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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 CONSOLIDATED REPLY TO APPELLANTS' CONSOLIDATED MEMORANUM IN OPPOSITION TO MOTIONS TO DISMISS PETITION TO APPEAL AND CERTIFICATE OF SERVICE

NA PUA MAKANI POWER PARTNERS, LLC AND DIRECTOR OF DEPARTMENT OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU'S CONSOLIDATED REPLY TO APPELLANTS' CONSOLIDATED MEMORANUM IN OPPOSITION TO MOTIONS TO DISMISS PETITION TO APPEAL

The Appellants' Opposition argues that: (1) the Appellants hold a property interest in a clean and healthful environment under the Hawaii Constitution Article XI, Section 9,[1] (2) Appellants' interest in a clean and healthful environment is protected by due process,[2] and (3) the DPP and the ZBA's Rules, as currently applied to the processing of minor Conditional Use Permits ("CUPs"), do not satisfy due process because they did not provide notice of the DPP Approvals to the Appellants as interested parties.[3] Therefore, according to the Appellants, DPP's failure to provide them notice of the DPP Approvals violated their due process rights and excuses their untimely appeals to the ZBA.

Appellants are incorrect for at least three independent reasons. First, the LUO provisions at issue in this case do not give rise to a "property interest" protected by due process. Second, even if the LUO's requirements create a constitutionally protected property interest, the applicable DPP and the ZBA Rules impose constitutionally permissible, reasonable restrictions on Appellants' right to appeal in the form of the mandatory 30-day appeal deadline that Appellants failed to meet. Third, the DPP and ZBA's Rules are sufficient to protect the Appellants' alleged property interest.

I. ARGUMENT.

A. The Director's Actions Do Not Affect Appellants' Property.

The Appellants argue that the DPP Approvals affect their constitutionally protected right to a clean and healthful environment, as established by Article XI, Section 9 of the Hawaii Constitution ("Article XI") and as enacted through the environmental laws contained in the City and County of Honolulu's Land Use Ordinance ("LUO") §§ 21-240-1, 21-290 *et seq*., 21-5.700, and 21-4.60.[4] However, as demonstrated below, the

[1] Opposition at 4-6.
[2] Opposition at 6-7.
[3] Opposition at 7-15.
[4] Opposition at 6-7.

Appellants' claimed property interest is not based in any law, ordinance or regulation as required by Article XI, and is only a general environmental interest. Therefore, Appellants' claim is clearly at odds with the Hawaii Supreme Court's decision in Sandy Beach Defense Fund,[5] which held that that general aesthetic and environmental interests are not "property" for due process purposes.

Appellants argue they possess a property interest in a clean and healthful environment granted by Article XI of the Hawaii State Constitution, as the basis for Appellant's due process claim. Article XI 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.[6]

In construing the above-quoted text, the Hawaii Supreme Court 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:

> [a]lthough a person's right to a clean and healthful environment is vested pursuant to article XI, section 9, **the right is defined by existing law relating to environmental quality**. A committee report from the 1978 Constitutional Convention explained that the right would be defined by environmental statutes, rules, and ordinances to lend flexibility to the definition of the right over time:
>
> > Your Committee believes that a clean and healthful environment is an important right of every citizen and that this right deserves constitutional protection. **The definition of this right would be accomplished by relying on the large body of statutes, administrative rules and ordinances relating to environmental quality. Defining the right in terms of present laws imposes no new legal duties on parties, a point of fairness important to**

[5] Sandy Beach Defense Fund v. City Council of Honolulu, 70 Haw. 361, 377, 773 P.2d 250, 261 (1989).
[6] (Emphasis added).

> **parties which have invested or are investing large sums of money to comply with present laws.**
>
> Developing a body of case law defining the content of the right could involve confusion and inconsistencies. On the other hand, **legislatures, county councils and administrative agencies can adopt, modify or repeal environmental laws or regulation laws** [sic] in light of the latest scientific evidence and federal requirements and opportunities. **Thus, the right can be reshaped and redefined through statute, ordinance and administrative rule-making procedures and not inflexibly fixed**.[7]

Article XI does not create an unconditional, free-standing property interest in the environment. This is clear from the MECO court's decision to reaffirm Sandy Beach, referenced *supra*, in which the challengers of an SMA permit did not identify any legal authority granting them the specific procedural or substantive rights they claimed were required:

> the challengers did not identify any source granting them a substantive legal right to enforcement of environmental laws. Rather, the asserted "property interests" were unilateral expectations of aesthetic value, including claims that a person who lived in close proximity to a proposed development would lose her view of the ocean and decrease the value of her property.[8]

Thus, the Hawaii Supreme Court has noted, "[A]rticle XI, section 9 does not itself define the substantive content of the right to a clean and healthful environment, but rather leaves it to the legislature to determine."[9]

Accordingly, where a party claims to have a right to a clean and healthful environment not actually provided by statute, ordinance, regulation, or rule, the Hawaii Supreme Court has consistently denied such claims, holding that a party does not have a property interest protected by due process in freestanding general aesthetic or

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[7] In re Application of Maui Elec. Co., Ltd. ("MECO") 141 Haw. 249, 261, 408 P.3d 1, 13 (2017) (quoting Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawaii 1978, at 689) (emphasis added).

