

**ZONING BOARD OF APPEALS  
CITY AND COUNTY OF HONOLULU**

650 SOUTH KING STREET, 7<sup>TH</sup> FLOOR • HONOLULU, HAWAII 96813  
PHONE: (808) 768-8006 • FAX: (808) 768-4663

KIRK CALDWELL  
MAYOR



LYLE M. ISHIDA, Chair  
KEN C. KAWAHARA, Vice-Chair  
GLADYS Q. MARRONE  
LONDON D. KANESHIRO

2019/ZBA-7

December 30, 2019

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
7017 3040 0000 9677 4746**

Keep The North Shore Country  
c/o Law Office of Lance D. Collins  
P. O. Box 179336  
Honolulu, Hawaii 96817

Dear Sir:

RE: Notice of Contested Case Hearing Schedule  
Conditional Use Permit (Minor) No. 2016/CUP-69  
Zoning Waiver No. 2016/W-63  
Minor Modification No. 2019/MOD-34  
Minor Modification No. 2019/MOD-35  
Na Pua Makani Wind Project – Subproject A  
56-668 Kamehameha Highway – Kahuku  
Tax Map Key: 5-6-8:6

Conditional Use Permit (Minor) No. 2016/CUP-49  
Minor Modification No. 2019/MOD-36  
Na Pua Makani Wind Project – Subproject B  
56-668 Kamehameha Highway – Kahuku  
Tax Map Key: 5-6-8:6

Please take notice that the Zoning Board of Appeals of the City and County of Honolulu (ZBA) will hold a contested case hearing to consider the petition that was filed on your behalf by Lance D. Collins, Esq. (Petitioner) appealing decisions of the Director of Planning and Permitting (Director) issued on January 20, 2017 and June 7, 2019 (CUP No. 2016/CUP-69 and Zoning Waiver 2016/W-63) and October 27, 2016 and June 7, 2019 (CUP No. 2016/CUP 49) concerning the above-mentioned permits.

In connection with the aforesaid hearing, notice is given of the following:

1. The contested case hearing will be held on **Thursday, March 5, 2020** at 12:30 p.m., or as soon thereafter as the matter can be heard, in the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii 96813 (Mission Memorial Conference Room) at which time the ZBA will receive and consider evidence and argument on the issues involved in the appeal.
2. The hearing is to be held under the authority of Section 6-1516 of the Revised Charter of the City and County of Honolulu 1973 (2017 ed.), Rule 22-4(c) of the Rules of the Zoning Board of Appeals, and Chapter 91, Hawaii Revised Statutes, as amended.
3. A meeting for the adoption of the contested case hearing schedule, the deadlines for filing of documents, and to address any procedural issues concerning the contested case hearing will be held on **Thursday, January 23, 2020** at 12:30 p.m., in the Mission Memorial Conference Room. **Please attend this meeting.**
4. On January 20, 2017, the Director issued Findings of Fact, Conclusions of Law, and Decision and Order approving Na Pua Makani Powers Partners, LLC's (Applicant) application for a Conditional Use Permit (Minor) and Zoning Waiver from Revised Ordinances of Honolulu 1990, as amended (ROH) Sections 21-4.60(c)(7) and 21-5.700(a) related to wind machine setbacks to allow in the AG-1 Restricted Agricultural District and AG-2 General Agricultural District, subject to various conditions (CUP 2016/CUP 69 and Zoning Waiver 2016/W-63).
5. On May 8 and 21, 2019, Applicant submitted a request for minor modification of CUP 2016/CUP 69 and Zoning Waiver 2016/W-63 to modify the location and height of four previously approved wind turbines.
6. On June 7, 2019, the Director approved Applicant's request for minor modification of CUP 2016/CUP 69 and Zoning Waiver 2016/W-63 (2019/MOD-34 and 2019/MOD-35).
7. On October 27, 2016, the Director issued Findings of Fact, Conclusions of Law, and Decision and Order approving Applicant's application for a Conditional Use Permit (Minor) to allow wind machines in the AG-1 Restricted Agricultural District, subject to various conditions (CUP 2016/CUP-49).

