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

In the Matter of the Petitions of)
)
KEEP THE NORTH SHORE COUNTRY, a)
nonprofit corporation, and THE KAHUKU)
COMMUNITY ASSOCIATION, a nonprofit)
corporation, concerning the Na Pua Makani)
Wind Project – Subprojects A & B, 56-668)
Kamehameha Highway, Kahuku, O’ahu, Tax)
Map Key (1) 5-6-008:006 & 5-6-006:018)
From the Actions of the Director of Planning)
and Permitting, dated October 24, 2016)
(2016/CUP-49); January 20, 2017)
(2016/CUP-69 & 2016/W-63), & June 7, 2019)
(2019/MOD-34, -35 & -36))

Case No. 2019/ZBA-7 (Consolidated)
NA PUA MAKANI POWER PARTNERS,
LLC AND DIRECTOR OF
DEPARTMENT OF PLANNING AND
PERMITTING, CITY AND COUNTY OF
HONOLULU’S MOTION TO DISMISS
KEEP THE NORTH SHORE
COUNTRY’S PETITION TO APPEAL;
MEMORANDUM IN SUPPORT;
DECLARATION OF KATHY
SOKUGAWA; EXHIBITS 1 - 10; AND
CERTIFICATE OF SERVICE

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NA PUA MAKANI POWER PARTNERS, LLC AND DIRECTOR OF DEPARTMENT OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU'S MOTION TO DISMISS KAHUKU COMMUNITY ASSOCIATION'S APPLICATION TO APPEAL DIRECTOR'S APPROVALS OF CONDITIONAL USE PERMITS, WAIVER, AND MODIFICATIONS FILED FEBRUARY 7, 2020

Na Pua Makani Power Partners, LLC ("NPM") and the Director of the Department of Planning and Permitting, City and County of Honolulu, Kathy Sokugawa ("Director"), through their respective counsel, jointly request that the Zoning Board of Appeals ("ZBA") dismiss Kahuku Community Association's ("KCA") Application to Appeal Director's Approvals of Conditional Use Permits, Waiver, and Modifications ("Appeal Petition") as untimely under the Rules of the Zoning Board of Appeals ("ZBA Rules") § 22-2.

Section 22-2 of the ZBA Rules requires that a written petition appealing an action of the Director must be received within 30 days of the mailing or personal service of the Director's decision. In this instance, KCA's Appeal Petition was not received within the mandated deadlines. Accordingly, NPM and the Director respectfully request that the ZBA dismiss the Appeal Petition.

This motion is based upon the attached memorandum, the declaration of the Director, Kathy Sokugawa, Exhibits 1 through 10, and other arguments of counsel as may be presented.

DATED: Honolulu, Hawaii, March 27, 2020.



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**NA PUA MAKANI POWER PARTNERS, LLC AND DIRECTOR OF DEPARTMENT
OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS KAHUKU
COMMUNITY ASSOCIATION'S APPLICATION TO APPEAL
DIRECTOR'S APPROVALS OF CONDITIONAL USE
PERMITS, WAIVER, AND MODIFICATIONS
FILED FEBRUARY 7, 2020**

NPM and the Director respectfully request that the ZBA dismiss KCA's Appeal Petition as untimely under ZBA Rules § 22-2.¹ KCA's Appeal Petition, with respect to each of the challenged actions of the Director, is untimely and has been filed well outside of the mandatory thirty-day appeal deadline for each challenged action, which is necessary to invoke the jurisdiction of the ZBA pursuant to ZBA Rules § 22-2. Therefore, the ZBA does not have jurisdiction to entertain KCA's appeal and should dismiss the Appeal Petition. Further, insofar as KCA's Appeal Petition raises a due process argument to excuse its failure to appeal within the mandatory appeal filing deadlines, the argument fails as the extremely narrow due process exception that KCA invokes in its Appeal Petition is in no way applicable to the circumstances in this case. KCA's assertion that it should be permitted to disregard the ZBA's mandatory appeal filing deadlines in this case would harm the citizens of this state by creating perpetual uncertainty regarding the appealability and status of lawfully-obtained permits, creating a chilling effect on all development in Hawaii. In support of their Motion to Dismiss, NPM and the Director state the following:

I. BACKGROUND.²

NPM has substantially constructed and is continuing to construct a renewable wind

¹ This Motion to Dismiss is timely filed. At its hearing on February 20, 2020, the ZBA established that motions were due on March 26, 2020. March 26, 2020 is a state holiday. See HRS § 8-1. Pursuant to ZBA Rules § 21-8(b), where a deadline falls on a state holiday, the deadline becomes the next business day, which in this case is March 27, 2020. Therefore, this Motion to Dismiss is timely filed.

² Exhibits 1 through 10 of this Motion to Dismiss KCA's Appeal Petition are identical to Exhibits 1 through 10 to NPM and the Director's Motion to Dismiss Keep the North Shore Country's Petition to Appeal Director's Approvals of Conditional Use Permits, Waiver, and Modifications Filed December 23, 2019 ("Motion to Dismiss KNESC's Appeal Petition"), filed contemporaneously herewith. In order to reduce the number of already voluminous exhibits to be submitted to the ZBA, NPM and the Director incorporate herein Exhibits 1 through 10 to their Motion to Dismiss KNESC's Appeal Petition.

energy project in Kahuku, Oahu (“Project”), which is comprised of eight turbines, all of which have already been erected on site. Once operational, the Project will offset approximately 70,000 tons of CO2 emissions and generate enough electricity to power approximately 16,000 homes annually. The Project is located on two separate parcels of land leased by NPM and are referred to as Subproject A³ and Subproject B.⁴ Of the eight turbines, Turbine Nos. 1 through 4 are located on Subproject A, and Turbine Nos. 6 through 9 are located on Subproject B.

