

Law Office of Lance D. Collins
Lance D. Collins 8246
Post Office Box 782
Makawao, Hawai'i 96768
808.243.9292

Law Office of Bianca Isaki
Bianca K. Isaki 9977
1720 Huna Street, 401B
Honolulu, Hawai'i 96837
(808) 927.5606

Attorneys for
KEEP THE NORTH SHORE COUNTRY &
KAHUKU COMMUNITY ASSOCIATION

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
THE STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY, a)	Civil No. _____
nonprofit corporation, and KAHUKU)	Agency Dkt. No. 2019/ZBA-7
COMMUNITY ASSOCIATION, a nonprofit)	
corporation,)	APPELLANTS' NOTICE OF APPEAL TO
Plaintiffs/Appellants,)	THE CIRCUIT COURT; STATEMENT OF
vs.)	THE CASE; EXHIBIT "A"; DESIGNATION
)	OF RECORD ON APPEAL; ORDER FOR
)	CERTIFICATION AND TRANSMISSION
ZONING BOARD OF APPEALS, City and)	OF RECORD
County of Honolulu; DIRECTOR OF THE)	
DEPARTMENT OF PLANNING AND)	
PERMITTING, City and County of Honolulu;)	
NA PUA MAKANI POWER PARTNERS, a)	
limited liability company,)	
)	
Defendants/ Appellees.)	

APPELLANTS' NOTICE OF APPEAL TO THE CIRCUIT COURT

Notice is hereby given that Plaintiffs/ Appellants KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation, and KAHUKU COMMUNITY ASSOCIATION, a nonprofit corporation (collectively, "Appellants"), by and through their undersigned counsel, hereby appeals to the Circuit Court of the First Circuit from the Findings of Fact, Conclusions of Law, and

Decision and Order of Defendant-Appellee ZONING BOARD OF APPEALS OF THE CITY AND COUNTY OF HONOLULU, STATE OF HAWAII, adopted on November 6, 2020 and dated November 17, 2020 (ZBA Order). A copy of the Order is attached as Exhibit "A".

Defendant-Appellee ZONING BOARD OF APPEALS OF THE CITY AND COUNTY OF HONOLULU, STATE OF HAWAII prejudiced the substantial rights of Appellants for all the reasons given in Hawai'i Revised Statutes §§91-8 and 91-14(g)(1)-(6). This appeal is also made upon the grounds set forth more fully in the Statement of the Case, filed on this date and attached hereto.

This Court has jurisdiction to hear and decide this Appeal pursuant to the bases set forth above. This Appeal is filed pursuant to Rules 2 and 72 of the Hawai'i Rules of Civil Procedure.

DATED: Makawao, Hawai'i

November 24, 2020

/s/ Lance D. Collins
LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Attorneys for Keep the North Shore
Country & Kahuku Community Association

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

THE STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY, a)	Civil No. _____
nonprofit corporation, et al,)	Agency Dkt. No. 2019/ZBA-7
)	
Plaintiffs/Appellants,)	STATEMENT OF THE CASE
vs.)	
)	
ZONING BOARD OF APPEALS, City and)	
County of Honolulu, et al,)	
)	
Defendants/ Appellees.)	

STATEMENT OF THE CASE

Plaintiffs/Appellants KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation (KNSC), and KAHUKU COMMUNITY ASSOCIATION, a nonprofit corporation, (collectively, “Appellants”), by and through their undersigned counsel, respectfully seeks relief for cause of action against Defendants/ Appellees ZONING BOARD OF APPEALS, City and County of Honolulu (ZBA); DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, City and County of Honolulu (Director), and NA PUA MAKANI POWER PARTNERS, a limited liability company (NPM) (collectively “Defendants”) for acting in excess of their authority and in violation of Hawai‘i Revised Statutes (HRS) chapter 91, articles I §5, XI §§1 and 9, and XII §7 of the Hawai‘i State Constitution.

I. INTRODUCTION

1. On December 23, 2019, KNSC filed its petition to appeal the Director’s approvals of conditional use permits, waiver, and modifications for NPM’s wind turbine - subprojects A & B, located at 56-668 Kamehameha Highway, Kahuku, O‘ahu, Tax Map Key (1) 5-6-008:006 & 5-6-006:018 (project). Thereafter, Kahuku Community Association filed a motion to intervene in KNSC’s appeal or, in the alternative, an independent appeal.

2. The ZBA granted KNSC’s petition, scheduled a contested case hearing, later granted Kahuku Community Association’s alternative request for an appeal, and consolidated the two appeals.

3. Appellants held protected interests in lands affected by the project, native Hawaiian traditional and customary practices, and environmental rights that would be aggrieved by the

Director's decisions to grant conditional use permits, waivers, and modifications of those permits for the project.

