

CARLSMITH BALL LLP

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

LAND USE COMMISSION
STATE OF HAWAII

2019 AUG 22 P 2:54

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

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

In the Matter of the Petition of

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

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

DOCKET NO. A18-806

**PETITIONERS' MEMORANDUM RE:
PETITIONERS' MOTION FOR
ISSUANCE OF ANTICIPATED
NEGATIVE DECLARATION OR
ANTICIPATED FINDING OF NO
SIGNIFICANT IMPACT;
DECLARATION OF DEREK B. SIMON;
CERTIFICATE OF SERVICE**

**PETITIONERS' MEMORANDUM RE: PETITIONERS' MOTION FOR ISSUANCE OF
ANTICIPATED NEGATIVE DECLARATION OR ANTICIPATED FINDING OF
NO SIGNIFICANT IMPACT**

Petitioners KEVIN M. BARRY AND MONICA S. BARRY, TRUSTEES OF THE
BARRY FAMILY TRUST DATED NOVEMBER 15, 2006 ("Petitioners"), by and through
their legal counsel, CARLSMITH BALL LLP, respectfully submit this Memorandum Regarding
Petitioners' Motion for Issuance of Anticipated Negative Declaration or Anticipated Finding of
No Significant Impact, filed July 26, 2019 (the "AFONSI Motion").

On July 26, 2019, Petitioners filed the AFONSI Motion, which requested that this honorable Land Use Commission of the State of Hawai‘i (the “**Commission**”): (a) determine that an anticipated negative declaration or anticipated finding of no significant impact pursuant to Chapter 343, Hawai‘i Revised Statutes (“**HRS**”) is warranted in this Docket; and (b) file notice thereof, together with a draft environmental assessment (“**EA**”), with the State of Hawai‘i Department of Health, Office Environmental Quality Control (“**OEQC**”). The AFONSI Motion was filed pursuant to Chapters 205 and 343, HRS, and Hawai‘i Administrative Rules (“**HAR**”) Chapter 15-15 (Commission Rules) and Chapter 11-200 (the “**Old EA/EIS Rules**”).

On July 30, 2019, after the AFONSI Motion was filed, Governor David Ige signed into law HAR Chapter 11-200.1 (the “**New EA/EIS Rules**”), and repealed the Old EA/EIS Rules, effective August 9, 2019. The New EA/EIS Rules provide, in pertinent part, that they “shall apply immediately upon taking effect” and that the Old EA/EIS Rules “shall continue to apply to environmental review of agency and applicant actions which began prior to the adoption of” the New EA/EIS Rules. *See* HAR § 11-200.1-32(a), (b). OEQC has clarified that, for the purposes of HAR § 11-200.1-32, the “environmental review of . . . applicant actions” commences upon, *inter alia*, publication of a draft EA with OEQC.

Petitioners have not yet published a draft EA with OEQC. Therefore, environmental review of Petitioners’ project will be processed under the New EA/EIS Rules, and Petitioners’ hereby amend the AFONSI Motion to conform to the New EA/EIS Rules to the extent necessary for full consideration of and action on the AFONSI Motion at the Commission’s meeting

presently scheduled for August 29, 2019.¹

Petitioners note that, with respect to the significance criteria set forth in HAR § 11-200.1-13, the analysis and conclusions set forth in (a) Petitioners' Memorandum Regarding Chapter 343, Hawai'i Revised Statutes Significance Criteria, filed July 16, 2019, and (b) the Preliminary Draft Environmental Assessment attached as Exhibit 2 to the AFONSI Motion (the "**Preliminary Draft EA**")² remain valid and well supported. Petitioners further note that the substantive contents of the Preliminary Draft Environmental Assessment comply with the New EA/EIS Rules, and that any necessary revisions to the Preliminary Draft EA will be made prior to publication of Petitioners' draft EA with OEQC.

DATED: Honolulu, Hawai'i, August 22, 2019.



STEVEN S.C. LIM
DEREK B. SIMON
Attorney for Petitioner
KEVIN M. BARRY AND MONICA S.
BARRY, TRUSTEES OF THE BARRY
FAMILY TRUST DATED NOVEMBER 15,
2006

¹ The AFONSI Motion, therefore, is now brought pursuant to Chapters 205 and 343, HRS, and HAR §§ 15-15-50(b), 15-15-70, 11-200.1-9(a)(2), 11-200.1-18, 11-200.1-19, and HRS §§ 343-5(a)(7), 343-5(e).

² As noted in the AFONSI Motion, the Preliminary Draft EA was filed with the Commission only for the purpose of the issuance of an AFONSI and is not intended to be transmitted to or published by OEQC.

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Consisting of 0.51 Acres from the
Conservation District to the Agricultural
District, Tax Map Key No. (3) 1-5-059:059.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that due service of the within document was made by depositing the same with the United States Mail, postage prepaid, or by hand delivery, on August 21, 2019, addressed to:

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

[Via Hand Delivery]

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

[Via Hand Delivery]

Attorney for State of Hawai'i Office of
Planning

MICHAEL YEE, DIRECTOR
Department of Planning, County of Hawai'i
Aupuni Center
101 Pauahi Street, Suite 3
Hilo, HI 96720

[Via U.S. Mail, postage prepaid]

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

[Via U.S. Mail, postage prepaid]

Attorney for County of Hawai'i Planning
Department

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

[Via U.S. Mail, postage prepaid]

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

[Via U.S. Mail, postage prepaid]

Attorney for County of Hawai'i Windward
Planning Commission

DATED: Honolulu, Hawai'i, August 22, 2019.



DEREK B. Simon

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