8. On May 8, 2019, Applicant submitted a request for minor modification of CUP 2016/CUP 49 to modify the height of four previously approved wind turbines by reducing the height of the wind turbines to 567.6 feet.

9. On June 7, 2019, the Director approved Applicant's request for minor modification of CUP 2016/CUP 49 (2019/MOD-36).

10. On December 23, 2019, Petitioner filed a petition with the ZBA appealing the Director's decisions approving CUP 2016/CUP 69, Zoning Waiver 2016/W-63, 2019/MOD-34 and 2019/MOD-35, CUP 2016/CUP-49, and 2019/MOD-36.

11. The particular sections of the ROH applicable to this appeal are Sections 21-2.40-1 to 21-2.90 et. seq., 21-2.130(a)(1), 21-4.60(c)(7) and 21-5.700.

12. The issues to be addressed in this appeal is:

Whether the actions of the Director in approving CUP 2016/CUP 69, Zoning Waiver 2016/W-63, 2019/MOD-34 and 2019/MOD-35, CUP 2016/CUP-49, and 2019/MOD-36, all subject to various conditions, were based on erroneous finding of a material fact, or whether the Director acted in an arbitrary or capricious manner, or manifestly abused her discretion?

13. You are required to file a position statement by 4:30 p.m., **Thursday, February 20, 2020** with the Department of Planning and Permitting, 650 South King Street, 7<sup>th</sup> Floor, Honolulu, Hawaii 96813.

14. The position statement shall include the following:

- a. A limited Statement of Facts together with any argument and a list of issues of the case, all of which shall not exceed a total of eight pages double-spaced.
- b. A list of witnesses and a statement of what each witness will testify about, all of which shall not exceed a total of ten pages double-spaced.
- c. All exhibits which will be introduced at the hearing.

Keep The North Shore Country  
c/o Law Office of Lance D. Collins  
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December 30, 2019

15. Each party shall provide the original and 6 copies of each document submitted to the ZBA for filing. Additionally, a copy of each document shall be served on each of the other parties or their attorneys or representatives.

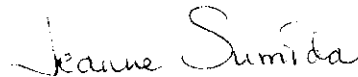
16. We will forward your petition to the Department of Corporation Counsel. The Corporation Counsel will designate a deputy corporation counsel to represent the Director before the ZBA. You may contact Jeanne Sumida, the ZBA's secretary, at (808) 768-8006, for the name of the deputy corporation counsel assigned to represent the Director.

17. You have the right to retain counsel, if you so desire. An individual may appear on his own behalf, or a member of the partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent said entity, provided the employee is authorized in writing, to represent the corporation, trust or association.

18. As a reminder, ZBA staff is not allowed to give legal advice, recommend specific action, interpret legal terminology, or encourage or discourage litigation.

19. If you have any questions concerning the contested case hearing, you may contact Dawn D. M. Spurlin, Deputy Corporation Counsel, for the ZBA at (808) 768-5296.

Very truly yours,



For LYLE M. ISHIDA, Chair  
Zoning Board of Appeals

LMI:js  
Attach.

cc: Kathy K. Sokugawa, Acting Director of the Department of Planning and Permitting  
(via hand delivery)  
Dawn D. M. Spurlin, Deputy Corporation Counsel for the Zoning Board of Appeals

DEPARTMENT OF LAND UTILIZATION  
CITY AND COUNTY OF HONOLULU

REPEAL OF RULES RELATING TO ADMINISTRATIVE PROCEDURE, ZONING BOARD OF APPEALS; AND ADOPTION OF PART 3, RULES OF THE ZONING BOARD OF APPEALS (adopted December 11, 1997).

SUMMARY

1. Rules Relating to Administrative Procedure, Zoning Board of Appeals, effective May 7, 1989, is repealed.
2. Part 3 (Chapters 21 and 22) of the rules of the Department of Land Utilization, Rules of the Zoning Board of Appeals, is adopted.

DEPARTMENT OF LAND UTILIZATION  
PART 3 RULES OF THE ZONING BOARD OF APPEALS

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DEPARTMENT OF LAND UTILIZATION

PART 3 RULES OF THE ZONING BOARD OF APPEALS

CHAPTER 21

GENERAL PROVISIONS

§21-1	Definitions
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§21-6	Quorum and number of votes
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§21-9	Rulemaking

§21-1 Definitions.