4. ZBA erred in dismissing KNSC's petition and Kahuku Community Association's intervention on procedural and substantive grounds.

5. The Director's unlawfully issued waiver and modifications of the project's conditional use permits remain effective and unchallenged and infringe on Appellants' substantive rights.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over the claims for relief in this action pursuant to HRS §§ 91-8, 91-14, 603-21.5, 603-21.9, and 632-1; and articles I §5, XI §§1 and 9, XII §7 of the Hawai'i State Constitution.

III. PARTIES

7. Appellant KEEP THE NORTH SHORE COUNTRY is a grassroots, volunteer-based North Shore non-profit, formed in 2006, "to preserve, protect and enhance the heritage and rural character of the North Shore of O'ahu in partnership with North Shore communities, including Kahuku. The Hawai'i Supreme Court recognized KNSC's ability to represent environmental interests on the North Shore in the landmark Turtle Bay Resort development case, which compelled Kuilima Resort Company, located in Kahuku, to supplement its 1985 Environmental Impact Statement. *Unite Here! Local 5 vs. City and County of Honolulu*, 123 Hawai'i 150, 231 P.3d 423 (2010).

8. Appellant KAHUKU COMMUNITY ASSOCIATION has been a Hawai'i nonprofit corporation since 1979. Kahuku Community Association was formed to develop community interests, provide a place for individual and community opinion, to find and study the needs of the community and carry out projects or activities to meet these needs, to act as the voice of the community in dealing with governmental and other outside agencies, and to develop and promote recreational programs to fulfill the needs of the community with special reference to the needs of the youth in the community.

9. Appellants have publicly opposed the NPM's Wind Project - Subprojects A and B, located at 56-668 Kamehameha Highway, Kahuku, O'ahu on Tax Map Keys (1) 5-6-006:008 and 5-6-006:018 respectively (project) through participation in numerous community meetings, agency

hearings, city council initiatives, signing petitions, and by providing comments as part of the environmental review process under HRS chapter 343 for the environmental impact statement prepared for the project in 2016.

10. Appellants raised property interests in the Director's decisions to waive setbacks, grant conditional use permits (minor), and modifications of the setbacks for the project because NPM's proposed wind turbine project may affect Appellants': (1) rights to a clean and healthy environment as defined by laws including the City's land use ordinance; (2) their respective missions as organizations dedicated to protecting the communities and environment of Kahuku and the North Shore; (3) traditional and customary cultural practices of its members, including hunting and gathering practices; (4) property values of their members' homes; and, (5) for Kahuku Community Association, permit conditions requiring \$2 million and other community benefits from the project go directly to the Kahuku community.

11. Appellants' members live, recreate, go to school, and work in areas nearby the proposed project and have interests clearly distinguishable from the general public.

12. Appellants' members include those whose traditional and cultural, recreational, and aesthetic practices include and rely on native birds and 'ōpe'ape'a that will be adversely impacted by the installation and operation of the wind turbines. They have interests in protecting endangered and threatened species, native species, and wildlife and specifically in wildlife conservation projects throughout the state, including Kahuku Point, Malaekahana, and James Campbell National Wildlife Refuge, near or within the area affected by the project.

13. Defendant/Appellee ZONING BOARD OF APPEALS, City and County of Honolulu, is a county board authorized to hear appeals from decisions of the Director. The ZBA is part of the City and County of Honolulu's Department of Planning and Permitting.

14. Defendant/Appellee DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, City and County of Honolulu, is the administrative head of the Department of Planning and Permitting. The Director is required to prepare a general plan and development plans for the improvement and development of the City, establish procedures for revising those plans, prepare and establish procedures for zoning ordinances, land subdivision, and land utilization, and is charged with the administration and enforcement of zoning, subdivision, park dedication, building and housing ordinances, and administer the county's land use ordinance.

15. Defendant/Appellee NA PUA MAKANI POWER PARTNERS, LLC, is a Delaware-based foreign limited liability company that is developing a 24 megawatt wind power

project to be located within the Ko‘olauloa District of O‘ahu on two adjacent parcels identified by tax map key (TMK) Nos. (1) 5-6-008:006 and 5-6-006:018 (project).

IV. GENERAL BACKGROUND

16. In March 2014, Kahuku Community Association voted against supporting the construction of any further industrial wind turbines in Kahuku.

17. In a comment submitted on August 10, 2015, Kahuku Community Association voiced its strong opposition to the NPM project as part of the HRS chapter 343 environmental review process, and attached a petition with signatures and comments from thousands of people, including KNSC officers.

18. Appellants and their members participated in many of the meetings NPM represented to the Director as having been held in regard to the proposed wind turbine project.

19. Appellants’ comments and petitions submitted as part of the HRS chapter 343 environmental review process are part of the Department of Planning and Permitting’s file for the challenged NPM project permits, waivers, and modifications.

