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BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition To Issue a Declaratory Order That a Photovoltaic System is Not an Agricultural Energy Facility.	DOCKET NO. DR16-55 DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU'S POSITION STATEMENT TO THE OFFICE OF PLANNING, STATE OF HAWAII AND THE DEPARTMENT OF AGRICULTURE'S PETITION FOR DECLARATORY ORDER; CERTIFICATE OF SERVICE

DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, CITY AND COUNTY OF HONOLULU'S POSITION STATEMENT TO THE OFFICE OF PLANNING, STATE OF HAWAII AND THE DEPARTMENT OF AGRICULTURE'S PETITION FOR DECLARATORY ORDER

The Director of the Department of Planning and Permitting, City and County of Honolulu ("the Director" hereinafter) here by submits his Position Statement regarding the Office of Planning, State of Hawaii ("OP" hereinafter) and the Department of Agriculture's ("DOA" hereinafter) Petition for Declaratory Order.

I. INTRODUCTION TO THE RELEVANT ISSUE

OP and DOA have entered their objections to the Director issuing a conditional use permit ("CUP" hereinafter) allowing the construction of an Agricultural Energy Facility ("AEF"

hereinafter) pursuant to Hawaii Revised Statutes ("HRS" hereinafter) Section 205-4.5 and HRS Section 269-91. Ostensibly, OP and DOA assert that an AEF may only be permitted on agricultural lands if the AEF generates renewable energy by the use of products of agricultural activities. The Director submits that OP and DOA's position on this matter does not comport with the plain language of the relevant statutes, the relevant statutory history and the underlying policy goals of the legislation.

II. THE DIRECTOR'S RATIONALE FOR ISSUING THE CUP

The Director's decision to approve the Conditional Use Permit for SMBII LLC is based primarily on policy priorities and relevant sections of HRS.

A. Policy Priorities

First, City and State policies provide for the protection and enhancement of agricultural lands and the viability of agricultural activities. In the agricultural district this is of paramount importance. Second, the goal of developing alternative energy sources outside of fossil fuels is also a stated priority of both City and State governments.

The Director submits that, this project achieves both goals simultaneously, in that it protects and enhances agricultural lands and it simultaneously and compatibly advances the goal of developing alternative energy. There is virtually no agricultural activity displaced by the project as the photovoltaic ("PV" hereinafter) panels are mounted on poles and act as shade structures that actually enhance the productivity of crops below. The two uses co-exist without conflict. While both uses could exist independently of each other in this project they are integrated to the benefit of agriculture which we know has a smaller margin of profitability than alternative energy. In some sense the energy subsidizes the agriculture.

There are ironies in the OP and DOA staff opposition to the classification of the facility proposed by SMB II LLC as an AEF. For instance, if shade structures were developed to shade the plants for a purely agricultural and/or horticultural reason and without any PV panels on them this debate would not even exist. The mere fact of adding PV panels causes this question even if there is no displacement of agriculture. The DOA staff knows very well that not all plants grow best in full sun and many plants grow best in shade or partial sunlight. This is true of piper betle. Also, the shading can reduce evaporation and possibly lead to greater water efficiency. The other irony is that if biofuels is the only accepted definition of AEF, then, when an AEF is developed biofuel crops will displace normal agricultural crops. This interpretation creates a zero sum game between renewable energy and agriculture which I think would be unfortunate and unnecessary.

B. Statutory Reasons

Reading of the relevant statutes, HRS Section 205-4.5(a)(17) and HRS Section 269-91, as well as some of the legislative history of the agricultural energy facility bill (SB2849, SD1) it is clearly discernable that when the concepts for AEFs was being discussed in the State Legislature there was much debate about a narrow or broad reading of the concept and the legislature adopted the broad interpretation. This broad interpretation is captured in HRS Section 291-91 in the list of renewable sources. Seven categories of renewable energy are listed. The interpretation being proposed by the OP and the staff of the DOA would essentially limit AEF to biomass since to the Director's knowledge there is no current way for agriculture (plants) to capture the other sources of energy. Theoretically there may be other ways for plants to capture renewable energy but those processes do not exist within today's technologies. Biomass is only one of the seven sources listed in the legislation.

In addition to listing seven sources of renewable energy the statute connects the list with the word "or". This is crucial because if the legislature meant only biofuels it would have used the connector "through" or a word with a similar meaning. "Or" means any of the sources in the list qualify.

Finally, two criteria are clearly articulated in the legislation for AEF: one is the concept of integration with agricultural activity and the second is a maximum 90% lot coverage by the agricultural activity. The reason for both criteria is a desire to reiterate the primacy of agriculture in the agricultural district. Having said that, the SMB II project meets both goals.

