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KEEP THE NORTH SHORE COUNTRY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

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| KEEP THE NORTH SHORE COUNTRY,<br><br>Appellant,<br><br>vs.<br><br>BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE D. CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and NA PUA MAKANI POWER PARTNERS LLC,<br><br>Appellees. | ) | Civil No. 18-1-0960-06 (JPC)<br><br>(Agency Appeal)<br><br>APPELLANT'S REQUEST FOR FURTHER FINDINGS AND CONCLUSIONS; CERTIFICATE OF SERVICE<br><br>Judge: Hon. Jeffrey P. Crabtree<br><br>Hearing: 12/5/18<br><br>Trial Week: N/A (agency appeal) |

**APPELLANT'S REQUEST FOR FURTHER FINDINGS AND CONCLUSIONS**

Appellant Keep the North Shore Country respectfully requests this court provide further findings of facts and conclusions of law. This court's April 10, 2019 order states that "[i]f any party believes further detail or conclusions are required under HRCP Rule 72, HRS Section 91-14, or other applicable authority, the court requests a filing detailing what further findings or conclusions are required, and by what authority…." Order Affirming Board of Land and Natural Resources' Decision ("Order") at 1. As indicated below, Appellant believes this court is "required" by law to augment its Order.

## I. Standard for Adequacy

In 1967, the Hawai‘i Supreme Court concluded that when considering the adequacy of the lower court's findings of facts in its decision there "is no question that under H.R.C.P., Rule 52(a), the trial court is required to make adequate findings of fact in nonjury actions." Shannon v. Murphy, 49 Haw. 661, 668 (1967). It is well-established law that this court's findings must be "(1) supported by the evidence; and (2) sufficiently comprehensive and pertinent to the issues in the case to form a basis for the conclusions of law." Baker v. Quintal, 2002 Haw. App. LEXIS *25 (2002) (quoting Nani Koolau Co. v. K & M Constr., Inc., 5 Haw. App. 137, 140, (1984)). See also Palama v. Sheehan, 50 Haw. 298 (1968); Ventura v. Grace, 3 Haw. App. 371(1982); Scott v. Contractors License Board, 2 Haw. App. 92 (1981). Essentially, the findings must include sufficient subsidiary facts in order to clearly demonstrate the steps by which the court reached its ultimate conclusion on each factual issue. See Tugaeff v. Tugaeff, 42 Haw. 455 (1958).

Therefore, pursuant to HRCP Rule 52(a) and the cases cited above, this court is "required" to enter findings of fact and conclusions of law that are "supported by the evidence" in the record, "sufficiently comprehensive and pertinent to the issues in the case," and with "sufficient subsidiary facts" to "demonstrate the steps" of its analysis. As indicated below, Appellant believes this court must therefore expand upon its summary nine-page decision in order to establish a sufficient appealable record.

## II. Detailed List of Conclusions for Which Findings Are Insufficient

This court's April 10, 2019 Order contains numerous statements that lack sufficient support, explanation, or citation to the record. This lack of detail and

connection to the extensive record in this appeal makes it difficult if not impossible for Appellant and a reviewing court to ascertain whether theses statements are supported by the evidence and "sufficiently comprehensive and pertinent to the issues" in this case in order to form a basis for this court's conclusions of law. Additional analysis, findings, and citations are required to support the following statements:

1. "Reviewing the Bat Guidance report, this court was struck by how much effort and thought went into it. In its own way, it is a remarkable document, and a testament to the serious efforts made to collect information and have that information inform and guide decision-making to preserve and protect ʻōpeʻapeʻa." Order at 3.
2. "The BLNR essentially adopted the factual findings of the ESRC." Order at 3.
3. "While the Hearings Officer eventually recommended against the project, the Hearings Officer agreed with the essential factual findings of the ESRC." Order at 3.
4. "The court finds no fault in the BLNR relying on and adopting the. ESRC's expertise in general, and its findings and conclusions on ʻōpeʻapeʻa specifically." Order at 3-4.
5. "This court is satisfied that those decisions were made on the best available data, and the ITL (the estimate of ʻōpeʻapeʻa deaths from the project) were reasonably adjusted to account for ambiguity or uncertainty on these factors." Order at 4.

6. "[I]f the essential facts relied on in approving the HCP and ITL turn out to be wrong, the adaptive measures which are part of the HCP license should step in and provide further protection for the ʻōpeʻapeʻa." Order at 5.
7. "The court's hope and expectation, based on the evidence presented, is that rather than seeing this case as 'green vs. green,' by applying and enforcing Hawaiʻi's strong environmental protections, the result will be a win-win, rather than a win-lose." Order at 6-7.

**III. Further Clarification Requested by Appellant**

In addition to seeking specific support for the statements in the Order as stated above, Appellant respectfully objects to the court's instructions that "if any party believes further detail or conclusions are required . . . the court requests a filing detailing what further findings or conclusions are required, and by what authority, along with proposed findings and conclusions." (Emphasis added.) Appellant requests clarification from this court as to how Appellant could ethically submit "proposed findings and conclusions" for critical aspects of the Order that Appellant contends are erroneous. This court has boxed in Appellant with an impossible request. On one hand, Appellant cannot "re-argue the case" because this court has made its decision and has expressly prohibited the parties from re-argument. On the other, this court instructs Appellant to draft proposed findings and conclusions on issues in the decision that are adverse to its claims. As a matter of due process, Appellant cannot in fact or in good conscience comply with the second part of the court's instructions.

Additionally, while Appellant does take issue with other parts of this court's April 10, 2019 Order, Appellant does not believe the law requires further clarification on every line of the Order. Appellant wishes to make clear, however, that it does not waive any rights to appeal those issues on which it has not requested above further "detail or conclusions."

Finally, in an abundance of caution, Appellant respectfully requests clarification from this court regarding the finality of the April 10, 2019 Order. Pursuant to HRAP Rule 4, Appellant is faced with 30-day ticking clock "after entry of the judgment or appealable order." Hawai'i law does not allow an appeal "from any decision which is tentative, informal or incomplete." Association of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98 (1985). Therefore, without guidance from this court, Appellant may be required to appeal the April 10 Order while the court is, by its own instructions, continuing to refine the same Order for the purposes of creating an adequate record for appeal. The conundrum could be resolved by this court's clarification that the Order is not final until further findings and conclusions are issued as requested by Appellant.

DATED: Honolulu, Hawai'i, April 26, 2019.

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Maxx E. Phillips
Attorney for Appellant
Keep The North Shore Country