

LAND USE COMMISSION
STATE OF HAWAII

2017 NOV 22 A 7:54

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	Docket No. SP17-408
)	
AES LAWA'I SOLAR, LLC)	ORDER ADOPTING THE COUNTY OF
)	KAUAI PLANNING COMMISSION'S
For a Special Use Permit to Establish)	RECOMMENDATION, FINDINGS OF
a Solar Energy Facility on)	FACT, CONCLUSIONS OF LAW, AND
approximately 196.33 acres of Land)	DECISION AND ORDER TO APPROVE
within the State Land Use Agricultural)	THE STATE SPECIAL USE PERMIT,
District at Kōloa and Lāwa'i,)	WITH MODIFICATIONS ; AND
Kaua'i, Hawai'i , Tax Map Key)	CERTIFICATE OF SERVICE
(4) 2-6-003:001 (portion).)	
)	

ORDER ADOPTING THE COUNTY OF KAUAI PLANNING COMMISSION'S
RECOMMENDATION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
AND ORDER TO APPROVE THE STATE SPECIAL USE PERMIT, WITH
MODIFICATIONS

AND

CERTIFICATE OF SERVICE

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawai'i.

11/22/17 by _____

Daniel E. Orodener, Executive Officer



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ORDER ADOPTING THE COUNTY OF KAUA'I PLANNING COMMISSION'S
RECOMMENDATION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
AND ORDER TO APPROVE THE STATE SPECIAL USE PERMIT, WITH
MODIFICATIONS

On August 17, 2017, AES Lāwa'i Solar, LLC ("Applicant") filed an application for a State Special Permit with the County of Kaua'i Planning Commission ("Planning Commission") for an approximately 28 Megawatt utility-scale solar energy facility that will also incorporate a battery storage system on approximately 196.33 acres of a 1,062.291 acre parcel of land in the State Agricultural District, identified as Tax Map Key No. (4) 2-6-003:001 (portion), in Kōloa and Lāwa'i, Island of Kaua'i, Hawai'i, pursuant to section 205-6, Hawai'i Revised Statutes ("HRS"), and section 15-15-95 *et seq.*, Hawai'i Administrative Rules ("HAR").

On September 12, 2017, the Director of the County of Kaua'i Planning Department ("Kaua'i PD") submitted a report to the Planning Commission on the subject Application.

On September 19, 2017, a Supplement #1 to the Planning Director's Report was submitted to the Planning Commission.

On September 26, 2017, a Supplement #2 to the Planning Director's Report was submitted to the Planning Commission.

On September 26, 2017, the Planning Commission met to consider the Application. The Planning Commission approved the Application subject to 24 conditions of approval.

On October 12, 2017, the Land Use Commission ("LUC") received from the Planning Commission an original, one paper copy, and one digital copy of the application documents consisting of Exhibits 1-38, the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated September 26, 2017, and a copy of the transcripts from the Planning Commission's September 26, 2017 hearing. LUC staff determined the filing was complete as of this date.¹

On October 31, 2017, the LUC mailed the agenda and meeting notice to the Applicant, State Office of Planning ("OP"), the Planning Commission, the Kaua'i PD, and the Statewide and Kaua'i Island mailing lists for the scheduled November 8-9, 2017 LUC hearings.

On November 2, 2017, the LUC received OP's comment letter, which included a copy of OP's comment letter to the Kaua'i PD dated September 19, 2017.

¹ The 45-day decision making time period began as of the date the application was a complete filing. Complete as of October 12, 2017 required a final decision be rendered by November 25, 2017.

On November 8, 2017, the LUC met in Līhu‘e, Kaua‘i, Hawai‘i, to consider the Application.² Curtis Tabata, Esq. and Benjamin Matsubara, Esq. appeared on behalf of the Applicant; Deputy Planning Director Ka‘āina Hull, Planner Dale Cua, and Jodi Higuchi, Esq., Deputy Corporation Counsel, appeared on behalf of the Kaua‘i PD; and Rodney Funakoshi and Deputy Attorney General Dawn Apuna, Esq., appeared on behalf of the OP. There was no public testimony. At the meeting the Applicant provided a description of the Project relative to SP guidelines under Section 15-15-95(c), HAR. After the presentation by the Applicant, the LUC asked clarifying questions about the operation of the Project and its impacts. The Kaua‘i PD provided a brief overview of its decision recommending approval of the Application and the conditions it requested the Planning Commission to impose. OP summarized its position in support of the Application as well as its written comments on the Planning Commission’s recommendation and Decision and Order, and OP’s proposed modifications to conditions contained in the Planning Commission's recommendation and Decision and Order.