[8] Id. at 265, 408 P.3d at 17 (emphasis added) (citing Sandy Beach Def. Fund, 70 Haw. at 367, 773 P.2d at 255).

[9] County of Hawaii v. Ala Loop Homeowners, 123 Haw. 391, 410, 235 P.3d 1103, 1122 (2010), *abrogated on other grounds by* Tax Found. of Hawaii v. State, 144 Haw. 175, 439 P.3d 127 (2019).

environmental claims.[10] In MECO, the Hawaii Supreme Court found that HRS § 269-6 was a law relating to environmental quality because it expressly required the Hawaii Public Utilities Commission to consider the effect of the State's dependence on fossil fuels on greenhouse gas emissions; consequently, plaintiffs had a "legitimate right of entitlement" to the enforcement of this law under Article XI.[11] In contrast, Appellants in this case do not seek the enforcement of any LUO requirements that specifically relate to or address environmental quality. Therefore, Appellant's general aesthetic and environmental interests do not rise to the level of "property" within the meaning of the due process clause under Sandy Beach.[12]

B. The LUO Does Not Create the Property Interest Claimed.

The Appellants do not identify any existing statute, regulation, ordinance or administrative rule that requires DPP to provide them with individual notice of the Director's actions. Rather, the Appellants argue that the LUO and Rules of the DPP and ZBA should provide them with such additional rights and protections.[13] Appellants' argument lacks legal merit because the right to a clean and healthful environment under MECO is the right to compliance with the **existing** rules, including those that establish notice and hearing procedures. The Appellants' arguments regarding what they believe the rules should say should be directed to the appropriate legislative body. The current proceeding is an adjudicatory one that depends only upon existing rules and what those existing rules actually provide.

In light of the above, the Appellants' claim to a due process right under Article XI is unsupportable. The due process right to a "clean and healthy environment" only exists

[10] For example, in Mauna Kea Anaina Hou v. University of Hawaii, the court noted that the challengers to a permit issued by BLNR did not have a property interest protected by due process under Article XI because there was no claimed "legitimate interest" that was being denied. 126 Haw. 265, 269 P.3d 800 (Haw App. 2012) (Mem Op.).
[11] MECO, 141 Haw. at 261-265, 408 P.3d at 13-17.
[12] Sandy Beach Def. Fund, 70 Haw. at 377, 773 P.2d at 261.
[13] For example, the Appellants argue that "heightened notice requirements to ensure all interested persons receive notice (DPP Rule § 6-2)" would be beneficial. Opposition at 8 (emphasis added). The Appellants also compare DPP's Rules to the County of Maui Department of Planning's rules and argue that the Maui Department of Planning's rules are better. Opposition at 10-11.

insofar as it has been created by statutes, regulations, ordinances, and administrative rules relating to environmental quality. The Appellants' argument is that the absence of a DPP Rule providing them with heightened notice protections and a hearing with respect to the DPP Approvals violates their right to a clean and healthful environment. This runs contrary to Article XI and the case law discussed above. The Appellants' rights are established by and limited to the procedures created by DPP and ZBA's Rules; they have no legitimate claim of entitlement to any other benefits or procedures.

Having failed to follow the procedures in place by which the Appellants could have appropriately participated in the DPP approval process, the Appellants have no "legitimate claim of entitlement"[14] and, therefore, no property interest protected by due process.

