

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

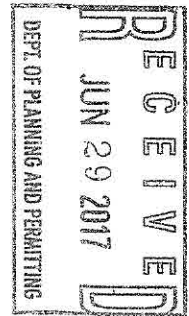
In the Matter of the Application of

FILE NO. 2014/SUP-6(RY)

KAWAIILOA SOLAR, LLC

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER TO
AMEND SP15-406

For an Amendment to a Special Use Permit to Allow Development of a 50-megawatt photovoltaic (PV) Energy Generation Facility and Accessory Uses and Structures on Lands Rated Class A, B and C by the Land Study Bureau, Ashley Road, Kawaiiloa Ahupua'a, Wailua District, Oahu, Hawai'i, Portions of Tax Map Key Nos.: (1) 6-1-005:001 and (1) 6-1-006:001, Part of Kamehameha School's Kawaiiloa Plantation



FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER TO AMEND SP15-406

In November 2014, Applicant Kawaiiloa Solar, LLC, ("Applicant") filed an Application for a State Special Use Permit ("Original Application") with the Department of Planning and Permitting, City and County of Honolulu ("DPP") proposing a 50 megawatt solar energy facility ("Project") on 382.2 acres of land. The Original Application was approved with amendments by the City and County of Honolulu Planning Commission ("Planning Commission") via Findings of Fact, Conclusions of Law, and Decision and Order dated May 8, 2015. Upon review of the Planning Commission record, the State of Hawaii Land Use Commission ("LUC") approved the

Original Application via Findings of Fact, Conclusions of Law, and Decision and Order Approving the Recommendation of the City and County of Honolulu Planning to Approve the State Special Use Permit Petition with Modifications dated June 29, 2015.

In February 2017, the Applicant requested to extend the deadline to establish the Project under Condition No. 6. The request was scheduled for hearing before the Planning Commission on March 29, 2017. On March 17, 2017, the DPP received a letter from the LUC stating that the Planning Commission could not extend the deadline to establish the Project without concurrence from the LUC.¹ By Letter dated April 11, 2017, the immediate parent company of Kawaihoa Solar, LLC, NRG Renew, LLC, notified the Planning Commission of its intent to file an application requesting modification of the State Special Use Permit (“SUP”) 15-406 under Planning Commission Rules § 2-49.

Applicant submitted its Application to Modify State Special Use Permit 15-406 on April 21, 2017 (“Modification Application”). On May 5, 2017, DPP accepted the Modification Application. On June 21, 2017, the Planning Commission held a public hearing on the Modification Application.

The Planning Commission, having examined the testimony, evidence and arguments of counsel presented during the hearings, along with the pleadings filed herein, hereby makes the following findings of fact, conclusion of law, and decision and order to support amendments to SUP 15-406.

¹ This letter dated March 17, 2017 also referred to Waipio PV, LLC, another entity owned by NRG, that was applying for a similar extension of time to establish the a solar energy facility in Waipio.

FINDINGS OF FACT

I. FACTS & PROCEDURAL MATTERS

1. By Findings of Fact, Conclusions of Law, and Decision and Order Approving the Recommendation of the City and County of Honolulu Planning to Approve the State Special Use Permit Petition with Modifications dated June 29, 2015, the Original Application was approved by the LUC, with Conditions. (“LUC’s D&O”).
2. SunEdison, the Applicant’s former parent company, was unable to finance construction of the Project and filed for bankruptcy in April 2016.
3. In October 2016, NRG Energy, Inc. purchased Kawaihoa Solar, LLC through the SunEdison bankruptcy proceeding.
4. On February 13, 2017, a request was filed with the Planning Commission to extend the deadline to establish the Project.
5. The request for a two-year extension was scheduled to be heard by the Planning Commission on March 29, 2017.
6. On March 17, 2017, the Planning Commission received a letter from the LUC stating that the Planning Commission could not extend the deadline to establish the Project unilaterally, but was required to process the request as a “modification” requiring the concurrence of the LUC, pursuant to Hawaii Administrative Rules (“HAR”) § 15-15-96.1.
7. Applicant’s immediate parent company, NRG Renew, LLC, submitted a letter dated April 11, 2017, notifying the Planning Commission that it intended to submit the Modification Application.