20. On September 28, 2015, Kahuku Community Association submitted a charter amendment proposal, which concerned the NPM project, to the Honolulu Charter Commission.

21. On or about February 2, 2016, Kahuku Community Association submitted testimony in support of their proposed City Charter Amendment with specific reference to public procedures for the NPM project.

22. In 2016, NPM applied for a CUP (minor) and a Waiver Permit for NPM’s subproject-A, which consists in four wind turbines, each of which were 591 feet (Turbine Nos. 1-4). The turbines were proposed to be located between 284 and 591 feet from the nearest property line. Subproject-A is located at TMK No. (1) 5-6-008:006 on lands owned by the State of Hawai‘i.

23. Also in 2016, NPM applied for a CUP for its subject-B, which consists in four wind turbines: Turbine No. 6 (590.5 ft) and Nos. 7-9 (656.3 ft each). Subproject-B is located at TMK No. (1) 5-6-006:018 on lands owned by Malaekahana Hui West.

24. By order dated October 27, 2016, the Director approved 2016/CUP-49 for Turbine Nos. 6-9 and no waiver because NPM represented that these turbines would meet the minimum standard setbacks for wind machines.

25. The Director’s October 24, 2016 decision to grant 2016/CUP-49 was premised on the finding that NPM would “pay \$10,000 per wind turbine per year over the life of the Project to

benefit the Kahuku Community” which translates to “the equivalent of approximately \$2,000,000 of direct economic benefits to the Kahuku Community.” These funds were anticipated to be administered by a board of local community members who would make decisions as to the use of the proceeds and which activities, programs, groups, and events will be sponsored.

26. On January 20, 2017, the Director approved NPM’s application for 2016/CUP-69 and Zoning Waiver No. 2016/W-63, which exempted Turbine Nos. 1-4 from LUO general agricultural height restrictions and waived specific wind machine setback requirements as follows:

Turbine Nos.	Height (ft)	Setback (ft)	Encroachment (ft)
1	591	284	307
2	591	372.5	218.7
3	591	591	0
4	591	591	0

27. The Director’s January 20, 2017 grant of 2016/CUP-69 and W-63 waiver was premised on findings that NPM will provide the Kahuku Community a Community Benefits package that equates to approximately \$2 million dollars over the 20- to 25-year life of the Project and the funding would be provided “directly to the Kahuku community.”

28. In 2017, Kahuku Community Association supported the City council’s Bill No. 54, enacted as Ordinance No. 17-46, which required a conditional use permit major for wind machines with a rated capacity of more than 100 kilowatts.

29. On May 8 and 21, 2019, NPM sought modifications of 2016/CUP-69 and 2016/W-63 to reduce the height of the four turbines to 567.6 feet and as follows:

Turbine Nos.	Height (initial/ revised)	Setback (initial/ revised)	Encroachment (initial/ revised)
1	591/567.6 ft	284/ 275.1 ft	307/292.5 ft
2	591/567.6 ft	372.5/354.5	218.7/135.8
3	591/567.6 ft	591/567.6	0
4	591/567.6 ft	591/567.6	0

30. By letter dated June 7, 2019, the Director granted NPM’s request for modifications under 2019/MOD-34 & -35, which impermissibly modified minimum standards for conditional wind turbine uses for Turbine Nos. 1-4. LUO §21-2.90-2(c).

31. By letter dated June 7, 2019, the Director granted NPM’s request for modifications under 2019/MOD-36, under which NPM represented Turbine Nos. 6-9 would be reduced in height from 590.5 ft (Turbine 6) and 656.2 ft (Turbines 7, 8, 9) to 567.6 feet each.

32. On October 10, 2019, Kahuku Community Association board members testified in support of a City Council proposed resolution urging the Department to enforce strict compliance with all applicable conditions and laws pertaining to permits and approvals for the NPM project.

33. In 2019, hundreds of community demonstrators stood in direct opposition to the NPM project, including dozens who were arrested during that effort.

34. The only way Appellants could have known of the Director's subsequent approvals of NPM's permits or modifications of those permits was to have known NPM had actually applied for permits or modifications of those permits.

35. Appellants had no way of knowing when NPM would file its CUP permit applications, nor when the Director would decide on the CUP permit applications.

36. Appellants had no way of knowing that NPM would seek to modify the Director's approvals, nor when the Director would make decisions on the applications for medication.

37. The Director held no public hearing or other public proceedings, nor did the Director publish notice of NPM's applications or her decisions on NPM's permit applications.

38. Appellants could not have advocated for conditions placed on the Director's approvals where it was not provided sufficient notice of NPM's permit applications.

