

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

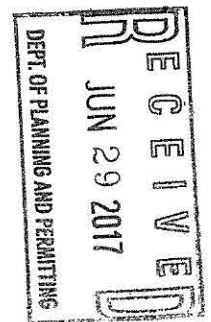
In the Matter of the Application of

FILE NO. 2014/SUP-3(RY)

WAIPIO PV, LLC

For an Amendment to a Special Use Permit to Allow Development of a 47-megawatt photovoltaic (PV) Energy Generation Facility and Accessory Uses and Structures on Lands Rated Class B by the Land Study Bureau, Waipio, Ewa, Oahu, Hawai'i Tax Map Key No.: (1) 9-5-003:017

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER TO AMEND SP15-405



FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER TO AMEND SP15-405

In September 2014, Applicant Waiawa PV, LLC, now known as Waipio PV, 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 47 megawatt solar energy facility ("Project") on 308.8 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 January 21, 2015. Upon review of the Planning Commission record, the State of Hawaii Land Use Commission ("LUC") approved the Original Application via Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated March 25, 2015.

In December 2016, the Applicant requested to extend the deadline to establish the Project. On February 15, 2017, the Planning Commission approved a two-year extension of the deadline to June 30, 2019. 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. By Letter dated April 11, 2017, the immediate parent company of Waipio PV, LLC, NRG Renew, LLC, requested that the two-year extension approval by the Planning Commission be withdrawn and an application requesting modification of the State Special Use Permit ("SUP") 15-405 be submitted in its stead.

Applicant submitted its Application to Modify State Special Use Permit 15-405 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 15-405.

FINDINGS OF FACT

I. FACTS & PROCEDURAL MATTERS

1. By Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, SUP 15-405 was approved by the LUC, with Conditions, on March 25, 2015 ("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 Waipio PV, LLC through the SunEdison bankruptcy proceeding.

4. On December 28, 2016, Applicant, now owned by parent company NRG Energy, requested that the Planning Commission extend the deadline to establish the Project.

5. On February 15, 2017, the Planning Commission approved a two-year extension of the deadline to complete construction of the Project no later than June 30, 2019.

6. By letter dated March 15, 2017, the Planning Commission informed the LUC of its approval of the two-year extension.

7. 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.

8. Applicant submitted a letter dated April 11, 2017, requesting that the Planning Commission withdraw its previous approval so that the Modification Application could be submitted in its stead.

9. On April 21, 2017, Applicant submitted its Modification Application to amend SUP 15-405.

10. Applicant submitted additional materials on May 5, 2017 and May 10, 2017.
11. DPP accepted the Modification Application for processing as of May 5, 2017.
12. 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.
13. 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").
14. DPP also received public testimony in support of the Modification Application from Pacific Resource Partnership by letter dated June 21, 2017.
15. On May 22, 2017, notice of the public hearing on the Modification Application was published in the Honolulu Star-Advertiser.
16. On June 13, 2017, DPP filed its report and recommendation for approval of Applicant's Modification Application ("DPP Recommendation").
17. On June 19, 2017, Applicant filed its First List of Witnesses; First List of Exhibits "1" – "11".
18. On June 20, 2017, Applicant filed its First Supplemental List of Exhibits; Exhibit "12".
19. No petitions to intervene before the Planning Commission were filed.
20. 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.

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

22. 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. 7, (3) clarifying references to the Planning Commission and LUC throughout the LUC's D&O, (4) updating the Project to allow solar panels to be placed on single-axis tracking racks instead of fixed racks, and (5) updating the Project to allow the use of 6-foot high chain-link fencing instead of 4-foot high hog-wire fencing.

23. DPP did not support Applicant's proposed insertion of the word "approximately" in Condition No. 3 and instead proposed insertion of the phrase "no less than".

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

25. 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 single-axis tracking racks and by the change to chain-link fencing.

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

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

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

29. Applicant clarified that the gross capacity of the Project is 47 megawatts, and that there is no change to the permitted area of 308.8 acres.

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

31. Applicant requested Condition No. 5 be amended so that the deadline to complete construction be set for December 31, 2019.