A. Subproject A – CUP No. 2016/CUP-69 and Zoning Waiver No. 2016/W-63 and Modifications.

On or about **November 29, 2016**, NPM submitted a Conditional Use Permit (“CUP”) Minor and Waiver Permit Application for a proposed Renewable Wind Energy Project, located in Kahuku, Oahu, Hawaii: Subproject A at Tax Map Key (“TMK”) No. (1) 5-6-008:006 (“Subproject A CUP Application”).⁵

Land Use Ordinance (“LUO”) § 21-4.60(c)(7) provides that the maximum permitted wind machine height is based on a setback from all property lines of one foot for every foot of the wind machine height. LUO § 21-5.700 provides that all wind machines must be set back from all property lines a minimum distance equal to the height of the system. Turbine Nos. 3 and 4, as proposed, complied with the minimum setback requirement. Turbine Nos. 1 and 2, as proposed, did not comply with the setback requirement. Thus, a zoning waiver was sought for Turbine Nos. 1 and 2.

On **January 20, 2017**, the Director issued Findings of Fact, Conclusions of Law, and Decision and Order approving NPM’s Subproject A CUP Application for a “Conditional Use Permit (Minor) (CUPm) and Zoning Waiver (W) from LUO Section 21-4.60(7) and LUO Section 21.5700(a)” to allow wind machine setbacks “in the AG-1

³ Subproject A is located at TMK No. (1) 5-6-008:006.

⁴ Subproject B is located on portions of TMK No. (1) 5-6-006:018.

⁵ See Subproject A CUP Application, dated November 29, 2016, without Figures, Appendices, and Attachment, attached to Motion to Dismiss KNCS’s Appeal Petition as **Exhibit 1**.

Restricted Agricultural District and AG-2 General Agricultural District”, subject to various conditions.⁶ NPM was issued CUP No. 2016/CUP-69 (“Subproject A CUP”) and Zoning Waiver No. 2016/W-63 (“Subproject A Zoning Waiver”). Pursuant to the Department of Planning and Permitting (“DPP”) Rules of Practice and Procedure (“DPP Rules”) § 6-2, the Director mailed notice of her decision on **January 20, 2017**.⁷ No appeal was filed with the ZBA regarding the Subproject A CUP or Subproject A Zoning Waiver before the mandatory appeal deadline, established under ZBA Rules § 22-2, of **February 21, 2017**.⁸

On **May 8, 2019**, NPM submitted a written request for minor modification of the Subproject A CUP and Zoning Waiver (“Subproject A CUP Minor Modifications Request”)⁹ to modify the location and height of the four previously-approved wind turbines. The proposed heights of all four turbines were reduced from 591 feet to 567.6 feet. The setback encroachment for Turbine No. 1 was reduced 8.9 feet from the original setback encroachment of 284 feet to 275.1 feet. Similarly, the setback encroachment for Turbine No. 2 was reduced 17.8 feet from the original setback encroachment of 372.3 feet to 354.5 feet. The proposed setback for Turbine Nos. 3 and 4 remained compliant with the minimum setback requirements provided for under LUO § 21-4.60(c)(7).

On **June 7, 2019**, the Director approved NPM’s Subproject A CUP Minor Modifications Request, which were issued as Minor Modification Nos. 2019/MOD-34 and 2019/MOD-35 (collectively, “Minor Modifications to Subproject A CUP”).¹⁰ Pursuant to

⁶ See Subproject A CUP and Waiver Findings of Fact, Conclusions of Law, and Decision and Order, dated January 20, 2017, without Attachments, attached to Motion to Dismiss KNSC’s Appeal Petition as **Exhibit 2**, at 15.

⁷ See Letter from Director approving the Subproject A CUP and Waiver, dated January 20, 2017, without Enclosure, attached to Motion to Dismiss KNSC’s Appeal Petition as **Exhibit 3**.

⁸ Thirty days following the date of mailing of the January 20, 2017 notice is February 19, 2017, which fell on a Sunday. Pursuant to ZBA Rules § 21-8, when the due date falls on a weekend or public holiday, the due date is the following business day. The next weekday, February 20, 2017, was President’s Day, a federal holiday and a Hawaii state holiday under HRS § 8-1. Accordingly, the deadline to appeal the Subproject A CUP and the Subproject A Zoning Waiver was Tuesday, February 21, 2017. See Declaration of Kathy Sokugawa (“Sokugawa Declaration”) at ¶4.

⁹ See Subproject A CUP Minor Modifications Request, dated May 1, 2019, without Attachments, attached to Motion to Dismiss KNSC’s Appeal Petition as **Exhibit 4**.

¹⁰ See Letter from the Director approving the Subproject A CUP Minor Modifications Request, dated June 7, 2019, without Enclosure, attached to Motion to Dismiss KNSC’s Appeal Petition as **Exhibit 5**.

DPP Rules § 6-2, the Director mailed notice of her decision on **June 7, 2019**.¹¹ No appeal was filed with the ZBA regarding the Minor Modifications to Subproject A CUP before the mandatory appeal deadline, established under ZBA Rules § 22-2, of **July 8, 2019**.¹²

B. Subproject B – CUP No. 2016/CUP-49 and Modification.

On or about **August 26, 2016**, NPM submitted a Conditional Use Permit (Minor) Application for a proposed Renewable Wind Energy Project, located in Kahuku, Oahu, Hawaii: Subproject B at TMK No. (1) 5-6-006:018 ("Subproject B CUP Application").¹³ Turbine Nos. 6 through 9 are all compliant with the setback requirements provided for under LUO § 214.60(c)(7). Accordingly, no setback waiver was required or requested.

On **October 27, 2016**, the Director issued Findings of Fact, Conclusions of Law, and Decision and Order approving NPM's Subproject B CUP Application for a "Conditional Use Permit, Minor (CUPm) to allow wind machines in the AG-1 Restricted Agricultural District", subject to various conditions.¹⁴ NPM was issued CUP No. 2016/CUP-49 ("Subproject B CUP"). Pursuant to DPP Rules § 6-2, the Director mailed notice of her decision on **October 27, 2016**.¹⁵ No appeal was filed with the ZBA regarding the Subproject B CUP before the mandatory appeal deadline, established under ZBA Rules § 22-2, of **November 28, 2016**.¹⁶

On **May 8, 2019**, NPM submitted a written request for minor modification of the

¹¹ See id.

¹² Thirty days following the date of mailing the notice, June 7, 2019, is July 7, 2019, which fell on a Sunday. Pursuant to ZBA Rules § 21-8, when the due date falls on a weekend or public holiday, the due date is the following business day. Accordingly, the deadline to appeal the Minor Modifications to Subproject A CUP was Monday, July 8, 2019. See Sokugawa Declaration at ¶5.

