

Authorization *Kathy K. Sokugawa*  
*Acting Director*  
Advertisement *May 22, 2017*  
Public Hearing *June 21, 2017*

DEPARTMENT OF PLANNING AND PERMITTING  
**CITY AND COUNTY OF HONOLULU**  
650 SOUTH KING STREET, 7<sup>TH</sup> FLOOR • HONOLULU, HAWAII 96813  
PHONE: (808) 768-8000 • FAX: (808) 768-6041  
DEPT. WEB SITE: [www.honolulu.gov](http://www.honolulu.gov) • CITY WEB SITE: [www.honolulu.gov](http://www.honolulu.gov)

KIRK CALDWELL  
MAYOR



KATHY K. SOKUGAWA  
ACTING DIRECTOR  
TIMOTHY F. T. HIU  
DEPUTY DIRECTOR

2014/SUP-6 (RY)  
1462754

June 13, 2017

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DEPT OF PLANNING  
and PERM  
CITY & COUNTY OF HONOLULU

**MEMORANDUM**

TO: Dean I. Hazama, Chair  
and Members of the Planning Commission

FROM: Kathy K. Sokugawa, Acting Director  
Department of Planning and Permitting *Kathy Sokugawa*

SUBJECT: Request to Amend a Special Use Permit (SUP) to Establish a  
Solar Energy Facility  
Kawailoa, North Shore, Oahu  
Tax Map Keys: 6-1-005: Portion of 001 and 6-1-006: Portion of 001

Transmitted for appropriate action is my report and recommendation for approval of the Petitioner's request to amend certain conditions of approval of the Land Use Commission's (LUC) Decision and Order dated June 29, 2015 (Order).

The Petitioner's requests are due to the recent acquisition of Kawailoa Solar LLC's solar energy facility (SEF) and associated entitlements from SunEdison, Inc., by the Petitioner's parent company, NRG Renew LLC in October 2016. The Petitioner desires additional time to restart and complete establishment of the SEF and proposes other amendments to the LUC's Order as a result of the design changes.

Enclosure

cc: Wren Wescoatt  
Jeff Overton, G70  
Craig Cornelius, Waipio PV LLC  
State Land Use Commission

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*Scanned file # 1473395*

DEPARTMENT OF PLANNING AND PERMITTING  
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

IN THE MATTER OF THE APPLICATION )  
 )  
 OF )  
 )  
 KAWAIOLOA SOLAR LLC )  
 )  
 FOR AN AMENDMENT TO A )  
 )  
 SPECIAL USE PERMIT )

FILE NO. 2014/SUP-6

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION  
FOR AN AMENDMENT TO A SPECIAL USE PERMIT

I. APPLICATION

A. Basic Information.

PETITIONER : Kawaioloa Solar LLC

LANDOWNER : Trustees of The Estate of Bernice Pauahi Bishop dba Kamehameha Schools

LOCATION : In the vicinity of Ashley Road, approximately 6,000 feet south of Waimea Beach Park and 4 miles northeast of Haleiwa Town, at Kawaioloa, North Shore, Oahu, Hawaii

TAX MAP KEYS : 6-1-005: Portion of 001 and 6-1-006: Portion of 001

AREA OF SPECIAL USE PERMIT : 382.8 Acres

STATE LAND USE DISTRICT : Agricultural

NORTH SHORE SUSTAINABLE COMMUNITIES PLAN LAND USE MAP : Agriculture

EXISTING ZONING : AG-1 Restricted Agricultural District

EXISTING USE : Wind Energy Generation System and Open Space

SURROUNDING LAND USE : Pasture, Crop Production, Open Space

- B. Proposal. Kawaihoa Solar LLC (Petitioner) proposes to modify Condition Nos. 6 and 8 of the Land Use Commission's (LUC) Decision and Order dated June 29, 2015 (see Attachment 1). The Petitioner also proposes design changes to vary the number of photovoltaic (PV) modules within the approved area<sup>1</sup>.