8. On April 21, 2017, Applicant submitted its Modification Application to amend SUP 15-406.
9. Applicant submitted additional materials on May 5, 2017 and May 10, 2017.
10. DPP accepted the Modification Application for processing as of May 5, 2017.
11. By letters dated May 12, 2017, with copies of the Modification Application enclosed, DPP solicited comments on the Modification Application from various City, State, and Federal agencies, as well as community organizations.
12. In May and June, 2017, DPP received comments on the Modification Application from the Office of Planning ("OP"), LUC, Department of Transportation ("DOT"), and Department of Agriculture ("DOA").
13. DPP also received public testimony in support of the Modification Application from Pacific Resource Partnership by letter dated June 21, 2017.
14. On May 22, 2017, notice of the public hearing on the Modification Application was published in the Honolulu Star-Advertiser.
15. On June 13, 2017, DPP filed its report and recommendation for approval of Applicant's Modification Application ("DPP Recommendation").
16. On June 19, 2017, Applicant filed its First List of Witnesses; First List of Exhibits "1" – "11".
17. On June 20, 2017, Applicant filed its First Supplemental List of Exhibits; Exhibit "12".
18. No petitions to intervene before the Planning Commission were filed.

19. On June 21, 2017, the Planning Commission held a hearing on the Modification Application. Entering appearances were Planner Raymond Young of DPP, Benjamin A. Kudo, Esq. and Sarah M. Simmons, Esq. for Applicant, as well as Wren Wescoatt and Jeff Overton, consultants for Applicant, and Aarty Joshi, Senior Environmental Manager for Applicant's parent company, NRG Energy.

20. No public witnesses came forward to testify at the hearing.

21. Raymond Young presented DPP's Recommendation, supporting Applicant's request to modify the LUC's D&O by (1) extending the deadline to complete construction, (2) changing the phrase "number of" to "area covered by" in Condition No. 8, and (3) updating the Project to describe the use of 6-foot high chain-link fencing instead of 4-foot high hog-wire fencing.

22. DPP did not support Applicant's proposed insertion of the word "approximately" in Condition No. 4 and instead proposed insertion of the phrase "no less than".

23. DPP's Recommendation also included an amendment to Condition No. 1, to address comments raised by the DOA.

24. Raymond Young noted on the record that the Applicant had complied with the proposed amendment to Condition No. 1 by submitting letters from the Applicant and Applicant's tenant confirming that sheep ranching operations are unaffected by the change to chain-link fencing.

25. Applicant presented oral testimony from Aarty Joshi, Senior Manager of Environmental Permitting, NRG Energy, and Wren Wescoatt, Director of Project Development, NRG Energy.

26. Ms. Joshi described NRG Energy's experience in solar energy projects and its commitment to increasing solar energy resources in the State of Hawaii.

27. Applicant presented its Modification Application, and summarized its previous submittals.

28. Applicant clarified that the gross capacity of the Project is 50 megawatts, and that there is no change to the permitted area of 382.2 acres.

29. Applicant clarified that Exhibit B, attached to the Modification Application is a preliminary configuration of the panels and that the figure of 299.809 acres is not a requested change in the permitted area of 382.2; instead, 299.809 acres is the fenced Project area, which is a smaller area within the permitted area of 382.2.

30. Applicant represented that this difference in area provides the Applicant with the ability to adjust the configuration of the PV panels within the permitted area of 382.2 acres, and provides sheep ranchers with additional space for ranching operations.

31. Applicant stated that once the engineering plans are finalized, site locations may be slightly adjusted due to topography, grade, and sunlight patterns.

32. Applicant confirmed that it will provide a metes and bounds description of the 382.2 permitted area as required by the LUC's D&O.

33. Applicant requested Condition No. 6 be amended so that the deadline to complete construction be set for December 31, 2019.