¹³ See Subproject B CUP Application, dated August 26, 2016, without Figures, Appendices, and Attachment, attached to Motion to Dismiss KNSC's Appeal Petition as **Exhibit 6**.

¹⁴ See Subproject B CUP Findings of Fact, Conclusions of Law, and Decision and Order, dated October 27, 2016, without Attachments, attached to Motion to Dismiss KNSC's Appeal Petition as **Exhibit 7**, at 15-17.

¹⁵ See Letter from the Director approving the Subproject B CUP Application, dated October 27, 2016, without Enclosure, attached to Motion to Dismiss KNSC's Appeal Petition as **Exhibit 8**.

¹⁶ Thirty days following the date of mailing the notice, October 27, 2016, was November 26, 2016, which fell on a Saturday. Pursuant to ZBA Rules § 21-8, when the due date falls on a weekend or public holiday, the due date is the following business day. Accordingly, the deadline to appeal the Subproject B CUP was Monday, November 28, 2016. See Sokugawa Declaration at ¶6.

Subproject B CUP (“Subproject B CUP Minor Modification Request”),¹⁷ to modify the height of the four previously-approved wind turbines by reducing the height of the wind turbines from 590.5 feet for Turbine No. 6 and 656.2 feet for Turbine Nos. 7, 8, and 9, to 567.6 feet for all four turbines (22.9 and 88.6-foot reductions, respectively). Turbine Nos. 6 through 9 continued to meet all setback requirements. On **June 7, 2019**, the Director approved NPM’s Subproject B CUP Minor Modification Request, which was designated as Minor Modification No. 2019/MOD-36 (“Minor Modification to Subproject B CUP”). Pursuant to DPP Rules § 6-2, the Director mailed notice of her decision on **June 7, 2019**.¹⁸ No appeal was filed with the ZBA regarding the Minor Modification to Subproject B CUP before the mandatory appeal deadline, established under ZBA Rules § 22-2, of **July 8, 2019**.¹⁹

C. KCA’s Appeal to the ZBA.

On **February 7, 2020**, KCA filed its Application to Intervene in Appeal of Director’s Approvals of Conditional Use Permits, Waiver, and Modifications, or Alternatively, to Appeal the Same (“KCA Application”). The ZBA considered the KCA Application at its hearing on February 20, 2020, and granted the KCA Application, in part, treating the Application as a new appeal (i.e., the Appeal Petition) with the understanding that NPM and the Director reserved their rights to challenge the appeal. The ZBA denied the KCA Application insofar as KCA sought to intervene in a separate appeal by Keep the North Shore Country (“KNSC”) in Case No. 2019/ZBA-7. The ZBA then ordered that the appeals of KCA and KNSC be consolidated in Case No. 2019-ZBA-7.

Substantively, KCA’s Appeal Petition challenges the actions of the Director

¹⁷ See Subproject B CUP Minor Modification Request, dated May 8, 2019, without Enclosures, attached to Motion to Dismiss KNSC’s Appeal Petition as **Exhibit 9**.

¹⁸ See Letter from the Director approving the Subproject B Minor Modification Request, dated June 7, 2019, without Enclosure, attached to Motion to Dismiss KNSC’s Appeal Petition as **Exhibit 10**.

¹⁹ Thirty days following the date of mailing the notice, June 7, 2019, was July 7, 2019, which fell on a Sunday. Pursuant to ZBA Rules § 21-8, when the due date falls on a weekend or public holiday, the due date is the following business day. Accordingly, the deadline to appeal the Minor Modification to Subproject B CUP was Monday, July 8, 2019. See Sokugawa Declaration at ¶7.

approving: (1) the Subproject A CUP, the Subproject A Zoning Waiver, and the Minor Modifications to Subproject A CUP, and (2) the Subproject B CUP and Minor Modification to Subproject B CUP (collectively, the “DPP Approvals”).

Relevant to this motion, KCA’s Appeal Petition states the following with respect to its organization and previous involvement with the NPM Project. KCA’s Appeal Petition avers that it is a nonprofit corporation that has previously expressed opposition to the NPM Project and other wind energy projects in Kahuku.²⁰ KCA alleges that it has participated in a number of community meetings and other various governmental proceedings regarding the NPM Project.²¹ KCA avers that it has expressed opposition to the NPM Project through its own vote and participated in NPM’s environmental impact statement (“EIS”) process under HRS Chapter 343 through petitions and comments submitted in opposition to the Project.²² KCA also states that it participated in proceedings regarding a City Charter amendment proposal to amend the LUO with respect to the wind energy machine permitting process.²³ Finally, KCA also states that it has challenged NPM’s incidental take license issued by the State Board of Land and Natural Resources (“BLNR”).²⁴ Of note, KCA’s Appeal Petition does not aver that it ever communicated directly to DPP expressing opposition to or advocating for any conditions in any of the DPP Approvals.

II. JURISDICTION OF THE ZONING BOARD OF APPEALS.

The Revised Charter of the City and County of Honolulu (“RCCCH”) § 6-1516 establishes the jurisdiction of the ZBA.²⁵ RCCCH § 6-1516 states, in relevant part:

Section 6-1516. Zoning Board of Appeals –

....The zoning board of appeals shall hear and determine appeals from the actions of the director in the administration of the zoning ordinances,

²⁰ KCA’s Appeal Petition at ¶¶1-4.

²¹ Id. at ¶4.

²² Id. at ¶¶6-7, 10.

²³ Id. at ¶¶8-9.

²⁴ Id. at ¶11.

²⁵ See Hoku Lele, LLC v. City & Cty. of Honolulu, 129 Haw. 164,166, 296 P.3d 1072, 1074 (2013).

including variances therefrom, subdivision ordinances and any rules and regulations adopted pursuant to either.

See also LUO § 21-1.40 (“Appeals from the actions of the director in the administration of the provisions of the LUO shall be to the zoning board of appeals as provided by Section 6–1516 of the charter. Appeals shall be filed within 30 days of the mailing or service of the director’s decision.”).

