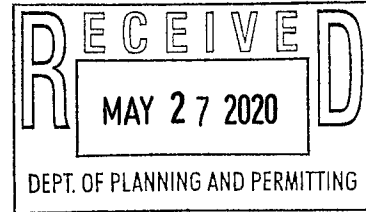


Law Office of Lance D. Collins
 Lance D. Collins 8246
 Post Office Box 782
 Makawao, Hawai'i 96768
 808.243.9292

Law Office of Bianca Isaki
 Bianca K. Isaki 9977
 1720 Huna Street, 401B
 Honolulu, Hawai'i 96837
 (808) 927-5606



Attorneys for
 THE KAHUKU COMMUNITY ASSOCIATION &
 KEEP THE NORTH SHORE COUNTRY

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

In the Matter of the Petitions of)	Case No. 2019/ZBA-7 (Consolidated)
)	
KEEP THE NORTH SHORE COUNTRY, a)	APPELLANTS' CONSOLIDATED
nonprofit corporation, and THE KAHUKU)	MEMORANDUM IN OPPOSITION TO NA
COMMUNITY ASSOCIATION, a nonprofit)	PUA MAKANI POWER PARTNERS, LLC
corporation, concerning the Na Pua Makani)	AND DIRECTOR OF DEPARTMENT OF
Wind Project - Subprojects A & B, 56-668)	PLANNING AND PERMITTING, CITY
Kamehameha Highway, Kahuku, O'ahu, Tax)	AND COUNTY OF HONOLULU'S
Map Key (1) 5-6-008:006 & 5-6-006:018)	MOTION FOR LEAVE TO FILE REPLY;
)	CERTIFICATE OF SERVICE
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))	

APPELLANTS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO NA PUA
 MAKANI POWER PARTNERS, LLC AND DIRECTOR OF DEPARTMENT OF PLANNING
 AND PERMITTING, CITY AND COUNTY OF HONOLULU'S MOTION FOR LEAVE TO
 FILE REPLY

Appellants KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation, and THE
 KAHUKU COMMUNITY ASSOCIATION, a nonprofit corporation (collectively, "Appellants"),

by and through their undersigned counsel, respectfully submit this Consolidated Memorandum in Opposition to Intervenor NA PUA MAKANI POWER PARTNERS, LLC (NPM) and Respondent DIRECTOR OF DEPARTMENT OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU's (Director) (collectively, "NPM") Motion for Leave to File a Reply, filed May 26, 2020 (NPM mtn). NPM improperly seeks leave to add further argument in response to Appellants' Consolidated Memorandum in Opposition to NPM's Motions to Dismiss the Kahuku Community Association's Application to Appeal Director's Approvals of Conditional Use Permits, Waiver, and Modifications and Keep the North Shore Country's Petition to Appeal, filed on April 2, 2020. This memorandum is filed pursuant to ZBA Rules §§ 22-4(e) and 22-7.

I. ARGUMENT

A. NPM fails to establish good cause for waiver of Board Rules and violates these rules.

By Notice of Contested Case Hearing Schedule dated March 11, 2020, the Board imposed a March 26, 2020 deadline for motions. *Id.* ¶11. ZBA rules provide for a prehearing procedure that includes motions and oppositions, but not reply briefs. ZBA Rule §22-4(e). To waive or suspend Board rules and orders, NPM was required to present "good cause" permitting this Board to waive its rules. *Id.* §22-7. NPM failed to do so. Instead of identifying the "good cause" for which this Board should waive its rules, NPM uses its supporting memorandum to present the arguments that would be raised in the reply itself. That NPM has developed better arguments in opposition to Appellants' standing in the past two months that it failed to include in its prior motions does not constitute "good cause" warranting waiver. ZBA Rule §22-7. On the contrary, NPM has pointedly violated rule requirements by inserting the arguments they seek "leave" to present in their memorandum.

