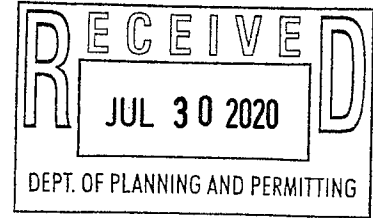


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 KEEP THE NORTH SHORE COUNTRY

BEFORE THE ZONING BOARD OF APPEALS
 CITY AND COUNTY OF HONOLULU
 THE STATE OF HAWAI'I

In the Matter of the Petitions of)	Case No. 2019/ZBA-7 (Consolidated)
)	
KEEP THE NORTH SHORE COUNTRY, a)	APPELLANTS' CONSOLIDATED
nonprofit corporation, and THE KAHUKU)	MEMORANDUM IN OPPOSITION TO NA
COMMUNITY ASSOCIATION, a nonprofit)	PUA MAKANI POWER PARTNERS, LLC
corporation, concerning the Na Pua Makani)	AND DIRECTOR OF DEPARTMENT OF
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Appellants KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation, and THE
 KAHUKU COMMUNITY ASSOCIATION, a nonprofit corporation (collectively, "Appellants"),

by and through their undersigned counsel, respectfully submit their Surreply to Intervenor NA PUA MAKANI POWER PARTNERS, LLC (NPM) and Respondent DIRECTOR OF DEPARTMENT OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU's (Director) (collectively, "NPM") reply to Appellants' memoranda in opposition to NPM's Motions to Dismiss the Kahuku Community Association's Application to Appeal Director's Approvals of Conditional Use Permits, Waiver, and Modifications and Keep the North Shore Country's Petition to Appeal,, filed July 23, 2020 (NPM mtn). At its June 25, 2020 meeting, the Board orally denied in part and granted in part Appellants' Consolidated Memorandum in Opposition to Na Pua Makani Power Partners, LLC and Director of Department of Planning and Permitting, City and County of Honolulu's Motion for Leave to File Reply, filed May 27, 2020 by granting Appellants' alternative relief consisting in leave to file the instant surreply.

This memorandum is filed pursuant to ZBA Rules §§ 22-4(e) and 22-7.

I. ARGUMENT

A. Appellants' have property interests in their constitutional rights to a clean and healthful environment and their traditional and customary practices.

NPM contends Appellants' lack property interests because "general environmental interest[s]" were deemed not "property"¹ for due process purposes under *Sandy Beach Defense Fund v. City Council of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 261 (1989) and article XI, §9 of the Hawai'i Constitution because neither the City and County of Honolulu Land Use Ordinance (LUO) (LUO) nor the Rules of Practice and Procedure of the Department of Planning and Permitting (Department Rules) is a "law relating to environmental quality." NPM mtn. at 3-4. In regard to the

¹ NPM is silent on property rights conferred under article XII, §7, which require the Department and the Board to identify: native Hawaiian traditional and customary practices that may be affected by the waiver and modifications of setbacks; impacts of the setback waivers and modifications may impact those traditional and customary practices; and feasible protections that could be implemented for those practices. See *Ka Pa'akai v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

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Under the circumstances, the rules NPM relies on for dismissal violate Appellants due process rights include LUO §21-1.40, which requires appeals from the Director's decisions to be filed within 30 days of the mailing or service of the director's decision. NPM relies on the Rules of Practice and Procedure of the Zoning Board of Appeals (ZBA Rules), which provides in relevant part:

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NPM also cites Department Rule §6-2, which provides:

The director shall mail the written decision to the applicant and, upon request, shall give notice of the decision to other interested persons. The decision shall be available for review by the public at the department of planning and permitting.

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It would appear self-evident that a party lacks an effective administrative remedy in a situation where the party is time-barred from appealing an administrative decision that the party was never appropriately made aware of until after the time for appeals had ended. If the party is not given notice that an appealable administrative decision was made in the first instance, then even the most sophisticated party who is aware of the appeals process would be precluded from any opportunity to timely appeal the decision.