39. The Director's notice of approvals were mailed to NPM and not to Appellants.

40. On December 23, 2019, KNSC filed its petition to appeal the Director's approvals of conditional use permits, waiver, and modifications for NPM's project, dated January 20, 2017 and June 7, 2019 because these decisions are in excess of her authority under the City and County of Honolulu Land Use Ordinance (LUO) §§ 21-2.130, 21-2.90, and 21-5.700.

41. By letter dated December 30, 2019, the ZBA noticed that it would hold a contested case hearing to consider KNSC's petition on March 5, 2020.

42. At its meeting on January 23, 2020, the ZBA granted NPM's application to intervene.

43. On February 7, 2020, Kahuku Community Association filed its Application to Intervene in Appeal of Director's Approvals of Conditional Use Permits, Waiver, and Modifications, or Alternatively, to Appeal the Same.

44. At its hearing on February 20, 2020, ZBA granted tKahuku Community Association's application, in part, treating Kahuku Community Association's application as a new appeal. The ZBA then ordered that the appeals of Kahuku Community Association and KNSC be consolidated in Case No. 2019-ZBA-7.

45. On March 27, 2020, the Director and NPM filed their Motion to Dismiss KNSC's Appeal Petition and Motion to Dismiss Kahuku Community Association's Appeal Petition (motions to dismiss).

46. On April 2, 2020, Appellants filed their Consolidated Memorandum in Opposition to NPM and the Director's Motions to Dismiss.

47. On May 26, 2020, the Director and NPM filed their Motion for Leave to File Reply and Memorandum in Support.

48. On May 27, 2020, Appellants filed their Consolidated Memorandum in Opposition to the Director and NPM's Motion for Leave.

49. At its meeting on June 25, 2020, the ZBA granted the Director and NPM's Motion for Leave and permitted the Appellants leave to file a Surreply to the Director and NPM's Reply.

50. On July 23, 2020, the Director and NPM filed their Consolidated Reply to Appellants' Opposition.

51. On July 30, 2020, the Appellants filed their Consolidated Surreply to the Director and NPM's Reply.

52. At its meeting on August 6, 2020, the ZBA heard arguments from the parties on the motions to dismiss and determined to dismiss Appellants' consolidated appeal.

53. On September 8, 2020, NPM filed a proposed order, to which Appellants lodged objections via filing dated September 23, 2020.

54. At its October 1, 2020 regular meeting, the ZBA determined to accept certain of Appellants objections in the proposed order and directed NPM to file a revised order.

55. On November 4, 2020, NPM filed its revised order.

56. At its November 12, 2020 regular meeting, the ZBA adopted the revised order as its Findings of Fact, Conclusions of Law, and Decision and Order (ZBA Order).

57. A copy of the ZBA Order dated November 17, 2020 was served on KNSC and Kahuku Community Association. This appeal ensued.

V. CAUSES OF ACTION

COUNT I - VIOLATION OF HRS CHAPTER 91

58. Appellants reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Statement of the Case.

59. A contested case is a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

60. The Director and the ZBA have a duty to provide those with property interests in a decision with notice of the decision and an opportunity for a hearing.

61. The Director's approvals of the locations for the wind turbines of the project impact Appellants' property rights.

62. Appellants had property interests in the decision of the Director.

63. The Director failed to provide Appellants an opportunity to be heard in a contested case regarding the decision of the Director.

64. To the extent an appeal to the ZBA can serve as an opportunity to be heard, the failure to hold a contested case on their rights, duties, and privileges in regard to the Director's decisions deprived Appellants of their right to due process and violated HRS chapter 91.

65. Appellants are aggrieved by the ZBA's decision to dismiss their contested case petitions.

66. Appellants are entitled to judicial review of the ZBA's decision. HRS §91-14.

67. Appellants seek vacatur of the ZBA's Findings of Fact, Conclusions of Law, and Decision and Order, entered November 17, 2020 and of the granting of the Director's and NPM's motions to dismiss and remand of this matter for a contested case hearing that comports with due process.

COUNT II - DIRECTOR'S DUE PROCESS VIOLATIONS

68. Appellants reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Statement of the Case.

69. The Director has a duty to provide those with property interests in a decision with notice of the decision and an opportunity for a hearing.

70. Appellants had property interests in the decision of the Director.

71. The Director failed to provide Appellants notice regarding the decisions of the Director.

72. Appellants' interests were significantly affected by the Director's decisions.

73. Appellants seek vacatur of the ZBA's Findings of Fact, Conclusions of Law, and Decision and Order, entered November 17, 2020 and granting the Director's and NPM's motions to dismiss and remand of this matter for a contested case hearing that comports with due process.

COUNT III - ZBA'S DUE PROCESS VIOLATIONS

74. Appellants reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Statement of the Case.

75. The ZBA has a duty to provide those with property interests in a decision with notice of the decision and an opportunity for a hearing.