Condition No. 6 required the Petitioner to establish the solar energy facility (SEF) within two years after the date the LUC approved the Special Use Permit (SUP). The Petitioner requests that the two-year deadline to establish the SEF be extended by 30 months from the date this SUP amendment is approved by the LUC. Condition No. 6 also specified a termination date of the SUP, which is 35 years from the date the LUC approved the SUP. The Petitioner requests that the SUP termination date be 35 years from the date the LUC approves this first SUP amendment.

Condition No. 8 allows future major modifications to the SUP to be approved by the City and County of Honolulu's Planning Commission (PC) and, subsequently, the LUC. One type of modification which requires PC and LUC review is any increase in the number of PV panels proposed. The Petitioner proposes to modify this condition by replacing "number of" to "area covered by" PV panels. The proposed modification removes any reference to the number of panels from Condition No. 8 and adds "area covered by" PV panels as an example of a major modification.

In addition, the Petitioner proposes to amend Condition No. 4 such that the amount of the required financial security to decommission the facility be an approximate amount.

Other Project design changes include a 6-foot high chain-link perimeter fencing in place of a 4-foot high hog wire fencing and an increase in projected power production from 50 megawatts to 51 megawatts, both of which do not require amendments to the LUC conditions of approval, but are being disclosed to update the Project description.

- C. Background. On June 29, 2015, the LUC granted the request of Kawaihoa Solar LLC's SUP application to establish a 50-megawatt SEF (Project) on approximately 382.2 acres of land in the North Shore of Oahu (Property). The SUP approval was subject to 14 conditions of approval. Condition Nos. 6 and 8 were imposed pursuant to the City and County of Honolulu Administrative Rules, Planning Department, Part 1, Rules of the Planning Commission No. 2-46(e) and LUC Administrative Rule No. 15-15-95(f), which establishes that the PC may attach such conditions to any SUP as it considers necessary to protect the public health, safety, and welfare.

Construction of the SEF was scheduled to begin in 2015 with completion projected for 2016. In February, 2015, construction was halted when Hawaiian Electric Company (HECO) terminated its Power Purchase Agreement (PPA) with SunEdison, Inc. In March 2016, the Petitioner's parent company, SunEdison, filed for bankruptcy. NRG Renew LLC purchased Kawaihoa Solar LLC and two other subsidiary companies that were developing SEFs on Oahu through a court-approved acquisition in October 2016.

The Petitioner has resumed work on development of the Project. A new PPA is to be negotiated with HECO and the Petitioner's revised schedule proposes construction to

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<sup>1</sup> Condition No. 14 of the LUC's Decision and Order requires that the Petitioner develop the Property in substantial compliance with representations made before the PC and the LUC. Failure to do so may result in the revocation of the SUP. Petitioner proposes to use a different PV module from those previously proposed which may result in an increase in PV panels; this information is intended to update the record. An amendment to any of the conditions of approval is not required for the proposed PV module change.

resume in 2018 and completion by 2019. Therefore, the Petitioner is requesting the 30-month extension to the deadline to establish the Project.

- D. Procedural Matters. On March 17, 2017, the Department of Planning and Permitting (DPP) received a letter dated March 14, 2017 (Attachment 2) from the LUC stating that essentially, the PC, with the concurrence of the LUC, may extend the time limit to establish the Project. On April 21, 2017, pursuant to the LUC's letter, the Petitioner filed a request to amend the SUP to extend the deadline to establish the Project and other amendments described above. On May 5, 2017, the DPP accepted the Petitioner's first SUP amendment application for processing.

## II. FINDINGS OF FACT

On the basis of the evidence provided, the Director finds:

- A. Site Location and Characteristics. The Property is located on former sugar cane plantation lands and consists of tablelands. Topography of the Property and surrounding lands ranges from relatively flat or moderate slopes in the former sugar cane fields to steep slopes in the gulches. Elevation of the Property ranges from 200 feet on the western end to 800 feet above mean sea level on the eastern end. Currently, the majority of the Property is vacant open grasslands interspersed with shrubs and trees. With the exception of the wind energy facilities, there are no other developments in the area. Surrounding lands to the east, west, north, and south are owned by Bernice Pauahi Bishop Trust Estate (Bishop Estate) and are either fallow or in diversified agriculture. Beyond these lands to the north is Waimea Valley, managed by Hiipaka LLC, and to the east, the land is used for military training.