"Action of the director" means a decision rendered on an application pursuant to the Land Use Ordinance or the Subdivision Ordinance; a decision rendered on a request for a zoning variance; a decision rendered on a petition for declaratory ruling; a decision rendered on a request for reconsideration, pursuant to part 1, chapter 4, Rules of Practice and Procedures of the department of land utilization; and an enforcement order pursuant to section 8.60-2 of the Land Use Ordinance.

"Board" means the zoning board of appeals of the City and County of Honolulu.

"Contested case hearing" means a hearing of the board in which the legal rights, duties or privileges of specific parties to the proceeding are determined, and which is held immediately prior to judicial review.

"Director" means the director of the department of land utilization, City and County of Honolulu or the director's designated representative.

"Effective date of order" means the date upon which an order is adopted by the board.

"Intervenor" means a person or agency who is admitted as a party in any proceeding before the board.

"Land Use Ordinance" means Ordinance No. 86-96, as amended, which is codified as chapter 21, Revised Ordinances of Honolulu, 1990, as amended.

"Meeting" means a convening of the board at which a quorum is present.

"Order" means the findings of fact, conclusions of law, and decision and order of the zoning board of appeals.

"Party" means the appellant; the director; and any intervenor who has been admitted by the board as a party to an appeal, pursuant to §22-5.

"Secretary" means the secretary-reporter assigned to provide administrative assistance to the board.

"Subdivision Ordinance" means chapter 22, Revised Ordinances of Honolulu, 1990, as amended.  
[Eff **MAR 02 1998**] (Auth: RCH §4-105; HRS §91-2) (Imp: HRS 91-2)

§21-2 Requests for information. (a) Requests for information, whether in person, by messenger, by mail, or by telephone should be directed to the Zoning Board of Appeals, Department of Land Utilization, 650 South King Street, Honolulu, Hawaii 96813.

(b) All board files are public records and may be examined upon request.

(c) Copies of public records of the board are available upon payment of the fees established by ordinance. [Eff **MAR 02 1998**] (Auth: RCH §13-105; HRS §91-2) (Imp: RCH §13-105; HRS §91-2)

§21-3 Communications. (a) All communications with the board shall be either orally at a duly called meeting of the board or in writing.



(b) Board members shall not consult any person on any issue relating to a matter before the board except at a meeting where all parties are given an opportunity to participate. [Eff **MAR 02 1998** ] (Auth: HRS §91-13)  
(Imp: HRS §91-13)

§21-4 Chair and vice-chair. The board shall elect a chair and a vice-chair to serve for a term of one year beginning July 1 of each year. The director shall furnish the board with reasonable administrative assistance. [Eff **MAR 02 1998** ] (Auth: RCH §§4-105, 13-103,)  
(Imp: RCH §§4-105, 13-103)

§21-5 Meetings. (a) Regular meetings of the board shall be held every two weeks on the day and time and at the location designated by the board on the Island of Oahu, unless there are no items on the agenda. Special meetings may be called at any time by the chair upon proper notice.

(b) The meetings of the board shall be open to the public.

(c) Notice of the board's meetings shall be filed in the city clerk's office at least six calendar days before the meeting and shall be posted at the site of the meeting. Notice shall also be mailed to all persons who have made a request in writing to be on the board's mailing list. [Eff **MAR 02 1998** ] (Auth: HRS §92-7)  
(Imp: HRS §92-7)

§21-6 Quorum and number of votes. (a) A majority of the members of the board shall constitute a quorum.

(b) The affirmative vote of a majority of the entire membership of the board is required for the board to take any action.

(c) Failure to obtain a majority vote, whether due to abstention or absence of members or for any other reason, shall automatically defer the item until the next regular meeting of the board or a specific date determined by the board. Failure to obtain a majority

vote at two separate meetings shall constitute a denial of an appeal.