76. Appellants had property interests in the decisions of the ZBA.

77. The ZBA failed to properly consider the Appellants' lack of notice regarding the decisions of the Director.

78. To the extent an appeal to the ZBA can serve as an opportunity to be heard, the failure to hold a contested case deprived Appellants of their right to due process.

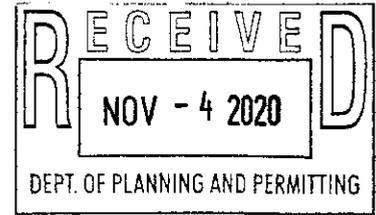
79. Applying rules imposing deadlines to appeal must be based upon notice, and when no such notice was provided, actually or constructively, breaches the duty to provide notice and an opportunity for hearing.

80. Appellants seek vacatur of the ZBA's Findings of Fact, Conclusions of Law, and Decision and Order, entered November 17, 2020 and of the granting of the Director's and NPM's motions to dismiss and remand of this matter for a contested case hearing that comports with due process.

WHEREFORE, Petitioners/Appellants respectfully request that this Court:

1. Sustain Appellants' appeal by:
 - a. Declaring Defendants violated HRS chapter 91 by dismissing Appellants' consolidated appeal and contested case hearing;
 - b. Declaring Defendants violated the fifth amendment of the U.S. Constitution and article I, §5 of the Hawai'i Constitution by concluding the Director's notice procedures were sufficient to support dismissing Appellants' consolidated appeal and failing to hold a contested case hearing;
 - c. Declaring Defendants violated the fifth amendment of the U.S. Constitution and article I, §5 of the Hawai'i Constitution by dismissing Appellants' consolidated appeal and failing to hold a contested case hearing;

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

I certify that this is a full, true and correct copy of the original document on file with the Department of Planning and Permitting/Zoning Board of Appeals, City and County of Honolulu.

Janice Sumida
Nov 17, 2020
DATE

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

Keep the North Shore Country (“KNSC”) and the Kahuku Community Association (“KCA” and with KNSC, the “Appellants”) have each appealed various approvals issued by the Director of the Department of Planning and Permitting (“Director” and “DPP”, respectively) regarding Na Pua Makani Power Partners, LLC’s (“NPM”) renewable wind energy project located in Kahuku, Oahu (“Project”), as follows: (1) CUP No. 2016/CUP-69; (2) Zoning Waiver No. 2016/W-63; (3) Minor Modification Nos. 2019/MOD-34 and 2019/MOD-35; (4) CUP No. 2016/CUP-49; and (5) Minor Modification No. 2019/MOD-36.

The Director and NPM moved to dismiss the Appellants’ appeal petitions as untimely filed with respect to each of the DPP Approvals under Zoning Board of Appeals (“ZBA”) Rules § 22-2 and Land Use Ordinance (“LUO”) § 21-1.40. This matter came on for hearing on August 6, 2020. Lance Collins, Esq. and Bianca Isaki, Esq. appeared on behalf of Appellants. Jodi S. Yamamoto, Esq. appeared on behalf of NPM. Brad Saito,

EXHIBIT "A"

Esq. appeared as counsel for the Director. After considering the written and oral arguments of counsel, ZBA members Lyle Ishida, Landon Kaneshiro, and Gladys Marrone voted 3-0 to dismiss KNSC's and KCA's appeal petitions as untimely filed.

I. **FINDINGS OF FACT.**

1. NPM has substantially constructed and is continuing to construct the Project, which is comprised of eight turbines, all of which have already been erected on site. The Project is located on two separate parcels of land leased by NPM and are referred to as Subproject A and Subproject B. Of the eight turbines, Turbine Nos. 1 through 4 are located in Subproject A, and Turbine Nos. 6 through 9 are located in Subproject B.

2. 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").

3. On January 20, 2017, the Director, without holding a public hearing, 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 Restricted Agricultural District and AG-2 General Agricultural District", subject to various conditions. NPM was issued CUP No. 2016/CUP-69 ("Subproject A CUP") and Zoning Waiver No. 2016/W-63 ("Subproject A Zoning Waiver").

4. Pursuant to Department of Planning and Permitting Rules of Practice and Procedure ("DPP Rules") § 6-2, the Director mailed notice of her decision on the

Subproject A CUP and Subproject A Zoning Waiver on January 20, 2017 to the Applicant's consultant.

5. No appeal was filed with the ZBA regarding the Subproject A CUP or Subproject A Zoning Waiver on or before February 21, 2017.

6. 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") to modify the location and height of the four previously-approved wind turbines.

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").

8. Pursuant to DPP Rules § 6-2, the Director mailed notice of her decision on the Minor Modifications to Subproject A CUP on June 7, 2019 to the Applicant's consultant.

9. No appeal was filed with the ZBA regarding the Minor Modifications to Subproject A CUP on or before July 8, 2019.

10. 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").

