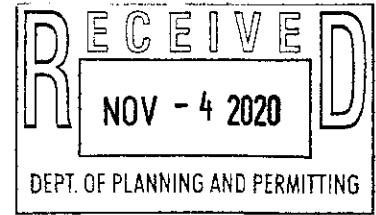


ZONING BOARD OF APPEALS
CITY AND COUNTY OF HONOLULU
THE STATE OF HAWAII



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,

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.

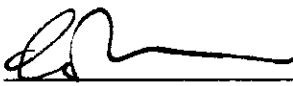
30. Taking into account all the relevant factors, DPP's Rules, as applied to the processing of the DPP Approvals and the Appellants, did not violate the Appellants' right to procedural due process.

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