As explained by the Hawaii Intermediate Court of Appeals (“ICA”) in the Hoku Lele case, [t]he ZBA Rules further address the scope of the ZBA’s jurisdiction, stating as follows:

§ 22–1 *Petition*. (a) Any person who is specially, personally, or adversely affected by an action of the director may appeal the director’s action to the board by submitting a written petition to the board[.]²⁶

Critically, the mandatory requirements to invoke the ZBA’s jurisdiction to appeal an action of the Director is further addressed in ZBA Rules § 22-2, which states:

§ 22-2 Mandatory appeal filing deadline. (a) A written petition appealing an action of the director **must be received** at the department of land utilization within 30 days of the date of mailing or personal service of the director’s written decision; except that in the case of an appeal relating to the administration of the subdivision ordinance, the petition must be received within 15 days after receipt of the notice of the action.

(b) If the appeal is not timely filed, it **shall be dismissed by the board** upon the board’s own motion or the motion of any party to the proceeding.²⁷

While the waiver of most ZBA Rules by the ZBA is expressly permitted, the ZBA Rules specifically prohibit the ZBA from waiving the mandatory appeal filing deadline.²⁸

²⁶ *Id.* 167, 296 P.3d at 1075 (citing ZBA Rules §§ 21–1, 22–1).

²⁷ ZBA Rules § 22-2 (emphasis added).

²⁸ ZBA Rules § 22-7 states:

§22-7 Waiver or suspension of rules. The board may waive or suspend any procedure in chapter 22 for good cause, except that the mandatory appeal filing deadline and any other provisions mandated by law, shall not be waived.

III. KCA'S APPEAL PETITION IS UNTIMELY AND MUST BE DISMISSED.

A. The Director Provided Proper Notice of her Decisions under DPP Rules § 6-2.

The Director provided a written decision and mailed proper notice with respect to each of the DPP Approvals. DPP Rules § 6-2 governs notices of the Director's decisions, and states:

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.

As explained *supra*, the following notices of the Director's decisions were mailed by the Director on the following dates:

DPP Approval	Notice of Decision Mailing Date
Subproject B CUP	October 27, 2016
Subproject A CUP	January 20, 2017
Subproject A Zoning Waiver	January 20, 2017
Minor Modifications to Subproject A CUP	June 7, 2019
Minor Modification to Subproject B CUP	June 7, 2019

All of the DPP Approvals have been and continue to be available for review by the public at the DPP.²⁹

B. KCA's Appeal Petition is Untimely under ZBA Rules § 22-2 and LUO § 21-1.40.

KCA's appeal of all of the DPP Approvals is grossly tardy. The following chart indicates the mandatory appeal filing deadline for each of the DPP Approvals, calculated based upon the 30-day deadline mandated by the ZBA Rules and LUO discussed above, and the number of days past the mandatory appeal filing deadline KCA's Appeal Petition was filed:

²⁹ See Sokugawa Declaration at ¶10.

DPP Approval	Mandatory Appeal Filing Deadline	Days Past Mandatory Appeal Filing Deadline KCA Appeal Petition was Filed
Subproject B CUP	November 28, 2016	1,166 Days
Subproject A CUP	February 21, 2017	1,081 Days
Subproject A Zoning Waiver	February 21, 2017	1,081 Days
Minor Modifications to Subproject A CUP	July 8, 2019	214 Days
Minor Modification to Subproject B CUP	July 8, 2019	214 Days

As explained by the ICA, ZBA Rules § 22-2 and 22-7 “establish a mandatory, exclusive, and short thirty-day period within which a director's action can be appealed to the ZBA; once the thirty-day period has passed, the director's action becomes final and binding.”³⁰ As stated by the Hawaii Supreme Court, “[i]t is undisputed that an appeal of a CUP issuance must take place within thirty days of the mailing or service of the director's decision, pursuant to LUO § 21–1.40 and as provided for in ZBA Rules § 22–2.”³¹ Accordingly, KCA’s Appeal Petition must be dismissed by the ZBA, pursuant to ZBA Rules § 22-2 and LUO § 21–1.40, because the Appeal Petition was untimely filed with respect to each of the DPP Approvals.

IV. KCA’S APPEAL PETITION DOES NOT RAISE A DUE PROCESS CONCERN.

KCA’s Appeal Petition attempts to invoke a due process argument to circumvent the ZBA’s mandatory dismissal of its appeal. The Hawaii Supreme Court recently decided Unite Here! Local 5 v. Department of Planning and Permitting, 145 Haw. 453, 455, 454 P.3d 394, 396 (2019) (“PACREP”), in which the Court found that **under the unique circumstances present in that case** - specifically, where the record demonstrates that the interested party advocated for certain conditions in a permit, the permit was approved

³⁰ Hoku Lele, LLC, 129 Haw. at 168, 296 P.3d at 1076.

³¹ Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & County of Honolulu, 114 Haw. 184, 196, 159 P.3d 143, 155 (2007).

with those conditions, and the permitting authority knew the importance of the conditions to the interested party - the interested party was entitled to heightened procedural protections regarding later decisions to modify that permit. However, **none** of the unique circumstances present in the PACREP case are present here and, therefore, due process does not require that the KCA Appeal Petition be considered.

A. PACREP Case.

1. DPP Proceedings.

In PACREP, the Hawaii Supreme Court considered the DPP's approval of two Waikiki Special District (major) permits for the development of a condo-hotel.³² Unite Here! Local 5 ("Local 5"), a union representing hotel and restaurant employees, actively expressed its concern regarding the first of the two permits considered by the DPP, the 2121 Kuhio Permit, during the DPP's consideration of the permit application.³³ Local 5 submitted written testimony to the DPP objecting to the 2121 Kuhio Permit, arguing that the applicant had not taken measures to ensure the building would be used solely for hotel accommodations and had not ensured adequate parking on the premises for guests and workers.³⁴ At the public hearing on the 2121 Kuhio Permit, a Local 5 representative also voiced the union's concern regarding the discrepancies in the number of parking spaces, job estimates, and unit types represented in the final environmental assessment and permit application for the project.³⁵

When the DPP approved the first of the two permits, the 2121 Kuhio Permit, the Director placed two restrictive covenants into the permit to ensure compliance with the LUO related to parking and park dedication requirements (collectively, "Pro-Union Conditions") at the behest of the Local 5.³⁶

Local 5 was not copied on the Director's letter to the permittee approving the 2121

³² 145 Haw. 453, 455, 454 P.3d 394, 396 (2019).