B. NPM's contention that it lacked notice of Appellants' due process rights lacks merit

NPM contends its motion for leave should be granted because they lacked notice that of Appellants' (1) property interest in a clean and healthful environment under the Hawaii Constitution

article XI, § 9; (2) that this property interest is protected by due process, and (3) that the processing of minor CUP permits in this case do not comply with due process. NPM mtg. at 4. These contentions lack merit because Appellants identified how their property rights in a clean and healthful environment are impacted by the permitted activities and that the permits were issued in excess of the Director's authority. Acts in excess of authority necessarily violate due process because the procedures due to Appellants, and others of the public, did not authorize the Director's actions. No "magic words" are required to secure due process rights. *See Credit Associates of Maui, Limited v. Montilliano*, 51 Haw. 325, 327, 460 P.2d 762, 764 (1969) (rejecting the "mechanical" position that "an appeal, which involves only a question of law, stands or falls, depending on the presence or absence of the magic words, 'this appeal is taken on a point of law,' or their equivalent"). This approach is particularly appropriate where the context required that each of Appellants' statements be read as part of a petition seeking a contested case hearing, defined to be "a hearing 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." ZBA Rule § 21-1; *see Henry Waterhouse Trust Co. v. Vicars*, 28 Haw. 232, 243 (1925) (interpretation of laws considers what the context requires).

In any case, Appellants utilized the language NPM complains they did not know indicated Appellants' property and due process rights. Appellant KCA's petition to intervene or for a contested case hearing states:

41. The Kahuku Community Association has property interests in the Director's decisions to waive setbacks, grant conditional use permits (minor), and modifications of the setbacks because NPM's proposed wind turbine project may affect the Kahuku Community Association's: (1) rights to a clean and healthy environment as defined by laws including the City's land use ordinance;

KCA petition, filed Feb. 7, 2020 (emphasis added). KNSC's petition to appeal stated:

23. Petitioner has specific interests in the property because Applicant's proposed wind turbine project may affect: (1) Petitioner and its members' rights to a clean and healthy environment as defined by laws including the City's land use ordinance;

KNSC petition, filed Dec. 23, 2019 (emphasis added). NPM knew, or should have known, that article XI, §9 protects each person's rights to a clean and healthy environment as defined by laws relating to environmental quality and that such rights are property interests protected by constitutional due process. *Id.* NPM's contention that its ignorance of the legal status of Appellants' rights do not constitute good cause to waive this Board's rules.

C. Appellants should be afforded leave to file a surreply, if NPM's motion is granted.

NPM waited two months after Appellants' filed their opposition on April 2, 2020 to seek leave to "reply" through a motion and memorandum that substantively engages Appellants' arguments. The equities of this situation strongly counsels that if NPM's motion is not denied that Appellants should be given an opportunity to file a surreply. To the extent that NPM is supplementing their original motion, and this Board permits them to do so, Appellants should be permitted to supplement our memorandum in opposition by way of a surreply.

II. CONCLUSION

For the foregoing reasons, Appellants request that this Board deny NPM's and the Director's motion for leave to file a reply. In the alternative, and if the Board grants the motion, Appellants respectfully submit that they should be afforded an opportunity to file a surreply or supplement to their arguments in opposition to dismissing this contested case.

DATED: Honolulu, Hawai'i

May 27, 2020



LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Kahuku Community Association &
Keep the North Shore Country

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

In the Matter of the Application of) Case No. 2019/ZBA-7
)
KEEP THE NORTH SHORE COUNTRY, a) CERTIFICATE OF SERVICE
nonprofit corporation,)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the above was duly served upon the following parties by e-mail or U.S. Mail, postage prepaid on this date as follows:

Jodi S. Yamamoto
Wil K. Yamamoto
Bradly S. Dixon
1100 Alakea Street, Suite 3100
Honolulu, Hawai'i 96813
jyamamoto@ychawaii.com
bdixon@ychawaii.com

Attorneys for
NA PUA MAKANI POWER
PARTNERS, LLC

Brad Saito,
Corporation Counsel
City & County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai'i 96813
bsaito@honolulu.gov

Attorney for
DIRECTOR, DEPARTMENT OF
PLANNING & PERMITTING

Dawn D.M. Spurlin
dspurlin@honolulu.gov

Counsel for
ZONING BOARD OF APPEALS

DATED: Honolulu, Hawai'i

May 27, 2020

Bianca Isaki

LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Kahuku Community Association &
Keep the North Shore Country