11. On October 27, 2016, the Director, without holding a public hearing, 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. NPM

was issued CUP No. 2016/CUP-49 ("Subproject B CUP").

12. Pursuant to DPP Rules § 6-2, the Director mailed notice of her decision on the Subproject B CUP on October 27, 2016 to the Applicant's consultant.

13. No appeal was filed with the ZBA regarding the Subproject B CUP on or before November 28, 2016.

14. On May 8, 2019, NPM submitted a written request for minor modification of the Subproject B CUP ("Subproject B CUP Minor Modification Request").

15. 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").

16. Pursuant to DPP Rules § 6-2, the Director mailed notice of her decision on the Minor Modification to Subproject B CUP on June 7, 2019 to the Applicant's consultant.

17. No appeal was filed with the ZBA regarding the Minor Modification to Subproject B CUP on or before July 8, 2019.

18. The Subproject A CUP, the Subproject A Zoning Waiver, and the Minor Modifications to Subproject A CUP, and the Subproject B CUP and Minor Modification to Subproject B CUP (collectively, the "DPP Approvals") have been at all times and continue to be available for review by the public at the DPP in its official files and record.

19. Both KNSC and KCA were consulted parties with respect to the NPM Project's Environmental Impact Statement ("EIS") process under HRS Chapter 343, during which time the Appellants provided input and comments regarding the environmental impacts of the NPM Project to the Hawaii Board of Land and Natural

Resources ("BLNR"), the agency responsible for NPM's EIS.

20. The NPM Project's Final Environmental Impact Statement, dated June 2016 ("2016 FEIS"), was accepted by BLNR.

21. KNSC's President Gil Riviere and KCA submitted comments on the Project's EIS that were included in the 2016 FEIS.

22. The comments and responses in Appendix M to the 2016 FEIS comprise 707 pages, consisting of approximately 1,612 letters, petitions, emails, and/or signatures received during the EIS process conducted by BLNR, both for and against the Project.

23. The 2016 FEIS was included with the NPM's Project's Subproject A and Subproject B CUP Applications.

24. In September of 2015, prior to the submission of any of the applications for the DPP Approvals and prior to the Director's decisions to approve each of the DPP Approvals, KCA specifically identified the NPM Project and sought to amend the City and County of Honolulu's wind turbine ordinance to require CUP major permits.

25. Before KNSC filed the KNSC Appeal Petition, the DPP did not receive any direct communications from KNSC regarding any opposition to the NPM Project or objections to the DPP Approvals, and KNSC did not participate in any meetings with the Director or DPP regarding the DPP Approvals.

26. Appellants do not allege they requested under DPP Rules § 6-2 to receive from the Director notice of the Director's actions regarding any of the DPP Approvals or the NPM Project.

27. Appellants do not allege that before the KCA Application/Appeal Petition they submitted to DPP any opposition to the NPM Project or objections to the

DPP Approvals.

28. The Director never received a request from KCA under DPP Rules § 6-2 to receive notice of the Director's actions regarding any of the DPP Approvals or the NPM Project.

29. The Director is not personally aware of any public comments that were made to DPP regarding the applications for the DPP Approvals and the Director did not impose any conditions in the DPP Approvals based on public comments that were made to DPP concerning the same.

30. KNSC and KCA are organizations that represent members of the North Shore community and their interests in a clean and healthful environment are shared by other of the members of the North Shore community.

31. On December 23, 2019, KNSC filed its Appeal Petition ("KNSC Appeal Petition"), challenging the actions of the Director approving the DPP Approvals.

32. On January 15, 2020, NPM filed its Application to Intervene in the ZBA's proceedings regarding KNSC's Appeal Petition ("Application to Intervene").

33. At its meeting on January 23, 2020, the ZBA granted NPM's Application to Intervene.

34. 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").

35. At its hearing on February 20, 2020, the ZBA granted the KCA Application, in part, treating the KCA Application as a new appeal ("KCA Appeal Petition") with the understanding that NPM and the Director reserved their rights to challenge the appeal. The ZBA then ordered that the appeals of KCA and KNSC be consolidated in

Case No. 2019-ZBA-7.

36. On June 25, 2017, the ZBA issued its Order Granting NPM's Application to Intervene regarding KNSC's Appeal Petition and issued its Order Granting in Part and Denying in Part KCA's Application.

37. KCA's Appeal Petition also challenges the actions of the Director approving the DPP Approvals.

38. On March 27, 2020, the Director and NPM filed their Motion to Dismiss KNSC's Appeal Petition and Motion to Dismiss KCA's Appeal Petition (collectively, "Motions to Dismiss").

39. On April 2, 2020, the Appellants filed their Consolidated Memorandum in Opposition to NPM and DPP's Motions to Dismiss ("Appellants' Opposition").