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Acts in excess of authority necessarily violate due process because the procedures due to Appellants, and others of the public, did not authorize the Director's actions. No "magic words" are required to secure due process rights. *See Credit Associates of Maui, Limited v. Montilliano*, 51 Haw. 325, 327, 460 P.2d 762, 764 (1969) (rejecting the "mechanical" position that "an appeal, which involves only a question of law, stands or falls, depending on the presence or absence of the magic words, 'this appeal is taken on a point of law,' or their equivalent"). This approach is particularly appropriate where the context required that each of Appellants' statements be read as part of a petition seeking a contested case hearing, defined to be "a hearing in which the legal rights, duties or privileges of specific parties to the proceeding are determined, and which is held immediately prior to judicial review." ZBA Rule § 21-1; *see Henry Waterhouse Trust Co. v. Vicars*, 28 Haw. 232, 243 (1925) (interpretation of laws considers what the context requires).

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NPM incorrectly applies the due process analysis employed in *In re Application of Maui Elec. Co., Ltd.*, 141 Haw. 249, 261, 408 P.3d 1, 13 (2017) (*MECO*). Procedures satisfying constitutional due process are determined by considering: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

NPM contends Appellants' "private" interests would not be affected because their interests are not "private" as they are not distinct from "every other member of the North Shore community." NPM mtn. at 6-7. *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982) counters NPM's contention:

a member of the public has standing to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.

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NPM contends the “risk of erroneous deprivation” and “probable value, if any, of additional or alternative procedural safeguards” are “small” and “zero” respectively. NPM mtn. at 7. NPM relies on Appellants’ robust engagement in environmental impact review processes for its assumption that, because these processes “considered” the “alleged concerns of the Appellants, including the siting of the wind turbines[,]” there was no risk of erroneous deprivation. This equation is illogical in that it is the notoriety of Appellants’ concern with the wind turbine siting that put the reasonable onus of notice of the waiver or modification of setback siting requirements on the Department.

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Finally, NPM’s contention that mere compliance with HRS chapter 92F, requiring that agency records be available for public inspection, is the same as “constructive notice” lacks merit. NPM mtn. at 9. All agencies are subject to this requirement and to construe this as “constructive notice” and absolve all of them of any notice by publication or otherwise would defeat the purpose of HRS chapter 92F (Uniform Information Practices Act). “It is axiomatic that service of process is

a fundamental requirement of due process of law and personal service is preferred to constructive service[.]” *Hustace v. Kapuni*, 6 Haw. App. 241, 248, 718 P.2d 1109, 1114 (App. 1986).

II. CONCLUSION

For the foregoing reasons, Appellants request that this Board deny NPM’s motions to dismiss filed March 27, 2020.

DATED: Honolulu, Hawai‘i

July 30, 2020



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LANCE D. COLLINS
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BIANCA ISAKI
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Keep the North Shore Country

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In the Matter of the Application of) Case No. 2019/ZBA-7
KEEP THE NORTH SHORE COUNTRY, a)
nonprofit corporation,)
CERTIFICATE OF SERVICE)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the above was duly served upon the following parties by e-mail or U.S. Mail, postage prepaid on this date as follows:

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DIRECTOR, DEPARTMENT OF
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Counsel for
ZONING BOARD OF APPEALS

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II. CONCLUSION

For the foregoing reasons, Appellants request that this Board deny NPM's motions to dismiss filed March 27, 2020.

DATED: Honolulu, Hawai'i

July 30, 2020



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Keep the North Shore Country

BEFORE THE ZONING BOARD OF APPEALS
CITY AND COUNTY OF HONOLULU
THE STATE OF HAWAII

In the Matter of the Application of) Case No. 2019/ZBA-7
KEEP THE NORTH SHORE COUNTRY, a) CERTIFICATE OF SERVICE
nonprofit corporation,)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the above was duly served upon the following parties by e-mail or U.S. Mail, postage prepaid on this date as follows:

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July 30, 2020

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