³³ Id. at 456, 454 P.3d at 397.

³⁴ Id.

³⁵ Id.

³⁶ Id.

Kuhio Permit, but Local 5 was aware the permit had been approved subject to the Pro-Union Conditions that Local 5 had advocated for so strongly.³⁷ Neither the permittee nor Local 5 appealed the 2121 Kuhio Permit.³⁸ Given that Local 5's Pro-Union Conditions were incorporated into the 2121 Kuhio Permit, the Court noted that Local 5 had no reason to appeal the permit and no reason to request notice of action pursuant to DPP Rules § 6-2.³⁹

Sometime after the Director's approval of the 2121 Kuhio Permit, the permittee **verbally requested** that the Pro-Union Conditions be waived.⁴⁰ In response to this verbal request, which was never made in writing, the Director removed the Pro-Union Conditions ("Modification Letter").⁴¹ Local 5 was not aware of the Modification Letter removing the Pro-Union Conditions, and Local 5 did not appeal the Modification Letter to the ZBA within 30 days, as required by LUO § 21.140 and ZBA Rules § 22-2, presumably because it had not been notified of the permit modification.⁴²

Later, the permittee applied for the second of the two permits, the 2139 Kuhio Permit, for phase two of the project, for which Local 5 again commented at the public hearing that it was concerned with, *inter alia*, the conversion of the hotel into a multi-family dwelling and the associated parking impacts.⁴³ The 2139 Kuhio Permit was approved by the Director without the Pro-Union Conditions that had previously been placed into the 2121 Kuhio Permit.⁴⁴

2. ZBA and Circuit Court Proceedings.

Local 5 appealed the Director's approval of the 2139 Kuhio Permit to the ZBA, arguing, *inter alia*, that the Director abused his discretion in approving the 2139 Kuhio

³⁷ Id. at 458, 454 P.3d at 399.

³⁸ Id.

³⁹ Id. at 467, 454 P.3d at 408.

⁴⁰ Id. at 458, 454 P.3d at 399.

⁴¹ Id.

⁴² Id.

⁴³ Id. at 458-59, 454 P.3d at 399-400.

⁴⁴ Id. at 459, 454 P.3d at 400.

Permit without the same Pro-Union Conditions as the 2121 Kuhio Permit.⁴⁵ The DPP argued that because the Director had removed the Pro-Union Conditions from the 2121 Kuhio Permit, the two permits were not inconsistent.⁴⁶ Local 5 first learned that the Pro-Union Conditions were removed from the 2121 Kuhio Permit at the contested case hearing before the ZBA regarding the 2139 Kuhio Permit.⁴⁷

The ZBA determined that it did “not have jurisdiction in this appeal to determine the validity of any modification or removal of conditions of the [2121 Kuhio Permit]” and stated that “[t]he conditions placed on the 2121 Kuhio project involve a different permit and application than the [2139 Kuhio Permit] and 2139 Application that are the subject of this appeal. As a result, any arguments of improper actions involving the [2121 Kuhio Permit] were not considered in this appeal.”⁴⁸

Upon appeal to the circuit court, the circuit court also found that it lacked jurisdiction to adjudicate the modification of the 2121 Kuhio Permit, concluding that the permit was not designated as an “action of the Director” in Local 5’s petition.⁴⁹ The circuit court also concluded that it did “not have jurisdiction over the 2121 Kuhio Permit, the modification of the 2121 Kuhio Permit, or the effects of the 2121 Kuhio Permit modification on Local 5’s due process rights pursuant to HRS § 91-14, in this case.”⁵⁰

3. The Hawaii Supreme Court Proceedings.

Before the Hawaii Supreme Court, Local 5 challenged two “decisions” by the Director: the Director’s Modification Letter removing the Pro-Union Conditions from the 2121 Kuhio Permit and the Director’s approval of the 2139 Kuhio Permit without the Pro-Union Conditions.⁵¹

With respect to the 2121 Kuhio Permit, the Hawaii Supreme Court held that “[o]n

⁴⁵ *Id.* at 459-60, 454 P.3d at 400-01.

⁴⁶ *Id.* at 460, 454 P.3d at 401.

⁴⁷ *Id.* at 458, 454 P.3d at 399.

⁴⁸ *Id.* at 462, 454 P.3d at 403.

⁴⁹ *Id.* at 464, 454 P.3d at 405.

⁵⁰ *Id.*

⁵¹ *Id.* at 465, 454 P.3d at 406.

the facts of this case, we agree with Local 5 that it was substantially prejudiced when it did not receive notice that the Director had removed [the Pro-Union Conditions] from the 2121 Kuhio Permit.”⁵² The DPP had argued that Local 5’s due process rights were not violated by the Modification Letter because the DPP was not required to give affirmative notice to Local 5 that the Director had removed the Pro-Union Conditions from the 2121 Kuhio Permit because Local 5 was not the applicant and had not formally requested notice of the Director’s actions under DPP Rules § 6-2⁵³ for the 2121 Kuhio Permit.⁵⁴

The Court disagreed based on the specific facts of the case and cited the general principle that due process

is not a fixed concept requiring a specific procedural course in every situation. Rather, due process is flexible and calls for such procedural protections as the particular situation demands. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.⁵⁵

The Court noted three distinct factors that amounted to a “**unique circumstance**” for which heightened due process protections should have been afforded to Local 5 with respect to the modification of the 2121 Kuhio Permit.⁵⁶ The three factors included: (1) Local 5 actively participated in the public hearing process for the 2121 Kuhio Permit and advocated for the Pro-Union Conditions; (2) Local 5 knew that the 2121 Kuhio Permit had been approved with the Pro-Union Conditions for which it had advocated and therefore had no reason to request notice of the decision; and (3) the 2121 Kuhio Permit was “not modified using the normal procedures for modification” in that (a) there was no evidence in the record to suggest that the permittee had publicly announced or filed a written request seeking to modify the 2121 Kuhio Permit; and (b) there was also no evidence that

⁵² *Id.* at 466, 454 P.3d at 407 (emphasis added).