Access to the site is via Ashley Road, a private roadway, which is maintained for the existing wind farm and connects to Kamehameha Highway.

- B. Public Agency Comments. The following public agencies were requested to evaluate the impact of the proposed amendment:

CITY AND COUNTY OF HONOLULU  
Honolulu Fire Department

STATE  
Department of Agriculture  
Department of Business, Economic Development and Tourism, LUC  
Department of Business, Economic Development and Tourism, Office of Planning  
Department of Transportation

FEDERAL  
Department of the Army

The following government agencies provided substantive comments on the SUP application. A summary of their comments are as follows:

Table 1 – Summary of Agency Comments

Source	Comments Summary
State Office of Planning (OP)	The OP concurs with the DPP that the proposed modification to Condition 4 to include the word “ <u>approximately</u> , four million dollars” be revised to say, “no less than four million dollars.” The OP is in support or has no objections to the proposed SUP modifications to Condition No. 6 (the change in ownership from SunEdison to NRG and extending the time limit by 30 months or about December 2019) as well as Condition No. 8 (increasing the number of panels to the area covered by the panels). The OP concurs that the proposed increase in the area to be covered by the panels is relatively minor since the proposed net capacity of the Project will not be increased.
State Department of Agriculture (DOA)	The Petitioner should affirm that the proposed change from hog wire fencing to chain-link fencing will not restrict or impede compatible agricultural uses within the Petition Area in any way or reduce the acreage within the Petition Area available for compatible agricultural uses. Also, the Petitioner should provide 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.

Other government agencies contacted did not object to the Project or did not provide comments.

All comments are included in Attachment 3. Written comments received by the DPP after the writing of this report will be forwarded to the PC via a separate transmittal.

- C. Community Concerns. Copies of the amendment request were transmitted to the North Shore Neighborhood Board (NB) No. 35.

To date, no comment from the NB has been received. Written comments received by the DPP after the writing of this report will be forwarded to the PC via a separate transmittal.

### III. ANALYSIS

- A. City and County of Honolulu Administrative Rules of the PC. Section 1-2, Subchapter 1, provides that the PC is charged with review and decision making for all SUPs within the City and County of Honolulu. Section 2-46, Subchapter 1, provides that the PC may attach conditions to any SUP to protect public health, safety, and welfare. Section 2-49, Subchapter 4, provides that a Petitioner who desires a modification or deletion of a condition imposed by the PC shall make such a request to the PC in writing. The request shall be processed in the same manner as the original application for a SUP.

- B. Analysis of Extending the Deadline to Establish the Project and its Validity Period – Condition No. 6. The PC Rule No. 2-46(e) requires that a reasonable time limit to establish the proposed use be a condition of the SUP. The PC recommended and the LUC approved Condition No. 6, which requires the Project be established two years from the date of the LUC’s Decision and Order approving the SUP. The deadline is June 29, 2017. As indicated by the Petitioner, the Project stopped construction due to bankruptcy of its parent company, SunEdison, Inc. Subsequently, NRG Renew LLC acquired the Project and is working with HECO to reinstate the PPA. In order to finance, construct, and connect the Project to the HECO electrical grid, the Petitioner requires additional time to establish the Project and is requesting the deadline be extended for 30 months from the date the LUC approves of the extension request. When the Petitioner acquired the Project from the prior developer, he had no control over the prior developer’s bankruptcy or schedule in establishing the Project; therefore, the DPP supports granting the Petitioner’s request for a reasonable amount of additional time to complete the Project. The Petitioner did not provide a detailed estimate of the timeframe necessary to complete the establishment of the Project. Nevertheless, an extension of 30 months is not an unreasonable amount of time to allow the current developer to finance, construct, and connect the completed Project to HECO’s existing electrical grid.

The DPP also supports the request to base the 35-year validity period to begin on the date this amendment is granted by the LUC. This amendment applies to this instance only. Any future change to the 35-year validity period would be subject to review and approval by the PC and the LUC.