III. STATUTORY INTERPRETATION

The most fundamental element underlying this dispute involves the interpretation of statutes. The first statute at issue is HRS Section 205-4.5 **Permissible uses within the agricultural districts** provides, in part, as follows:

> (a) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B and for solar energy facilities, class B or C, shall be restricted to the following permitted uses:
> . . . .
>
> (17) Agricultural-energy facilities, including appurtenances necessary for an agricultural-energy enterprise; provided that the primary activity of the agricultural-energy enterprise is agricultural activity. To be considered the primary activity of an agricultural-energy enterprise, the total acreage devoted to agricultural activity shall be not less than ninety per cent of the total acreage of the agricultural-energy enterprise. The agricultural-energy facility shall be limited to lands owned, leased, licensed, or operated by the entity conducting the agricultural activity.
>
> As used in this paragraph:
>
> 'Agricultural activity' means any activity described in paragraphs (1) to (3) of this subsection.

'Agricultural-energy enterprise' means an enterprise that integrally incorporates an agricultural activity with an agricultural-energy facility.

'Agricultural-energy facility' means a facility that generates, stores, or distributes renewable energy as defined in section 269-91 or renewable fuel including electrical or thermal energy or liquid or gaseous fuels from products of agricultural activities from agricultural lands located in the State.

'Appurtenances' means operational infrastructure of the appropriate type and scale for the economic commercial generation, storage, distribution, and other similar handling of energy, including equipment, feedstock, fuels, and other products of agricultural-energy facilities. . . . (Emphasis added).

The next relevant statute is HRS Section 269-91 [Definitions], which provides in part, as follows:

For the purposes of this [part]:

. . . .

'Renewable electrical energy' means:

(1) Electrical energy generated using renewable energy as the source, and beginning January 1, 2015, includes customer-sited, grid-connected renewable energy generation; and

(2) Electrical energy savings brought about by:

(A) The use of renewable displacement or off-set technologies, including solar water heating, sea-water air-conditioning district cooling systems, solar air-conditioning, and customer-sited, grid-connected renewable energy systems; provided that, beginning January 1, 2015, electrical energy savings shall not include customer-sited, grid-connected renewable-energy systems; or

(B) The use of energy efficiency technologies, including heat pump water heating, ice storage, ratepayer-funded energy efficiency programs, and use of rejected heat from co-generation and combined heat and power systems, excluding fossil-fueled qualifying facilities that sell electricity to electric utility companies and central station power projects.

'Renewable energy' means energy generated or produced using the following sources:

(1) Wind;
(2) The sun;
(3) Falling water;
(4) Biogas, including landfill and sewage-based digester gas;
(5) Geothermal;
(6) Ocean water, currents, and waves, including ocean thermal energy conversion;
(7) Biomass, including biomass crops, agricultural and animal residues and wastes, and municipal solid waste and other solid waste;
(8) Biofuels; and
(9) Hydrogen produced from renewable energy sources.

'Renewable portfolio standard' means the percentage of electrical energy sales that is represented by renewable electrical energy. (Emphasis added).

The language of the statute regarding limitations which OP and DOA seek to place on AEFs is misplaced. The plain language of the relevant portions of HRS Section 205-4.5 (17) only places limitations upon the generation of renewable energy from products of agricultural activities on "Agricultural-energy enterprise" ("AEE" hereinafter) and not AEFs. In essence, it is AEE's that must generate renewable energy from agricultural activities. The statute clearly segregates this restriction to AEEs. However, its plain language does not place this limitation on AEFs.

Moreover HRS Section 205-4.5 (17) specifically references HRS Section 269-91 for defining the types of renewable fuel sources that qualify for use on agricultural lands. Once again, the plain language of Section 205-4.5, and its unambiguous referencing of Section 269-91, clearly provides that the underlying AEF of SMB II, LLC, was foreseen and intended to be permitted on agricultural lands by the legislature.

The rules of statutory construction caution against betraying the clear legislative intent of a statute by strained and unnatural readings of the statute.

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Hawaii Government Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawai'i 197, 202, 239 P.3d 1, 6 (2010) quoting Awakuni v. Awana, 115 Hawai'i 126, 133, 165 P.3d 1027, 1034 (2007) (citation omitted in original).

Given the plain language of the statute and the clear delineation of the limitations places on AEEs, and not imposed on AEF's, it is clear that the Director reasonably interpreted the relevant statutes and applied the statutory requirements on the facts underlying this matter.

IV. CONCLUSION

Agriculture in Hawaii faces many challenges. The announcement of the closure of HCS by the end of the year represents truly the end of an era of plantation agriculture that has shaped much of the modern history of Hawaii. It also highlights the impact of global economic forces on the agricultural industry. In this environment, the industry needs to be creative, innovative and nimble. The Director submits that our regulations need to be both protective of the resource and flexible enough to accommodate new ideas where the end results are mutually beneficial.

Likewise, the Director's action herein comports with the legislature's intended for the statutes to be interpreted in that manner.

DATED: Honolulu, Hawaii, March 31, 2016.

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was served upon the following by means of hand delivery or mailing the same, postage prepaid, on March 31, 2016:

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DATED: Honolulu, Hawaii, March 24, 2016.

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