(d) A member who was not present at any meeting when a case was heard may vote only after reading the file of the case, or if no written transcript is available, after listening to the tape recordings of the meeting. [Eff **MAR 02 1998** ] (Auth: RCH §13-103)  
(Imp: RCH §13-103; HRS §91-2)

§21-7 Conflict of interest. (a) When a member of the board discovers that he or she may have a conflict of interest in any proceeding before the board, the member shall disclose the conflict.

(b) The disclosure shall be made at the start of the proceedings and shall become a part of the record of the proceeding. The disclosure shall be applicable to all subsequent board actions in the proceeding.

(c) The member who has disclosed a conflict of interest shall not participate in the proceeding unless it is determined by the board that there is no conflict, or unless all parties agree to the member's participation in the proceeding. [Eff **MAR 02 1998** ] (Auth: RCH §11-103)  
(Imp: RCH §11-103; HRS §91-2)

§21-8 Computation of time. (a) Whenever the procedures specify a period of days for a particular action to be taken, it shall be calendar days.

(b) The action shall be completed by 4:30 p.m. on the last day of the specified period, except that when the specified period of days ends on a public holiday or weekend day, the action shall be completed by 4:30 p.m. of the next business day.

(c) The date the action is initiated shall be counted from the date following the board's action. [Eff **MAR 02 1998** ] (Auth: RCH §4-105) (Imp: RCH §4-105; HRS §91-2)

§21-9 Rulemaking. (a) The board may at any time initiate proceedings to adopt, amend or repeal its rules.

(b) Any person may petition the board requesting the adoption, amendment or repeal of any rule of the board.

(c) Petitions for rulemaking shall contain:

- (1) The petitioner's name, address and telephone number;
- (2) A draft of the substance of the proposed rule or amendment or a designation of the provision sought to be repealed;
- (3) A statement of the nature of the petitioner's interest;
- (4) A statement of the reasons in support of the proposed rule, amendment or repeal.

(d) Within thirty days after receipt of the petition, the board shall either deny the petition in writing, stating the reasons for the denial, or initiate rulemaking proceedings in accordance with §91-3, HRS. Upon disposition of the petition the board shall notify the petitioner in writing. [Eff MAR 02 1998 ]  
(Auth: HRS §91-6, ) (Imp: HRS §§91-2, 91-6)

CHAPTER 22

PROCEDURE FOR APPEALS

§22-1	Petition
§22-2	Mandatory appeal filing deadline
§22-3	Withdrawal of petition
§22-4	Prehearing procedure
§22-5	Intervention
§22-6	Contested case hearing
§22-7	Waiver or suspension of rules
§22-8	Decision and order
§22-9	Reconsideration
§22-10	Procedure upon remand

§22-1 Petition. (a) Any person who is specially, personally and 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 setting forth the following:

- (1) The petitioner's name, mailing address and telephone number.
- (2) Identification of the property by street address and tax map key number.
- (3) The petitioner's interest in the property.
- (4) How the petitioner is adversely affected by the action appealed.
- (5) Designation of the specific applicable provision of the Land Use Ordinance or the Subdivision Ordinance.
- (6) The action of the director and the date the action was taken.
- (7) All pertinent facts, including facts to support the Charter's criteria for sustaining an appeal.
- (8) Reasons why the petitioner believes that the director's action was based on an erroneous finding of material fact, and/or that the

director acted in an arbitrary or capricious manner or manifestly abused his/her discretion.

(b) Failure to comply with any provision of subsection (a) shall constitute grounds for dismissal of the appeal by the board, provided that petitions shall not be unreasonably rejected for minor technical errors and omissions. [Eff **MAR 02 1998** ] (Auth: RCH §6-909)  
(Imp: RCH §6-909)

§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.  
[Eff **MAR 02 1998** ] (Auth: ROH §21-1.40, §22-3.7)  
(Imp: ROH §21-1.40, §22-3.7; HRS §91-2)

§22-3 Withdrawal of petition. (a) A written request from the petitioner to withdraw a petition shall be approved by the secretary if the request is made with the written concurrence of all parties to the proceeding.

(b) In all other instances the request for withdrawal shall be considered by the board, which may approve or deny the request. [Eff **MAR 02 1998** ]  
(Auth: RCH §4-105) (Imp: RCH §4-105; HRS §91-2)

§22-4 Prehearing procedure. (a) Within ten days after receipt of a petition, the secretary shall forward copies of the petition to the director and to the fee owner and lessee, if any, of the affected property, if they are not the petitioner.