C. The Right to Appeal May be Reasonably Limited and Regulated.

Even if the Appellants had a property interest in a clean and healthful environment affected by the DPP Approvals, Article XI 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."[15] Reasonable limitations specifically include a reasonable statute of limitations. The committee report on this provision explains that the committee intended that,

> 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.[16]

Hawaii law recognizes that the City Council, DPP Director, and DPP are empowered to administer the substantive rights created under the LUO. These agencies have done so through the establishment of rules and procedures that set forth who is

[14] See MECO, 141 Haw. at 260, 408 P.3d at 12.
[15] (Emphasis added).
[16] See Ala Loop Homeowners, 123 Haw. at 418, 235 P.3d at 1130, *abrogated on other grounds by* Tax Found. of Hawai'i,144 Haw. 175, 439 P.3d 127 (quoting Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 690) (emphasis added).

required to receive notice of the Director's actions and how any interested party may request notice of such actions.[17]

In this case, the "reasonable limitation and regulation as provided by law" include both the mandatory 30-day appeal deadline set forth in LUO § 21-1.40 and the ZBA Rules § 22-2, which require the filing of an appeal with the ZBA within thirty days of personal service or the date of mailing of the Director's decision and limits the ZBA's jurisdiction, and DPP's notice provisions under DPP Rules § 6-2. These regulations create legitimate and lawful limitations on when and how an appeal may be taken from a Director's action.

D. DPP's Rules and Procedures are Sufficient.

Even if the Appellants did have a property interest protected by due process and affected by the DPP Approvals, the DPP's Rules sufficiently protect this interest and, in this specific case, did sufficiently protect the Appellants' claimed property interest. 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.[18]

1. The private interest affected.

First, the "private interest" asserted by the Appellants is slight. The right to a "clean and healthful environment" is a right shared by the entire public. Although Appellants claim to represent members of the North Shore community that would be particularly affected by the Project due to their closer proximity to the Project,[19] they have not made any allegations that show that they have particular property interests that are distinct from

[17] DPP Rules § 6-2.
[18] See MECO, 141 Haw. at 265, 408 P.3d at 17; Sandy Beach Def. Fund, 70 Haw. at 378, 773 P.2d at 261.
[19] Opposition at 4-6.

every other member of the North Shore community.[20]

2. Risk of erroneous deprivation and value of additional safeguards.

The facts of this case demonstrate that DPP's Rules already protect the public such that the risk of an erroneous deprivation of the Appellants' alleged interest is negligible. First, the Project was already subject to the EIS process under HRS Chapter 343 for which both Appellants were participating parties and had an extensive opportunity to provide input and comments regarding the environmental impacts of the Project. The alleged concerns of the Appellants, including the siting of the wind turbines, were considered during the EIS process that was required to be completed before the Project applied for the minor CUPs.[21] Accordingly, the risk of an erroneous deprivation of any right would be small.

Second, the "probable value of additional safeguards" would be zero because the Appellants' own Opposition, Declarations and Exhibits show that they already knew that the Project required CUPs, and therefore, providing additional notice to the Appellants regarding those same CUPs would have been meaningless.[22] Specifically, (1) the Appellants admit in their Opposition that "[c]oncerns about the NPM project in Kahuku led KCA to propose amending the wind turbine ordinance to require CUP major permits";[23] (2) the current KCA President affirmed in his Declaration that KCA's proposed charter amendment to require a hearing for wind machines "specifically identified the NPM project"; and (3) the previous KCA President submitted testimony in support of KCA's proposed amendment specifically complaining that NPM only required a CUP minor

[20] For example, there is no allegation that the Appellants or their members are adjoining landowners or have any other distinct interest in the Project.

[21] DPP requires an application for a minor CUP to include a copy of a completed EIS if one is required under HRS Chapter 343. See e.g., the current CUP Minor Application Form for "All Uses Except Meeting Facility, Day-Care Facility, School" from DPP at http://www.honoluludpp.org/ApplicationsForms/ZoningandLandUsePermits.aspx (*last accessed* May 21, 2020); 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* July 2, 2020).

[22] The Appellants question in their Opposition, "how Appellants and other interested persons could have known to request notifications." Opposition at 3. However, the Appellants' own submissions reveal that they actually knew by at the latest September of 2015 (prior to submission of all of the CUP applications), that NPM would require CUPs for the Project.

[23] Opposition at 11 (emphasis added).

permit – all of which was done prior to submission of NPM's CUP applications.[24] Appellants knew that CUP minor permits were required for NPM under the then-existing law.

Under DPP's Rules, any person interested in DPP's processing of a permit can request notice of the Director's decision.[25] Here, the Appellants knew about the CUPs prior to NPM's submission of the CUP applications and simply failed to request notification of the DPP Approvals.[26] Additional safeguards are unnecessary here where the Appellants had actual notice the Project would be seeking CUPs from DPP and affirmatively chose not to utilize the procedures available to them that would have provided notice of the DPP Approvals.[27]

3. Governmental interest and burden.

The governmental burden the Appellants seek to impose upon DPP is significant[28] and, in this case, the additional safeguards proposed by the Appellants would have been

