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BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

IN THE MATTER OF

A Contested Case Hearing Re Final Habitat Conservation Plan and Incidental Take License for the Na Pua Makani Wind Energy Project by Applicant Na Pua Makani Power Partners, LLC; Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018, Koolauloa District, Island of O'ahu, Hawai'i.

Case No. BLNR-CC-17-001

KEEP THE NORTH SHORE COUNTRY'S
**REPLY TO THE APPLICANT'S
OPPOSITION TO THE MOTION TO
RECUSE SAM GON III; CERTIFICATE OF
SERVICE**

KEEP THE NORTH SHORE COUNTRY'S **REPLY**
TO THE APPLICANT'S OPPOSITION TO THE MOTION TO RECUSE SAM GON III

The applicant's opposition to Keep the North Shore Country's motion to recuse Sam Gon III raises red herrings and ignores the salient issues.

I. The Applicant Raises Irrelevant Red Herrings.

The applicant attempts to distract this board from the salient issues by discussing HRS § 84-14 and *Liberty Dialysis-Hawaii, LLC v. Rainbow Dialysis, LLC, et al.*, 130 Hawai'i 95, 306 P.3d 140 (2013), neither of which are relevant to Keep the North Shore Country's motion.

First, HRS § 84-14 is not relevant to Keep the North Shore Country's motion. Keep the North Shore Country never cited it as grounds for recusal. Nor does HRS § 84-14 govern the

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DEPARTMENT OF LAND AND NATURAL RESOURCES
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entire universe of situations where recusal is called for. Nothing in the statute states that the circumstances identified in HRS § 84-14 are the only circumstances warranting recusal. Additionally, *Liberty Dialysis-Hawaii* does not say that. In fact, we know that the due process clause of our constitution requires far more. For example, in *Sussel v. Honolulu Civil Serv. Comm'n*, 71 Haw. 101, 107, 784 P.2d 867, 870 (1989), the Hawai'i Supreme Court, without relying on HRS § 84-14, concluded that a commissioner should not have participated in decisionmaking. Its decision was based on due process concerns.

Second, the Supreme Court did not consider due process issues in *Liberty Dialysis-Hawaii*. That decision interpreted, as the applicant admits, HRS § 323D-47, which is not applicable or relevant to the Board of Land and Natural Resources.

II. The Applicant Overlooks the Salient Issues.

The applicant ignores the salient issues by glossing over precisely what Sam Gon said and his actions.

A. Gon's Participation Violates HRS §§ 91-9(g) and 91-13.

It is black letter law that board members are forbidden from considering matters outside the record. *See* HRS §§ 91-9(g) and 91-13; *Mauna Kea Power Company Inc. v. BLNR*, 76 Hawai'i 259, 262, 874 P.2d 1084, 1087 (1994) (internal citations omitted). Realizing this, the applicant attempts to show that whatever Gon considered was part of the record.¹ It was not.

To be clear, there is no dispute that (1) the Endangered Species Recovery Committee

¹ The record is made up of exhibits that are identified by alpha-numeric numbers as well as the transcript. The pleadings and motions are also part of the record, but they are not evidence. Minutes from various Endangered Species Recovery Committee meetings have been made part of the record. However, the "ESRC proceedings," if that term is broader than the minutes themselves, are not part of the record – as the applicant argues on the top of page 6 of its opposition. For the "ESRC proceedings" to be part of the record, they would first have to be identified with some specificity and be identified by a party or the hearing officer as being part of the record.

visited the Kahuku site in considering the habitat conservation plan; (2) the Endangered Species Recovery Committee considered the habitat and conditions (or, as the applicant refers to them, “the location, topography and vegetation types”) at the Kahuku site; and (3) the Endangered Species Recovery Committee discussed and considered the take estimate based on data from the existing Kahuku facility. There is also no dispute that **neither** the applicant **nor** the Endangered Species Recovery Committee considered differences in turbine height or rotor swept area in assessing the impact of the project on bat mortality. HO FOF 190 and 194; Transcript Vol I at 104 and 111; and Exhibits A-35 and A-36.