(b) The secretary shall also notify persons who submitted written comments or testified at a public

hearing, if one was held, on the matter that led to the action being appealed.

(c) The board shall set the date for the hearing on the appeal and schedule the dates on which the position statements of the parties are due. Unless otherwise directed by the board, petitioner's position statement shall be due not less than fourteen days prior to the scheduled hearing date, and the director's position statement shall be due not less than seven days prior to the scheduled hearing date. Failure of any party to timely submit a position statement shall be grounds for dismissal of the appeal by the board, upon its own motion or the motion of any party.

(d) Position statements shall include the following:

- (1) A limited statement of facts together with any argument and a list of issues of the case, all of which shall not exceed a total of eight pages double-spaced.
- (2) A list of witnesses and a statement of what each witness will testify about, all of which shall not exceed a total of ten pages double-spaced.
- (3) All exhibits which will be introduced at the hearing.

(e) Motions to the board and supporting memoranda may be submitted by the parties as they deem appropriate, except that the board will not accept any such motion and memorandum submitted less than twenty-one days prior to the scheduled hearing date for the appeal. Opposing memoranda must be submitted to the board no less than ten days prior to the scheduled hearing date for the appeal. All memoranda shall not exceed ten pages, double-spaced, excluding motions and exhibits.

(f) Each party shall file an original and six copies of each document with the board. Additional copies shall be promptly provided at the request of the secretary or the chair.

(g) Each party shall provide copies of all documents to all other parties to the appeal, and shall file a certification with the board attesting to the transmittal of the document and including the following information:

- (1) The name of the document;
- (2) The date and manner of transmittal;
- (3) The name and address to which the document was transmitted.

(h) Witness subpoena requests shall be filed together with the position statement.

[Eff. **MAR 02 1998**] (Auth: RCH §4-105; HRS §91-9)  
(Imp: HRS §91-2, §91-9)

§22-5 Intervention. (a) At a meeting of the board, the board shall consider and act upon applications to intervene.

(b) The board shall not accept any application for intervention submitted after the date on which the petitioner's position statement is due, if such date has been scheduled, or thirty days prior to the scheduled hearing date for the appeal, whichever occurs first.

(c) Applications to intervene shall be disposed of as follows:

- (1) Intervention shall be granted to an applicant who has a property interest in the property subject to the appeal.
- (2) Intervention shall be granted to applicants who demonstrate that they will be so directly and immediately affected by an adverse decision that their interest in the proceeding is clearly distinguishable from that of the general public.
- (3) Intervention may be denied in the sound discretion of the board when it appears that the position of the applicant is substantially

the same as that of a party already admitted to the proceeding. [Eff **MAR 02 1998** ]  
(Auth: RCH §4-105; HRS §91-9, §91-10 )  
(Imp: HRS §91-2, §91-9, §91-10, )

§22-6 Contested case hearing. (a) The hearing shall be conducted in conformity with the applicable provisions of sections 91-9, 91-10 and 91-11, HRS.

(b) The secretary shall provide written notice of the hearing on an appeal to all parties to the appeal by registered or certified mail, return receipt requested, or by delivery.

(c) At the hearing, parties shall be entitled to call witnesses, to cross-examine witnesses and to make legal arguments.

(d) The board shall have the power to exclude irrelevant, immaterial or unduly repetitious evidence or evidence with regard to issues that were not presented to the director during the proceeding that led to the action being appealed.

(e) The record of the proceeding shall be transcribed only upon request of the board or upon appeal of the decision of the board. Any party may, with the prior consent of the board, arrange for the services of a recording stenographer to prepare a transcript at the expense of and for the use of that party.

(f) If a visit to the site is made by the board, all parties shall be given ten days prior notice and may be present and participate as in any other meeting of the board. Minutes shall be kept.

(g) A contested case hearing may be continued at the discretion of the board for good cause shown by the moving party, or by motion of the board. In any event, the board shall continue the hearing for lack of a quorum.