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

33. Applicant requested that the modification to Condition No. 7 be granted, changing the phrase "number of" to "area covered by" to more aptly reflect the intent of the Condition.

34. 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.

35. Applicant also requested to change the configuration of the Project to include single-axis tracking racks in order to gain additional sunlight time to make the Project more efficient.

36. To support this change, Applicant submitted an updated reflectivity study that confirmed no additional glare would result from the single-axis tracking racks.

37. Upon questioning by the Planning Commission, Applicant confirmed that an updated noise study to account for the tracking racks was not conducted.

38. Applicant represented that any increase in noise would be insignificant, as the loudest equipment is the HECO substation located in the eastern part of the property and the nearest proposed subdivision, Koa Ridge, is across the H-2 Freeway and well out of range to hear noise from the Project.

39. Applicant supported DPP's proposed language to amend Condition No. 3 by adding "no less than".

40. 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.

41. 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.

42. Applicant had no objection to DPP's recommendation deleting Condition No. 11.

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

44. Applicant noted that it had received unofficial comments from the DOT, Airports Division, concerning the potential for glint or glare impacts and radio frequency interference.

45. Applicant stated that the updated reflectivity report, attached as an exhibit to the Modification Application, and Condition No. 10 adequately addressed DOT, Airports Division's concerns regarding glint or glare.

46. Applicant also represented that DOT, Airports Division's concerns regarding radio frequency interference was an issue with older PV panels, but that updated technology of the PV panels and the EMF filters in the inverters removes the interference.

47. 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. 5 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 15-405 CONDITIONS

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

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

50. Condition No. 3 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.

51. Applicant proposed to make this \$4,000,000.00 security an approximate amount by inserting the word "approximately" in Condition No. 3.

52. DPP and OP objected to the proposed change to Condition No. 3 and instead suggested the phrase “no less than” to clarify the condition.

53. 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).

54. The addition of “no less than” clarifies Condition No. 3 to ensure that a sufficient decommissioning security be secured for the Project.

55. Condition No. 5 requires Applicant to establish the Project within two years after the date the LUC approved the SUP, or March 25, 2017.

56. Applicant now seeks an extension to this deadline from March 25, 2017 to December 31, 2019.

57. 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.

58. Condition No. 5 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.

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

60. 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.

61. Condition No. 7 states that a major modification includes, but is not limited to, a significant increase in the number of panels.

62. 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.

63. 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.

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

65. Applicant 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.

66. Deleting the phrase "number of" and replacing it with "area covered by" is a reasonable modification of Condition No. 7.

67. In the OP comments, OP noted that Condition No. 11 had been met because the State Historic Preservation Division accepted the draft archeological assessment in a letter dated January 16, 2015 and submitted to the Planning Commission an Annual Report dated February 9, 2016.

68. DPP supports OP's recommendation to delete Condition No. 11.

69. Deleting Condition No. 11 is reasonable as the condition has already been met by the Applicant.

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 15-405 have no effect on this analysis.

2. The proposed amendments to SP 15-405 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 15-405 will not adversely affect the surrounding property or unreasonably burden public agencies.

4. The proposed amendments to SP 15-405 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 15-405 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 (1) Applicant's request to withdraw the February 15, 2017, approval of a two-year extension of the Project completion deadline to June 30,

2019 and (2) the amendment of Condition Nos. 1, 3, 5, and 7, and the deletion of Condition No. 11, of the LUC's D&O dated March 25, 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 one year 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 fixed-tilt racks to single-axis tracking racks, and 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 Tin Roof Ranch stating that the proposed amendments to the SUP will not have any adverse effect on its planned ranching operation within the Project Area.”

“3. Within one year of the completion of construction or prior to the closing of the building permit for the solar energy facility, 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. . . .”

“5. The Applicant shall establish the Project no later than December 31, 2019. Requests for future extensions of this deadline shall be submitted to the Director of the DPP prior to the expiration of the deadline. The LUC [Commission] 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.”

“7. 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.”

“11. [Petitioner shall obtain approval of the draft archaeological assessment, dated August 2014, from the State Historic Preservation Division (SHPD) prior to commencement of construction of the solar farm.]”

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

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

By: _____
Dean I. Hazama, Chair