The applicant cites to a number of exhibits to show that the Endangered Species Recovery Committee visited the Kahuku site and considered the conditions there. None of those exhibits, however, reveal that the Endangered Species Recovery Committee actually visited the Kawailoa site, or any other wind turbine project, in considering this habitat conservation plan. Gon said,

the ESRC went to **visit as many of these projects** in person to look at the areas that were being surveyed, to consider the records for each of those places, the different conditions and habitat, everything from the vegetation, to typical wind behavior and the like, in order to assess what was most appropriate to apply to this particular HCP.

January 12, 2018 Transcript at 47. Nothing in the record supports that statement. On page 7 of its opposition, the applicant relies on three exhibits: Exhibits A-33, A-34 and B-13. Exhibits A-33 at 1 and A-34 at 31 discuss the Kahuku site visit. They do not discuss a site visit to any other location. The applicant fails to cite to any page number in Exhibit B-13, but nothing in these minutes discuss a site visit by the Endangered Species Recovery Committee to Kawailoa. Nothing in the minutes discuss a site visit to any other wind turbine project by the Endangered Species Recovery Committee. Nothing in Exhibit B-13 reveals that the Endangered Species

Recovery Committee visited any other project “in order to assess what was most appropriate to apply to this particular HCP.” In addition, the minutes found in Exhibit B-13 were taken for a meeting that took place more than eight months after the Endangered Species Recovery Committee voted to recommend approval of this habitat conservation plan. Thus, none of the three exhibits that the applicant relies upon provide any evidence that the Endangered Species Recovery Committee visited many sites in person in order to assess what was the most appropriate factors to consider for the applicant’s habitat conservation plan.

Thus, Gon’s statement is based on information that is not in the record. As such, his statement reveals a clear violation of HRS § 91-9(g).² Gon’s participation in the Endangered Species Recovery Committee decisionmaking on this habitat conservation plan renders him unable to participate in the same matter that this board is considering because he is relying upon information that is not in the record and has not been made available to Keep the North Shore Country.

B. Gon’s Participation Creates an Appearance of Bias and Prejudice.

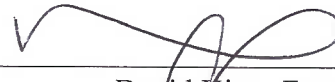
The standard for recusal in this state is an appearance of bias – not demonstrated actual bias. *Sussel v. Honolulu Civil Serv. Comm’n*, 71 Haw. 101, 107, 784 P.2d 867, 870 (1989). The applicant does not dispute the facts that Keep the North Shore has presented that reveal bias. It is not Gon’s expertise that Keep the North Shore Country has any problem with; it is the role he played, the statements that he has made, and the actions he took. He voted against Keep the North Shore Country’s participation in this contested case hearing. Exhibit A-41 at 15. Before Keep the North Shore County had any opportunity to present any evidence or cross examine the applicant’s “experts,” he proclaimed that “[t]he suggestion that the habitat conservation plan is

² Keep the North Shore Country also believes that that Gon’s statement is false and it must be given the opportunity to discredit his claim by calling witnesses.

fatally flawed or inadequate researched its problematic in his mind.” *Id.* at 14. He made the motion while on the Endangered Species Recovery Committee to approve the habitat conservation plan. Exhibit A-36 at 6. Gon’s statement reveals prejudice as to the adjudicative facts.

In any case, for the same reasons that appellate court judges do not participate in cases that they heard as circuit court judges, Gon may not participate in this matter on the BLNR.

DATED: Honolulu, Hawai‘i, February 7, 2018.



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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a copy of Keep the North Shore Country's reply to the applicant's opposition to the motion to recuse Sam Gon III was served upon the following parties by hand delivery or electronically, on February 7, 2018, at the addresses below:

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DATED: Honolulu, Hawai'i, February 7, 2018.



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