(h) For good cause shown, such as new evidence not previously presented to the director, the board may continue the hearing and refer the matter to the director for further consideration.



(i) A motion to take final action on any matter before the board shall be deemed to include a motion to close the hearing on that matter. [Eff **MAR 02 1998** ]  
(Auth: RCH §4-105; HRS §91-9, §91-10) (Imp: HRS §91-2, §91-9, §91-10)

§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. [Eff **MAR 02 1998** ] (Auth: RCH §4-105; HRS §91-9) (Imp: HRS §91-2, §91-9)

§22-8 Decision and order. (a) An appeal shall be sustained if the board finds that:

- (1) The director's action was based on an erroneous finding of a material fact; or
- (2) The director acted in an arbitrary or capricious manner or had manifestly abused his/her discretion.

(b) In the event that the board sustains an appeal, it may remand the matter to the director with the board's recommendations, if any.

(c) The party prevailing in the appeal shall prepare a proposed order for adoption by the board, which shall set forth in separately numbered paragraphs the findings of fact and conclusions of law material to the decision of the board.

(d) Unless the time is extended by the board for good cause, the proposed order shall be filed with the board no later than thirty days after the announcement of the decision.

(e) Any party objecting to the proposed order shall present the objections in writing to the board no later than fifteen days after receipt of the proposed order.

(f) Unless the matter is continued for lack of a quorum, the board shall consider and adopt the proposed order within ninety days of the announcement of the

decision unless otherwise agreed upon by the parties. Parties who have submitted written objections to the proposed order shall be permitted to argue their objections at a meeting of the board, and the party proposing the order shall be permitted to respond to the objections.

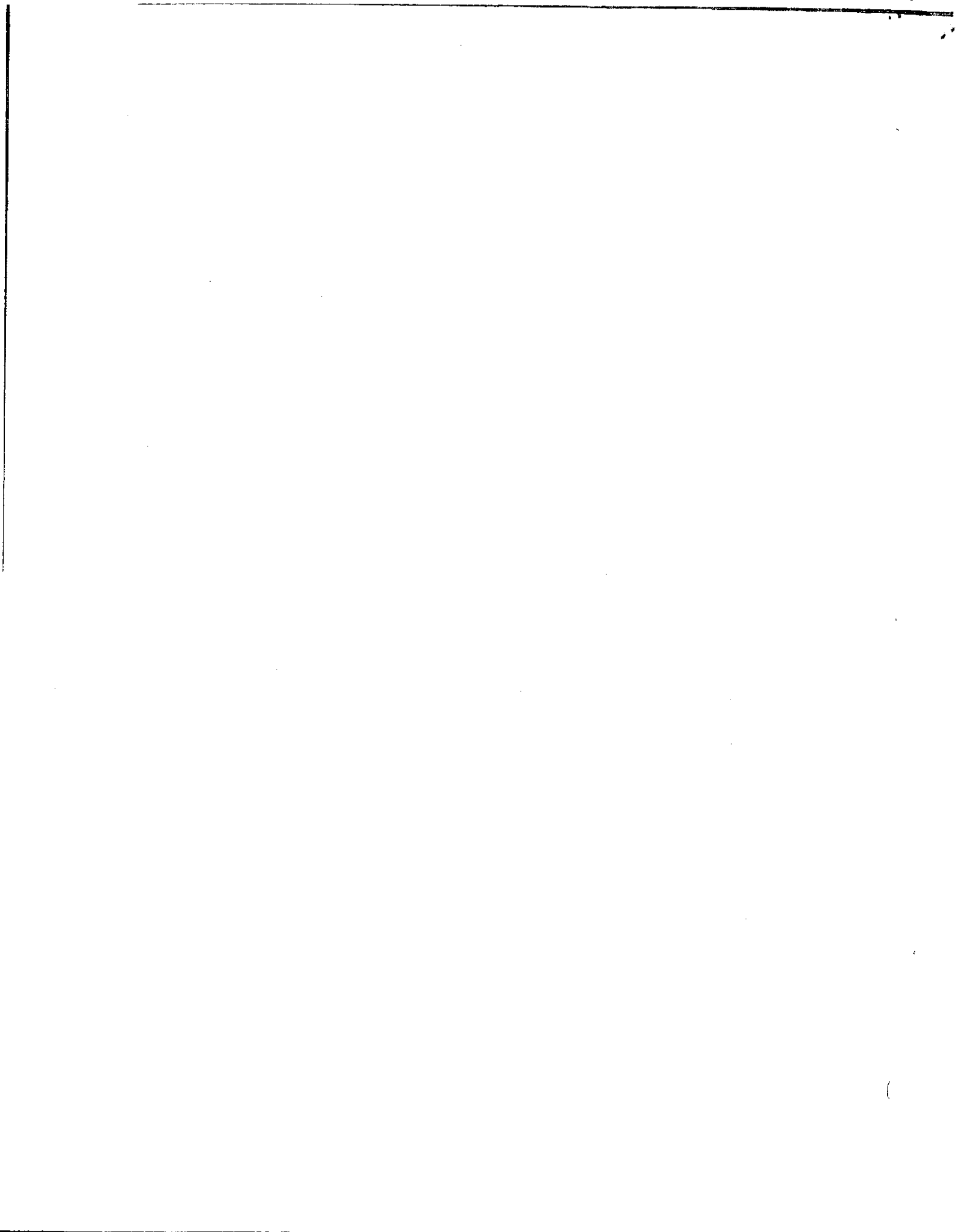
(g) Following the board's adoption of the order, the secretary shall promptly transmit a certified copy of the order to all parties by delivery or regular mail. [Eff **MAR 02 1998** ] (Auth: RCH §6-909; HRS §91-11, §91-12)  
(Imp: HRS §6-909; HRS §91-2)