⁵³ DPP Rules § 6-2 provides that “[t]he 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.”

⁵⁴ PACREP, 145 Haw. at 466, 454 P.3d at 407.

⁵⁵ *Id.* (quoting *Price v. Zoning Bd. of Appeals*, 77 Haw. 168, 172, 883 P.2d 629, 633 (1994) (citations omitted)).

⁵⁶ *Id.* at 467, 454 P.3d at 408.

the Modification Letter removing the Pro-Union Conditions was available at the DPP for review by the public.⁵⁷

Given these highly unusual and unique circumstances, the Hawaii Supreme Court carved out a narrow holding to provide relief to Local 5 and held that:

where the record demonstrates that the interested party advocated for certain conditions in a permit, the permit was approved with those conditions, and the permitting authority knew the importance of the conditions to the interested party, that interested party is entitled to heightened procedural protections regarding later decisions to modify that permit.⁵⁸

The “heightened procedural protections regarding later decisions to modify that permit”, included notice and an opportunity to be heard.⁵⁹ Therefore, the Court remanded the case back to the ZBA to determine whether the Director’s Modification Letter was a proper modification of the 2121 Kuhio Permit.⁶⁰

B. KCA’S Appeal Petition Raises None of the Same Due Process Concerns as were Raised in PACREP.

The PACREP case could not be any more different from the case at hand. Not one of the factors identified by the Hawaii Supreme Court in PACREP to support the “unique circumstance” in that case to justify heightened due process protections is present in KCA’s Appeal Petition. Unlike in the PACREP case, (1) KCA never commented regarding the DPP Approvals or any of the applications (prior to the KCA Appeal Petition to the ZBA filed on February 7, 2020) and never advocated for any pro-KCA conditions to the DPP Approvals; (2) the DPP Approvals never included any pro-KCA conditions; (3) the Director did not know of the importance of any pro-KCA conditions as none existed; (4) there was no later action by the DPP to modify the DPP Approvals to remove the non-

⁵⁷ Id. at 466-67, 454 P.3d at 407-08.

⁵⁸ Id. at 467, 454 P.3d at 408.

⁵⁹ Id.

⁶⁰ Id. In addition, because the Director’s decision to approve the 2139 Kuhio Permit rested, in part, on the removal of the Conditions from the 2121 Kuhio Permit, the Court also vacated and remanded the Director’s decision to approve the 2139 Kuhio Permit for a redetermination of whether the Director abused his discretion in approving the permit without the Conditions. PACREP, 145 Haw. at 468, 454 P.3d at 409.

existent pro-KCA conditions; and (5) all applications for the DPP Approvals were submitted in writing and have been and continue to be available at the DPP for review by the public.

KCA's Appeal Petition asserts that KCA was involved in a number of activities involving wind projects generally and that it expressed opposition to the NPM Project either privately or to public/governmental agencies and bodies but not to DPP.⁶¹ None of these averments allege any direct opposition to or direct comment upon any of the DPP Approvals to any agency including but not limited to DPP, and do not allege that any pro-KCA condition was inserted into any of the DPP Approvals so as to create a "heightened due process protection" under PACREP.

KCA also avers in its Appeal Petition that it submitted comments and a petition in connection with the Project's EIS which is included in DPP's files.⁶² DPP requires an application for a minor CUP to include a copy of a completed EIS if one is required under HRS Chapter 343.⁶³ A copy of the Project's Final Environmental Impact Statement dated June 2016 ("2016 FEIS"), which was reviewed and accepted by BLNR (not DPP) was submitted to DPP as an attachment to NPM's Subproject A and B CUP Applications.⁶⁴ Appendix M to NPM's 2016 FEIS includes public comments, and responses thereto, on the Project's first draft EIS, draft habitat conservation plan, and second draft EIS.⁶⁵ The comments and responses in Appendix M comprise 707 pages, consisting of approximately 1,612 letters, petitions, emails, and/or signatures received during the EIS

⁶¹ See KCA Appeal Petition at ¶¶2-3,5, 8-9, 11.

⁶² *Id.* at ¶¶6-7.

⁶³ See e.g., the current CUP Minor Application Form for "All Uses Except Meeting Facility, Day-Care Facility, School" from DPP at <http://www.honolulu.dpp.org/ApplicationsForms/ZoningandLandUsePermits.aspx> (*last accessed* March 10, 2020).

⁶⁴ NPM's 2016 FEIS, dated June 2016, is available online from BLNR at <https://dlnr.hawaii.gov/ld/na-pua-makani-wind-project-final-eis/> (*last accessed* March 10, 2020). Because the entire 2016 FEIS is approximately 2,447 pages long, it has not been included as an exhibit to this motion, but a copy of the 2016 FEIS submitted with NPM's Subproject A and B CUP Applications is public information available at BLNR's website referenced above.

⁶⁵ See *id.* at Appendix M.

process conducted by BLNR.⁶⁶

Comments contained in the 2016 FEIS, accepted by another agency, are not sufficient to invoke the specific and unique due process exception recognized in PACREP for the simple reason that the comments in the 2016 FEIS are not comments upon or objections to the DPP Approvals. Furthermore, those comments to the 2016 FEIS never resulted in conditions to the DPP Approvals to address those comments,⁶⁷ and DPP never subsequently removed the non-existing conditions without notice and an opportunity to be heard. The voluminous comments in the 2016 FEIS were considered and addressed by BLNR during the EIS process, culminating in the accepted and final 2016 FEIS, which was not appealed. The comments in the 2016 FEIS (1) were necessarily made before NPM submitted an application for any of the DPP Approvals as the 2016 FEIS was submitted with the initial Subproject A and B CUP Applications, (2) were directed to and considered by BLNR, and (3) were not comments upon or objections to the then non-existent DPP Approvals.

A finding by the ZBA that DPP (and every other governmental agency that issues a permit) is required by PACREP first to review all comments expressing opposition to a project in an EIS submitted with a project application and then to provide subsequent notice to those individuals each time an action is taken by the Director regarding a permit for that project (1) would be impossible and create an untenable administrative burden that has impacts far beyond DPP and (2) is in no way supported by the PACREP case.

