordance with such representations, the Commission shall issue and serve upon the party bound by the condition an order to show cause why the Petition Area should not revert to its former land use classification or be changed to a more appropriate classification.

2. Notice of Change in Ownership. Petitioners shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Petition Area, prior to development of the Petition Area.

3. Annual Reports. Petitioners shall timely provide, without any prior notice, annual reports to the Commission, the Office of Planning, and the Count of Hawai'i Planning Department in connection with the status of the Petition Area and Petitioners' progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.

4. Release of Conditions. The Commission may fully or partially release the conditions provided herein as to all or any portion of the Petition Area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioners.

5. Notice of Imposition of Conditions. Within seven (7) days of the issuance of the Commission's Decision and Order for the subject reclassification, Petitioners shall: (a) record with the Bureau of Conveyances or the State of Hawai'i Land Court, or both, as appropriate, a statement that the Petition Area is subject to conditions imposed herein by the Land Use Commission in the reclassification of the Petition Area; and (b) shall file a copy of such recorded statement with the Commission.

6. Recordation of Conditions. Petitioners shall record the conditions imposed herein by the Commission with the Bureau of Conveyances or the State of Hawai'i Land Court, or both, as appropriate, pursuant to HAR § 15-15-92.

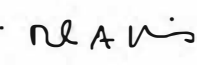
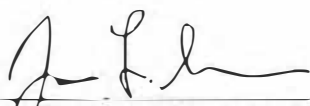
7. Vegetation Removal. Petitioners shall refrain from construction activities that disturb or remove woody vegetation taller than 15 feet between June 1 and September 15, when Hawaiian hoary bats may be sensitive to disturbance.

8. Exterior Lighting. All exterior lighting shall be shielded from shining upward, in conformance with Hawai'i County Code § 14-50 et seq., to minimize the potential for disoriented seabirds.

**ADOPTION OF ORDER**

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 21th day of April, 2021. This ORDER may be executed in counterparts. This ORDER shall take effect upon the date that this ORDER was certified by the Commission.

DONE at Honolulu, Hawai'i, this 21th day of April, 2021, per motion on April 14, 2021.

<div>APPROVED AS TO FORM</div> <div></div> <div>Deputy Attorney General</div>	<div>LAND USE COMMISSION STATE OF HAWAII</div> <div></div> <div>JONATHAN LIKEKE SCHEUER Chairperson and Commissioner</div>
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Filed and effective on: April 21, 2021.

Certified by:



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DANIEL E. ORODENER  
Executive Officer

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

In the Matter of the Petition of

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

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

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

I hereby certify that due service of the foregoing document was made by depositing the same with the United States Mail, postage prepaid, or by hand delivery, on April 21, 2021, addressed to:

MARY ALICE EVANS, DIRECTOR  
Office of Planning  
State of Hawai'i  
235 South Beretania Street, 6th Floor  
Honolulu, HI 96813

[Via Hand Delivery]

BRYAN YEE, ESQ.  
Deputy Attorney General  
Department of the Attorney General  
425 Queen Street  
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Attorney for State of Hawai'i Office of  
Planning

[Via Hand Delivery]

ZENDO KERN, DIRECTOR  
Department of Planning, County of Hawai'i  
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[Via U.S. Mail, postage prepaid]

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STEVEN S.C. LIM, ESQ.  
DEREK B. SIMON, ESQ.  
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County of Hawai'i  
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Honolulu, HI 96813  
Attorney for Petitioners

[Via U.S. Mail, postage prepaid]

DATED: Honolulu, Hawai'i, April 21, 2021.



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DANIEL E. ORODENKER  
Executive Officer



LAND USE COMMISSION  
STATE OF HAWAII

2021 APR 21 P 1:50

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

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND DECISION AND ORDER  
AND  
CERTIFICATE OF SERVICE

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**  
**AND**  
**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF  
THE DOCUMENT ON FILE IN THE OFFICE OF THE STATE LAND USE  
COMMISSION, HONOLULU, HAWAII.

DATE

April 21, 2021

by \_\_\_\_\_

EXECUTIVE OFFICER