§22-9 Reconsideration. Any member of the board may move to reconsider an action on an appeal. The motion shall be made at the same meeting, or at the next regular meeting of the board. If an action is to be reconsidered at a meeting other than the meeting when the original action was taken, all parties shall be notified. [Eff **MAR 02 1998** ] (Auth: RCH §4-105)  
(Imp: HRS §91-2)

§22-10 Procedure upon remand. (a) In the event a court orders an appeal remanded to the board, the board shall hold a contested case hearing at the first available meeting following the date of the remand, and shall take appropriate action to ensure compliance with the court order.

(b) Notice of the hearing shall be given to all parties as provided in §22-6(b). The notice shall include a statement of any limits to be placed on evidence and testimony.

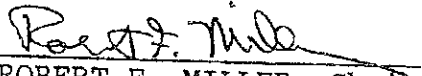
(c) The proceeding shall be conducted pursuant to the procedures set forth in §22-6. [Eff **MAR 02 1998** ]  
(Auth: RCH §4-105; HRS §91-14) (Imp: HRS §91-2, §91-14)




The Rules Relating to Administrative Procedure of the Zoning Board of Appeals (1989) were repealed and Part 3 Rules of the Zoning Board of Appeals was adopted following a public hearing held on June 19, 1997 and December 11, 1997, notice of which was published in the Honolulu Star Bulletin on May 12, 1997.

These rules shall become effective upon approval by the Mayor of the City and County of Honolulu and ten days after filing with the City Clerk.

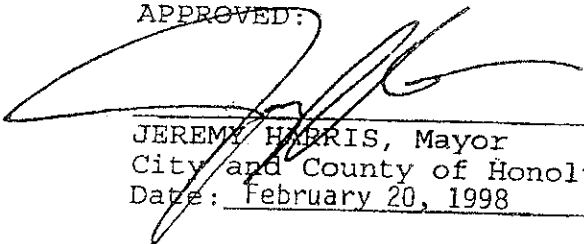
ADOPTED this 11th day of  
December, 1997

  
ROBERT F. MILLER, Chair  
Zoning Board of Appeals  
City and County of Honolulu

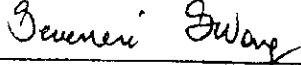
APPROVED AS TO FORM:

  
Deputy Corporation Counsel  
Date: January 9, 1998

APPROVED:

  
JEREMY HARRIS, Mayor  
City and County of Honolulu  
Date: February 20, 1998

RECEIVED this 20th day of  
February, 1998.

  
City Clerk, Genevieve G. Wong