40. On May 26, 2020, the Director and NPM filed their Motion for Leave to File Reply and Memorandum in Support ("Motion for Leave").

41. On May 27, 2020, the Appellants filed their Consolidated Memorandum in Opposition to the Director and NPM's Motion for Leave.

42. At its meeting on June 25, 2020, the ZBA granted the Director and NPM's Motion for Leave and permitted the Appellants leave to file a Surreply to the Director and NPM's Reply.

43. On July 23, 2020, the Director and NPM filed their Consolidated Reply to Appellants' Opposition ("Reply")

44. On July 30, 2020, the Appellants filed their Consolidated Surreply to the Director and NPM's Reply.

45. At its meeting on August 6, 2020, the ZBA heard arguments from the

parties on the Motions to Dismiss.

46. To the extent that a finding of fact may be construed as a conclusion of law, may it be so construed.

II. CONCLUSIONS OF LAW.

1. 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.

2. DPP Rule § 6-2 and the posting of the Director's decisions in DPP's publicly available files provides constructive notice of the Director's decisions to members of the public.

3. DPP Rules § 6-2 also provides the public with a reasonable opportunity to request and obtain individual notice of the Director's decision.

4. The Revised Charter of the City and County of Honolulu ("RCCCH") § 6-1516 establishes the jurisdiction of the ZBA and 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, including variances therefrom, subdivision ordinances and any rules and regulations adopted pursuant to either.

5. LUO § 21-1.40 provides that "[a]ppeals 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."

6. ZBA Rules § 22-2 provides:

§ 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.

7. ZBA Rules § 22-7 provides:

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.

8. 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." Hoku Lele, LLC v. City and Cnty. of Honolulu, 129 Hawaii 164, 168, 296 P.3d 1072, 1076 (App. 2013).

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

10. The mandatory appeal deadline established under ZBA Rules § 22-2 for the Subproject A CUP and Subproject A Zoning Waiver was February 21, 2017.

11. The mandatory appeal deadline established under ZBA Rules § 22-2 for the Minor Modifications to Subproject A CUP was July 8, 2019.

12. The mandatory appeal deadline established under ZBA Rules § 22-2 for the Subproject B CUP was November 28, 2016.

13. The mandatory appeal deadline established under ZBA Rules § 22-2 for the Minor Modification to Subproject B CUP was July 8, 2019.

14. The LUO did not require that the Director hold a public hearing with respect to any of the DPP Approvals.

15. Based upon the record in this case, the written memoranda of counsel, and the arguments presented at the hearing, the ZBA concludes that KCA's and KNSC's Appeal Petitions must be dismissed, pursuant to ZBA Rules § 22-2 and LUO § 21-1.40, because both KNSC's and KCA's Appeal Petitions were untimely filed with respect to each of the DPP Approvals.

16. Article XI, Section 9 ("Article XI") of the Hawaii Constitution states:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

17. The Hawaii Supreme Court has explained that Article XI does not create an independent right to a "clean and healthful environment," but allows aggrieved persons to enforce "laws relating to environmental quality" adopted by the legislative branches of government. In re Application of Maui Elec. Co., Ltd. ("MECO") 141 Haw. 249, 261, 408 P.3d 1, 13 (2017).

18. Article XI also provides that any appeal thereunder must be brought through appropriate legal proceedings and would be "subject to reasonable limitations and regulation as provided by law." MECO, 141 Haw. at 260, 408 P.3d at 12. The Hawaii

Supreme Court has explained that one such reasonable limitation is a statute of limitations:

the legislature may reasonably limit and regulate this private enforcement right by, for example, prescribing reasonable procedural and jurisdictional matters, and a reasonable statute of limitations.

County of Hawaii v. Ala Loop Homeowners, 123 Haw. 391, 418, 235 P.3d 1103, 1130 (2010), *abrogated on other grounds by* Tax Found. of Hawai'i v. State, 144 Haw. 175, 439 P.3d 127 (2019) (quoting Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 690). “The clear import of the passage is that ‘reasonable limitations and regulation’ would encompass matters such as statutes of limitations or procedural or jurisdictional limitations.” *Id.*

19. The Hawaii Supreme Court’s decision in Unite Here! Local 5 v. Department of Planning and Permitting, 145 Haw. 453, 467, 454 P.3d 394, 408 (2019) (“PACREP”) 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.

20. PACREP does not support the Appellants’ request for an exception to the mandatory appeal filing deadlines under ZBA Rules § 22-2 and LUO § 21–1.40 in this case. In PACREP, the Director had actual knowledge of Unite Here! Local 5’s interest, while here the Director was not provided notice of the Appellants’ interest in this case. Neither of the Appellants participated in public hearings or proceedings leading up to the Director’s consideration of the underlying DPP Approvals. Further, neither Appellant advocated for conditions that were placed into the DPP Approvals and later

removed without notice to their proponents. Nor did the Appellants provide notice to the Director under DPP Rule § 6-2 that they were interested parties who desired actual notice of the Director's decisions regarding the Project or the underlying properties.