- C. Analysis of Replacing the Limits on the Number of PV Panels with Area Covered by PV Panels – Condition No. 8. Condition No. 8 states, in part, that major modifications to the Project plans, including but not limited to significant increase in the number of PV panels, be subject to review and approval of the PC and the LUC. The Petitioner proposes design changes to the Project, which may result in significant changes in the number of PV panels installed due to a change in the panel manufacturer selected and varying panel dimensions involved. The Petitioner anticipates utilizing PV panels that are smaller in size than originally contemplated, which would result in a large increase in the number of PV panels, but still covers the same amount of acreage as proposed by the previous developer. As the proposed amendment does not alter the amount of land approved under the SUP, the DPP has no objections to this amendment.
- D. Analysis of Approximating the Amount of the Financial Security – Condition No. 4. The remaining amendment request affects Condition No. 4 where the Petitioner proposes the amount of four million dollars (\$4,000,000.00) financial security to be an approximate amount. The DPP prefers that this be the minimum amount required to demonstrate financial security to decommission the Project, especially as this requirement will be applicable for as long as 35 years. The use of the word “approximate”, in this instance, is difficult to administer as it leaves the amount of the security open to interpretation and could be reduced substantially, contrary to the intent of Section 205-4.5(a)(21)(B).
- E. Analysis of the State OP Comments. As noted in Paragraph D above, the DPP has previously recommended and thus supports the OP’s recommendation that the proposed modification to Condition No. 3 to include the word “approximately, four million dollars” be revised to say, “no less than four million dollars.” The DPP accepts OP’s concurrence of the other proposed SUP modifications to Conditions Nos. 6 and 8: 1) The change in ownership and property owner from SunEdison to NRG; 2) Extending the

time limit by 30 months or December 2019; 3) Increasing the number of panels to the area covered by the panels, and 4) the additional area covered by the panels is relatively minor, so no further changes to these conditions are needed.

- F. Analysis of the State DOA Comments. The DPP has no objections to the recommendation by the DOA that the Petitioner should affirm that the proposed change from hog wire fencing to chain-link fencing, will not restrict or impede compatible agricultural uses within the Petition Area in any way or reduce the acreage within the Petition Area available for compatible agricultural uses. Also, the Petitioner should provide 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. The DPP recommends adding this as an amendment to Condition No.1.
- G. Five Tests in Determining an "Unusual and Reasonable Use". The request for revisions to the conditions of the Decision and Order does not affect the analysis and justifications for granting of the Project pursuant to Section 2-45 "Test to be applied", in the Rules of the PC.
- F. City and County of Honolulu Plans and Programs. The request to modify the affected conditions does not affect the Project's compliance with established City plans and programs.
- G. Public Services and Facilities. There were no objections from public agencies who were provided an opportunity to comment. The proposed amendments do not adversely affect any of the services or facilities provided by public infrastructure agencies or any other regulatory agencies.

#### IV. CONCLUSION

The proposed amendment to Condition No. 6 to allow an extension of time to establish the Project is necessary as the bankruptcy of SunEdison was unforeseen and, thus, beyond the control of the Petitioner. It will not, in any way, affect the intent of Chapter 205, Hawaii Revised Statutes (HRS), to protect surrounding agricultural lands for appropriate uses for the public welfare. In addition, the proposed amendment start date of the SUP's 35-year validity period is reasonable, provided that future amendments that affect deadlines continue to be reviewed by the PC and the LUC.

The proposed amendment to Condition No. 8 to replace the limitation on the number of panels with the area covered by panels (due to design changes) is reasonable and not contrary to the justifications supporting the granting of the SUP.

Amending Condition No. 4, as proposed by the Petitioner, would be contrary to the intent of Section 205-4.5(a)(21)(B), HRS, related to providing proof of financial security to decommission the facility, and is not supported by the DPP.

Amending Condition No. 1, as proposed by the State DOA, is reasonable and in keeping with the justification for supporting the granting of the SUP and in keeping the intent and purpose of the Agricultural District.