This case demonstrates how untenable the administrative burden would be if the ZBA were to find that KCA's untimely appeal could be heard. As explained above, NPM's Appendix M to the 2016 FEIS is 707 pages long and contains approximately 1,612 letters, petitions, emails, and/or signatures received during the EIS process with BLNR. Many of

⁶⁶ This count includes all letters, comments, and signatures included in the 2016 FEIS both for and against the Project. This count has not attempted to de-duplicate the commenters.

⁶⁷ See Sokugawa Declaration at ¶9.

the signatures are illegible such that the name of the signatory cannot be determined. Additionally, for those names that are legible, many of the names do not have accompanying addresses, so that it is impossible to determine which “John Doe” of the many John Does of the world commented. Finding that the PACREP case supports an exception here would require DPP: (1) to review all of the comments in the 2016 FEIS submitted with NPM’s permit applications (for which it was not the Accepting Agency); (2) to determine which persons and organizations, if signatures are legible, opposed the Project; (3) to determine the grounds for the opposition of each person and organization; (4) to determine whether the grounds for opposition are still valid given the outcome of the EIS process and the permit under consideration; and (5) to decipher, catalogue, and store the contact information, if the contact information is included, for each “opponent” to the Project and the grounds for opposition for later reference. All the foregoing would be required in the event a permit is later issued or modified to which the opponent may have an objection based solely on his or her previous comments in the 2016 FEIS. This extraordinary burden is neither supported nor required by the PACREP case and would result in a perpetual state of uncertainty regarding any permit or other approval granted by DPP.

Under DPP’s Rules, any person interested in DPP’s processing of a permit can request notice of the Director’s decision,⁶⁸ which KCA did not request. Further, KCA cannot argue it was unaware the Project would be seeking permits from DPP as it knew minor CUPs would have to be obtained from DPP, given that the draft EIS and 2016 FEIS both included notice to commenters that NPM would have to seek minor CUPs from the City and County of Honolulu for the Project.⁶⁹ KCA knew the Project would require CUPs from DPP, yet affirmatively neglected to avail itself of DPP’s procedures, available to any

⁶⁸ See DPP Rule § 6-2 (“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.”)

⁶⁹ 2016 FEIS at 5-27, Table 5-2; 4-156; 5-24.

interested party, that would provide KCA notice and the opportunity to be heard regarding the Director's decisions. PACREP neither allows nor requires the ZBA to permit KCA to ignore DPP's Rules that exist to ensure an orderly permit approval process and the finality of the decisions of the Director.

DPP did not receive any direct communications from KCA regarding any opposition to the NPM Project or objections to the DPP Approvals, and KCA did not participate in any meetings with the Director or DPP regarding the DPP Approvals.⁷⁰ In other words, KCA's Appeal Petition filed on February 7, 2020, was the first indication from KCA to the Director or her department that KCA was opposing the Project and/or the DPP Approvals. Importantly, KCA also does not allege that any condition for which it advocated was included in (or removed from) any of the DPP Approvals. The reason no such allegation was made is because KCA simply did not advocate for any condition for any of the DPP Approvals. It did not participate in the DPP Approvals process at all.

KCA is attempting to invoke the narrow PACREP exception and transform it into a weapon whereby any project opponent could simply provide notice of its concerns with any project to a permitting agency and then have a perpetual right to appeal permits validly issued to the project by the permitting agency. In that environment, there would be no development and no financing or funding for development in Hawaii. Completed projects or near-completed projects, like the NPM Project, would be under perpetual threat of challenge. KCA's attempt should be rejected.

Each factor relied upon by the Hawaii Supreme Court to justify heightened procedural protections for Local 5 is glaringly missing in this case. First, in PACREP, Local 5 "actively participated in the public hearing process for the 2121 Kuhio Permit" and advocated for inclusion of certain Pro-Union Conditions.⁷¹ As explained above, KCA did not communicate to DPP or participate in any other way with DPP regarding its

⁷⁰ See Sokugawa Declaration at ¶¶8-9.

⁷¹ PACREP, 145 Haw. at 466-67, 454 P.3d at 407-08.

consideration of the DPP Approvals. In PACREP, Local 5's objections were expressed directly to the DPP, and there was no dispute that the DPP was aware that Local 5 advocated for the Pro-Union Conditions in the 2121 Kuhio Permit, and, therefore, no dispute that the permitting authority knew the importance of the conditions to the interested party.⁷²

Second, in PACREP, Local 5 was aware that the 2121 Kuhio Permit had been approved with the Pro-Union Conditions for which it had advocated.⁷³ Here, critically, KCA has not identified any condition or any pro-KCA condition in any of the DPP Approvals that was included in any permit because KCA had advocated for them.⁷⁴ KCA only states that it expressed opposition to the Project privately or to other governmental agencies. Because there was no pro-KCA condition included in any of the DPP Approvals,⁷⁵ there was never any pro-KCA condition to take away and no "heightened procedural protections" required prior to taking away such a condition.

Third, in PACREP, the 2121 Kuhio Permit was "not modified using the normal procedures for modification."⁷⁶ In that case, the Applicant did not submit a request for modification in writing, but verbally requested that the Director remove the Pro-Union Conditions and there was no evidence that the Modification Letter was available at the DPP for review by the public.⁷⁷ Here, all of the DPP Approvals and applications relating to such approvals have been and continue to be available for review by the public in the

⁷² Id.

⁷³ Id. at 467, 454 P.3d at 408.

⁷⁴ KCA's Appeal Petition suggests that its primary objection to the project is the height and setback encroachment of the project's wind turbines. Assuming *arguendo* that a condition was included in the Subproject A or B CUPs that had been advocated by KCA with respect to the height/setback requirements of the wind turbines, the subsequent modifications to the Subproject A and B CUPs reduced the heights of the wind turbines and either (1) decreased the amount of setback encroachment for which NPM had been granted a waiver (Subproject A) or (2) the changes had no effect on compliance with setback requirements (Subproject B). KCA could, therefore, demonstrate no harm by the modification, even if there had been a condition advocated for by KCA in the Subproject A or B CUPs, which there was not.