34. Applicant represented that this extension was needed due to SunEdison's bankruptcy and HECO's cancellation of the Power Purchase Agreement.

35. Applicant requested that the modification to Condition No. 8 be granted, changing the phrase “number of” to “area covered by” to more aptly reflect the intent of the Condition.

36. Applicant represented that this change is reasonable because SunEdison’s unforeseeable bankruptcy required the Applicant to use panels with different dimensions, which may result in a significant increase in the number of panels, but not in the area covered by the panels.

37. Applicant supported DPP’s proposed language to amend Condition No. 4 by adding “no less than”.

38. Applicant requested that the Project fencing be changed from four-foot high hog wire fencing to six-foot high chain-link fencing, to increase safety and restrict access to the medium-voltage equipment.

39. Applicant noted that it had submitted Exhibits “10” and “11” to comply with the proposed modification to Condition No. 1, and proposed that the amendment to Condition No. 1 suggested by DPP be removed.

40. Applicant had no objection to the comments received by the DOT, Highways Division.

41. Applicant represented that the modifications requested were not significant and would not increase the impacts created by the Project.

42. A motion was made, seconded and passed unanimously to approve the Modification Application, subject to the DPP Recommendations. However, the extension deadline in Condition No. 6 would be changed to December 31, 2019, rather than the recommended thirty (30) month extension from the date of the LUC’s approval.

II. AMENDMENTS TO STATE SPECIAL USE PERMIT 15-406 CONDITIONS

43. DOA proposed in its comments that the Applicant and the Applicant's agricultural tenant submit letters to confirm that a change to six feet high chain link fencing would not restrict or impede compatible agricultural uses.

44. DPP does not object to DOA's comments and recommends that Condition No. 1 be amended to reflect this additional requirement.

45. Condition No. 4 requires the Applicant to submit proof of financial security in the amount of \$4,000,000.00 to decommission the Project and restore the land to its same physical condition as existed prior to development of the Project.

46. Applicant proposed to make this \$4,000,000.00 security an approximate amount by inserting the word "approximately" in Condition No. 4.

47. DPP and OP objected to the proposed change to Condition No. 4 and instead suggested the phrase "no less than" to clarify the condition.

48. Applicant's proposal is not a reasonable change, as the insertion of the word "approximately" leaves the amount of security open to interpretation and could be reduced substantially, contrary to the intent of Hawaii Revised Statutes § 205-4.5(a)(21)(B).

49. The addition of "no less than" clarifies Condition No. 4 to ensure that a sufficient decommissioning security be secured for the Project.

50. Applicant supports DPP's proposal to add the phrase "no less than" to Condition No. 4.

51. Condition No. 6 requires Applicant to establish the Project within two years after the date the LUC approved the SUP, or June 29, 2017.

52. Applicant now seeks an extension to this deadline from June 29, 2017 to December 31, 2019.

53. This extension is reasonable in light of the previous parent company's bankruptcy and HECO's termination of the Power Purchase Agreement, both of which occurred in 2016.

54. Condition No. 6 also states that the SUP shall be valid for a period of thirty-five (35) years from the date of the LUC's D&O approving the SUP.

55. Applicant requests that this 35-year period begin when the Modification Application is approved by the LUC.

56. DPP supported this request as reasonable, but also noted that any future change to the 35-year validity period would be subject to review and approval by the Planning Commission and the LUC.

57. Condition No. 8 states that a major modification includes, but is not limited to, a significant increase in the number of panels.

58. Due to SunEdison's bankruptcy, panels of the same dimensions are no longer available for the Project and alternate panels with different dimensions will be used instead.

59. Applicant has not selected the final panel dimensions for the Project, but if a smaller panel is selected, the number of panels may significantly increase.

60. A significant increase in the number of panels does not necessarily correlate to a significant increase in the area covered by panels.

61. Applicant has represented that the area covered by panels will not significantly increase due to the improved efficiency of PV panels in the market since the Original Application was approved.

62. Deleting the phrase “number of” and replacing it with “area covered by” is a reasonable modification of Condition No. 8.