[24] According to the Appellants, KCA submitted a charter amendment proposal in **September of 2015** that "specifically identified the NPM project" and sought to amend the LUO to require a hearing on permits for wind energy projects. See Declaration of Tevita o Ka'ili at ¶ 15 attached to Opposition; see Opposition at Exhibit 10. Further, KCA's then-president, Kent Fonoimoana, submitted testimony in support of KCA's amendment proposal in **February of 2016**. See Opposition at Exhibit 6 at 4, 6. In that testimony, KCA explicitly states that the LUO only requires NPM to obtain a CUP minor permit, which "is a discretionary/ministerial permit that does not require public comment…." Opposition at Exhibit 6 at 6. NPM did not submit its first CUP application until **November 29, 2016**. Appellants cannot now credibly claim they did not know that NPM needed CUP minor permits for their Project. They cannot now credibly claim they required notice to protect their rights.

[25] DPP Rules § 6-2 states: "[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" (emphasis added). This rule is currently in effect and has been in effect at all times relevant to this proceeding.

[26] Note that the Appellants also knew minor CUPs were required given that the draft EIS and 2016 FEIS for the Project both included notice to commenters that NPM would have to seek minor CUPs from the City and County of Honolulu. See 2016 FEIS at 5-27, Table 5-2; 4-156; 5-24. Appellants repeatedly state that they, and their members, participated in the Project's EIS process with BLNR. Opposition at 13-14. Appellants knew the Project would require minor CUPs from DPP, yet affirmatively chose to not utilize the process available to them through DPP Rules § 6-2, that would have provided them notice regarding the Director's actions on the DPP Approvals.

[27] The Appellants' Opposition also argues that the "Director's procedures are further insufficient because they were employed for approvals that exceeded the Director's authority." Opposition at 11. This is, of course, non-sensical as the merits of the Director's decision have no rational relation whatsoever to whether the procedures employed by DPP adequately protect a party's property interest. While the Director and NPM vigorously disagree with the Appellants' assertion, this relates solely to the merits of Appellants' claims and not the issue of whether the untimely filing of their appeal should be excused. As such, we do not address it here.

[28] See Motion to Dismiss KCA Appeal Petition at 16-17 discussing the governmental burden.

wholly superfluous. The Appellants appear to suggest that constructive notice like that provided by the Maui Planning Department may have been sufficient to satisfy their proposed theory in their Opposition regarding what notice due process requires.[29] The Appellants ignore that DPP does provide constructive notice of its decisions as its records are available for public inspection and, in this case, each of the DPP Approvals was actually made available for public inspection.[30]

The Appellants attempt to minimize the burden that would be imposed upon DPP by arguing that in 2017 the City Council amended the LUO to require a major CUP for wind machines with a rated capacity of more than 100 kilowatts and, therefore, upholding the Appellants' alleged due process rights would not have an impact on future developers who will now be expressly covered by the 2017 ordinance.[31] The Appellants misunderstand NPM and the Director's argument. If the ZBA decides in favor of the Appellants, permits already issued for longstanding projects would be placed in jeopardy, including permits having nothing to do with wind machines, with apparently no time limitation on a party's ability to assert an appeal.[32]

In this case, the Appellants' own record demonstrates that they knew that NPM would be required to obtain minor CUPs from DPP well before any permits were sought by NPM. DPP Rules § 6-2 places the burden upon interested parties to request to receive notifications of actions of the Director, and the Appellants' own record demonstrates that the Appellants knowingly neglected to exercise the procedural rights available to them. The burden of imposing upon DPP the additional protections demanded by the Appellants

[29] Opposition at 10-11.
[30] See DPP Rules § 6-2; Sokugawa Declarations at ¶10 attached to KNSC and KCA Motions to Dismiss. Further, Appellants had actual notice that the Project would seek minor CUPs over a year before NPM applied for the first DPP Approval and could have requested notice of the DPP Approvals under DPP Rules § 6-2, so Maui's form of constructive notice would be of no value to the Appellants.
[31] Opposition at 11.
[32] See Motion to Dismiss KNSC Appeal Petition at 18; Motion to Dismiss KCA Appeal Petition at 18. The Appellants also note that the Director testified in support of requiring major CUP permits for future large wind turbine projects. Opposition at 12. This change in the law has nothing to do with the burden that the Appellants seek to impose on DPP in this case with respect to permits processed prior to the change in the LUO, and it also has nothing to do with DPP's processing of future minor CUPs or other permits.

is significantly outweighed here by the demonstrable futility of the additional safeguards in light of the protections already provided by DPP's Rules.

II. 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, July 23, 2020.

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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:

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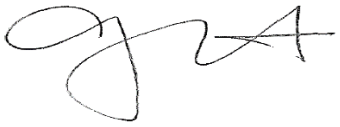

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