⁷⁵ See Sokugawa Declaration at ¶9.

⁷⁶ PACREP, 145 Haw. at 467, 454 P.3d at 408.

⁷⁷ Id.

DPP's files.⁷⁸

In summary, a finding that KCA could ignore the ZBA's mandatory appeal filing deadlines under the facts of this case would severely undermine developers' ability to rely on permits issued by the City and County and would ultimately harm citizens in this state by increasing the costs and uncertainty associated with development. This result is not supported by PACREP, which the Hawaii Supreme Court narrowly tailored to the specific facts of that case, and is an unreasonable and untenable extrapolation of the holding in that case.

V. CONCLUSION.

For the reasons stated herein, NPM and the Director respectfully request that the ZBA grant NPM and the Director's Motion to Dismiss in the above-referenced matter.

DATED: Honolulu, Hawaii, March 27, 2020.



BRAD T. SAITO

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DEPARTMENT OF PLANNING AND
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PARTNERS, LLC

⁷⁸ See Sokugawa Declaration at ¶10.

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

In the Matter of the Petitions of)
)
KEEP THE NORTH SHORE COUNTRY, a) Case No. 2019/ZBA-7 (Consolidated)
nonprofit corporation, and THE KAHUKU)
COMMUNITY ASSOCIATION, a nonprofit) DECLARATION OF KATHY
corporation, concerning the Na Pua Makani) SOKUGAWA
Wind Project – Subprojects A & B, 56-668)
Kamehameha Highway, Kahuku, O’ahu, Tax)
Map Key (1) 5-6-008:006 & 5-6-006:018)
)
From the Actions of the Director of Planning)
and Permitting, dated October 24, 2016)
(2016/CUP-49); January 20, 2017)
(2016/CUP-69 & 2016/W-63), & June 7, 2019)
(2019/MOD-34, -35 & -36))
)

DECLARATION OF KATHY SOKUGAWA

1. I am the Director of the Department of Planning and Permitting, City and County of Honolulu (“Director” and “DPP”, respectively).
2. As Director, I am familiar with the procedures and processes utilized by the DPP and the files maintained by the DPP.
3. Na Pua Makani Power Partners, LLC (“NPM”) and I have jointly filed the Motion to Dismiss Kahuku Community Association’s (“KCA”) Application to Appeal Director’s Approvals of Conditional Use Permits, Waiver, and Modifications, filed February 7, 2020 (“Motion to Dismiss”), and I am familiar with the contents thereof.

4. No appeal was filed with the ZBA regarding the Subproject A CUP or Subproject A Zoning Waiver, as defined in the Motion to Dismiss, prior to the mandatory appeal deadline of February 21, 2017.

5. No appeal was filed with the ZBA regarding the Minor Modifications to Subproject A CUP, as defined in the Motion to Dismiss, before the mandatory appeal deadline of July 8, 2019.

6. No appeal was filed with the ZBA regarding the Subproject B CUP, as defined in the Motion to Dismiss, before the mandatory appeal deadline of November 28, 2016.

7. No appeal was filed with the ZBA regarding NPM's Minor Modification to Subproject B CUP, as defined in the Motion to Dismiss, before the mandatory appeal deadline of July 8, 2019.

8. The DPP did not receive any direct communications from KCA regarding any opposition to the NPM Project or objections to the DPP Approvals, as defined in the Motion to Dismiss, and KCA did not participate in any meetings with me or DPP regarding the DPP Approvals.

9. To the best of my knowledge, DPP did not receive any public comments on the applications for the DPP Approvals. I am not personally aware of any public comments that were made to DPP regarding the applications for the DPP Approvals and I did not impose any conditions in the DPP Approvals based on public comments that were made to DPP concerning the same.

10. All of the DPP Approvals have been and continue to be available for review by the public at the DPP.

11. I declare under penalty of law that the foregoing is true and correct.

FURTHER DECLARANT SAYETH NAUGHT.

[Signature on following page]

Executed on March 25, 2020.


KATHY SOKUGAWA
DIRECTOR OF DEPARTMENT
OF PLANNING AND PERMITTING

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

In the Matter of the Petitions of)) KEEP THE NORTH SHORE COUNTRY, a) nonprofit corporation, and THE KAHUKU) COMMUNITY ASSOCIATION, a nonprofit) corporation, concerning the Na Pua Makani) Wind Project – Subprojects A & B, 56-668) Kamehameha Highway, Kahuku, O’ahu, Tax) Map Key (1) 5-6-008:006 & 5-6-006:018)) From the Actions of the Director of Planning) and Permitting, dated October 24, 2016) (2016/CUP-49); January 20, 2017) (2016/CUP-69 & 2016/W-63), & June 7, 2019) (2019/MOD-34, -35 & -36))) <hr style="width: 40%; margin-left: 0;"/>	Case No. 2019/ZBA-7 (Consolidated) CERTIFICATE OF SERVICE
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CERTIFICATE OF SERVICE

I hereby certify that on this date copies of the foregoing document, together with this Certificate of Service, were duly served on the following parties as set forth below:

Recipients	E-Mail
Kathy Sokugawa Department of Planning and Permitting City and County of Honolulu 650 South King Street, 7 th Floor Honolulu, Hawaii 96813 ksokugawa@honolulu.gov <i>Director of the Department of Planning and Permitting, City and County of Honolulu</i>	<input checked="" type="checkbox"/>

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<p>Lance D. Collins P.O. Box 179336 Honolulu, Hawaii 96817 lawyer@maui.net</p> <p>and</p> <p>Bianca K. Isaki 1720 Huna Street, 401B Honolulu, Hawaii 96837 bianca.isaki@gmail.com</p> <p><i>Counsel for Keep the North Shore Country and Kahuku Community Association</i></p>	<input checked="" type="checkbox"/> 1 copy to each
<p>Dawn Spurlin 530 S. King Street Honolulu, HI 96813 dspurlin@honolulu.gov</p> <p><i>Deputy Corporation Counsel for the Zoning Board of Appeals</i></p>	<input checked="" type="checkbox"/> Carbon copy

DATED: Honolulu, Hawaii, March 27, 2020.



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