21. The Director did not have actual notice of the Appellants' interest in the DPP Approvals or their objections to the Director's actions before the filing of their Appeal Petitions.

22. In determining what procedures are required to comply with constitutional due process, the following factors are considered: (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. MECO, 141 Haw. at 261, 408 P.3d at 17.

23. Some of the interests of the Appellants in the DPP Approvals are general interests shared by every member of the general public.

24. The risk of an erroneous deprivation of the Appellants' interest using the procedures under DPP Rules § 6-2 is not unreasonable and does not outweigh the burden on the Director to provide individual notice to all persons with environmental interests who have not requested individual notice, including the Appellants.

25. The Director did not receive any direct communications or actual notice from the Appellants regarding the Appellants' objections to the DPP Approvals.

26. Appellants' participation in the EIS process does not entitle them to individual or actual notice of the DPP Approvals.

27. The Director has a substantial interest in the orderly processing and resolution of permit applications, the finality of her decisions, and the efficient use of

government resources. Requiring the government to provide individual notice of the DPP Approvals to the Appellants where the Director did not have actual notice regarding the Appellants' environmental concerns and those concerns are not different from those of the general public would be a heavy and unwarranted burden on the Director.

28. The governmental interest, including the burden that additional procedural safeguards would entail, would be heavy here if the Director were required to provide KNSC and KCA with actual or individual notice of the DPP Approvals.

29. In weighing the three factors under MECO, the procedures followed by DPP in this case comply with constitutional due process.

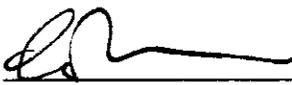
30. Taking into account all the relevant factors, DPP's Rules, as applied to the processing of the DPP Approvals and the Appellants, did not violate the Appellants' right to procedural due process.

31. Any conclusions of law that constitute findings of fact shall be so construed.

III. DECISION AND ORDER.

Based on the foregoing Findings of Fact and Conclusions of Law, the ZBA hereby GRANTS the Director and NPM's Motions to Dismiss the Appeal Petitions, filed March 27, 2020.

Dated: Honolulu, Hawai'i, November 12, 2020.

By: 
LYLE ISHIDA, Esq., Chairman
ZONING BOARD OF APPEALS OF
THE CITY AND COUNTY OF HONOLULU

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
THE STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY, a) Civil No. _____
nonprofit corporation, et al,) Agency Dkt. No. 2019/ZBA-7
)
Plaintiffs/Appellants,) DESIGNATION OF RECORD ON APPEAL
vs.)
)
ZONING BOARD OF APPEALS, City and)
County of Honolulu, et al,)
)
Defendants/ Appellees.)

DESIGNATION OF RECORD ON APPEAL

TO THE CLERK OF THE FIRST CIRCUIT COURT OF THE STATE OF HAWAII

Pursuant to Rule 72(d) of the Hawai'i Rules of Civil Procedure, Appellants hereby designate as the Record on Appeal the entire file of the ZONING BOARD OF APPEALS, City and County of Honolulu, in the above-captioned matter, as defined in section 91-9(e), Hawaii Revised Statutes, including all pleadings, transcripts, and exhibits.

DATED: Makawao, Hawai'i November 24, 2020

_____/s/ Lance D. Collins_____
LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Keep the North Shore Country &
Kahuku Community Association

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
THE STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY, a) Civil No. _____
nonprofit corporation, et al,) Agency Dkt. No. 2019/ZBA-7
)
Plaintiffs/Appellants,) ORDER TO CERTIFY AND TRANSMIT
vs.) THE RECORD ON APPEAL
)
ZONING BOARD OF APPEALS, City and)
County of Honolulu, et al,)
)
Defendants/ Appellees.)

ORDER TO CERTIFY AND TRANSMIT THE RECORD ON APPEAL

TO THE ZONING BOARD OF APPEALS, CITY AND COUNTY OF HONOLULU

In accordance with section 91-14(d), Hawaii Revised Statutes, and Rule 72(d) of the Hawai'i Rules of Civil Procedure, you are hereby ordered to certify and transmit to the Circuit Court of the First Circuit, within twenty (20) calendar days of the date of this Order, or within such further time as may be allowed by this Court, the entire record as defined by section 91-9(e), Hawaii Revised Statutes, and as set forth in the appended Designation of the Record on Appeal. Any request to enlarge time shall be submitted to the Court prior to the expiration of the above 20-day period.

DATED: Honolulu, Hawai'i _____

CLERK OF THE ABOVE-ENTITLED COURT