CONCLUSIONS OF LAW

1. The Planning Commission has jurisdiction to permit unusual and reasonable uses within the agricultural districts, and the Project is an unusual and reasonable use pursuant to HRS § 205-6. The proposed amendments to SP 15-406 have no effect on this analysis.

2. The proposed amendments to SP 15-406 are not contrary to the objectives sought to be accomplished by HRS Chapters 205 and 205A, or the rules of the Planning Commission.

3. The proposed amendments to SP 15-406 will not adversely affect the surrounding property or unreasonably burden public agencies.

4. The proposed amendments to SP 15-406 will not change or negatively affect the availability of portions of the Petition Area for compatible agriculture in accordance with HRS § 205-4.5(a)(21)(A).

5. The proposed amendments to SP 15-406 have no effect on the Planning Commission’s constitutional duties under Article XII, section 7, Article XI, section 7, Article XI, section 1, and Article XI, section 3 of the Hawaii State Constitution.

DECISION AND ORDER

Having duly considered the complete record of the Planning Commission's proceeding on the Modification Application, and good cause existing and upon motion duly passed by the Planning Commission at a public hearing conducted on June 21, 2017, in Honolulu, Hawaii, and the motion having passed unanimously, the Planning Commission hereby APPROVES the amendment of Condition Nos. 1, 4, 6, and 8 of the LUC's D&O dated June 29, 2017 as follows (additional text is underlined, deleted text is bracketed):

"1. Usable lands of the Petition Area, including areas under PV panels, shall be made available for compatible agricultural use at a lease rate that is at least 50 percent below the fair market rent for comparable properties, as long as the Project is in operation. Compatible agricultural operations shall be established, or Applicant shall be actively seeking to have such operations established, within 6 months of the start of commercial power generation. Extensions to this deadline may be granted by the Director of the DPP for unforeseen extenuating circumstances. Prior to the start of commercial power generation, the Applicant should affirm, through a separate study or other competent means, that the proposed change from hog wire fencing to chain-link fencing, will not restrict or impede compatible agricultural uses within the Petition Area available for compatible agricultural uses. Also, the Petitioner shall provide, in writing, a letter from Kualoa Ranch stating that the proposed amendments to the SUP will not have any adverse effect on its planned ranching operation within the Project Area."

"4. Prior to the closing of the building permit for the SEF, the Applicant shall submit to the DPP proof of financial security, such as a posted letter of credit or similar

mechanism from a creditworthy financial institution, in favor of the owner of the land subject to the SUP, in the amount of no less than four million dollars (\$4,000,000.00), which security shall remain in place for the duration of the operation of the Project, with evidence of same provided to the Director of DPP on an annual basis, to decommission the Project and restore the Petition Area to substantially the same physical condition as existed prior to the development of the SEF. . . .”

“6. The Applicant shall establish the Project no later than December 31, 2019. Future r[R]equests for extensions of this deadline shall be submitted to the Director of the DPP prior to the expiration of the deadline. The LUC may grant [an] extensions to the deadline to establish the Project due to unforeseen circumstances that were beyond the control of the Applicant. This SUP shall be valid for a period of thirty-five (35) years [from the date of the State LUC’s Decision and Order approving the SUP], subject to further extensions upon a timely request for extension filed with the Planning Commission at least one-hundred twenty (120) days prior to the SUP’s expiration.

The 35-year validity period of the SUP shall begin on the date the LUC approves the first amendment request.”

“8. Major modifications to: (1) the Project plans, including but not limited to significant increases in the area covered by [number of] PV panels; (2) amendments to the conditions of approval; (3) significant expansions of the approved area; or (4) change in uses stated herein, shall be subject to the review and approval of the Planning Commission and the LUC. Minor modifications including minor additions to accessory uses and structures, and new incidental uses and structures in the approved area are subject to review and approval by the Director of the DPP.”

Dated at Honolulu, Hawaii this _____ day of _____, 2017.

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

By: _____
Dean I. Hazama, Chair