Following discussion, a motion was made and seconded to approve the Special Permit and adopt the Planning Commission's recommendation, findings of fact, conclusions of law, and decision and order to approve the State Special Permit, with modifications as proposed by OP and the LUC. By a vote tally of 7 ayes, 0 nays, and 2 excused, the motion carried.

On November 13, 2017, the LUC mailed out the agenda and notice of hearing for the November 21, 2017, LUC meeting in Honolulu, O‘ahu, to Petitioner, OP, the Kaua‘i PD, and the Statewide and Kaua‘i mailing lists.

² At the proceeding, Commissioner Scheuer disclosed that he served as a consultant on water issues to the State of Hawai‘i, Department of Hawaiian Home Lands. There were no objections to Commissioner Scheuer’s participation in the proceeding.

On November 21, 2017, the LUC conducted a meeting to adopt the form of the Order on this docket in Honolulu, O‘ahu. The LUC provided an opportunity for public testimony.

The LUC, having duly considered the complete record in this matter and the oral arguments presented by the Applicant in this proceeding, together with public testimony, and a motion having been duly made and seconded at a meeting conducted on November 8, 2017, in Līhu‘e, Hawai‘i, to approve the recommendation of the Planning Commission, and the motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion, the LUC hereby ADOPTS the recommendation and findings of fact, conclusions of law, and decision and order of the Planning Commission approving a State Special Permit, with modifications as proposed by OP³ and the LUC⁴, and as agreed to by the Applicant, for the Project within the Petition Area consisting of approximately 196.33 acres of land in the State Land Use Agricultural District identified by Kaua‘i Tax Map Key No. (4) 2-6-003:001 (portion) in Kōloa and Lāwa‘i, Kaua‘i, Hawai‘i, and approximately shown on Exhibit “A” attached hereto and incorporated by reference herein, subject to the following conditions:

1. The solar utility facility shall be constructed and operated as represented. Any changes to the facility and/or operation shall be reviewed by the Kaua‘i PD to determine whether Planning Commission review and approval is required.

³ OP proposed omitting County Conditions 22 and 23 which were redundant as they were adequately covered under County Condition 6.

⁴ The LUC approved the deletion of County Conditions 22 and 23; amendment to County Condition 7 to require LUC approval of any time extensions to the SP; amendment to County Condition 18 to clarify that any relief would be granted by the County Planning Commission; amendment to County Condition 14 to require Applicant’s submittal of a SHPD-approved Archaeological Monitoring Plan before work begins on the Project; and any necessary changes for renumbering, grammar, spelling, Hawaiian diacriticals, and clarity.

2. 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 by the Applicant and its successors and/or assigns within six (6) months of the start of commercial power generation. Extensions to this deadline may be granted by the Director of the Kaua'i PD for unforeseen extenuating circumstances. Additional consideration may be given if the Applicant is actively seeking to have such operations established.
3. If at any time during the term of the Special Permit no compatible agricultural operations exist on the usable lands of the Petition Area for six (6) months, the Applicant shall notify the Director of the Kaua'i PD in writing within 30 days of the end of the 6-month period. If requested by the Director of the Kaua'i PD, the Applicant shall attend a meeting of the Planning Commission and submit a report to the Planning Commission detailing the Applicant's actual and reasonable efforts to establish compatible agricultural operations on the usable lands of the Petition Area. The Planning Commission may determine whether probable cause exists to re-evaluate the SP and to hold a hearing pursuant to the Rules of the Planning Commission. Extensions to the 6-month deadline may be granted by the Director of the Kaua'i PD for unforeseen extenuating circumstances.
4. The Applicant shall submit for review and obtain the approval of the following from the Director of the Kaua'i PD, prior to the issuance of a grading or building permit:
 - a. Applicant shall minimize or avoid clearing and grading activities from June 1 through September 15.

- b. A survey map accompanied by a metes and bounds description of the approved Petition Area.
 - c. A site plan showing the area required under Condition 1, above, relating to the minimum land area to be made available for compatible agricultural use.
5. Prior to the closing of the building permit for the facility, the Applicant shall submit to the Kaua'i PD proof of financial security, such as a letter of credit or similar assurance, from a creditworthy financial institution satisfactory to Kaua'i PD. The security will remain in place for the duration of the operation of the Project, with evidence of same provided to the Director of the Kaua'i PD on an annual basis, in an amount approved by the Kaua'i PD as sufficient to decommission the Project and restore the Petition Area to substantially the same physical condition as existed prior to the development of the facility.

The Applicant shall decommission the facility, including removal of all equipment related to the facility, within twelve (12) months following the termination of operations of the facility. A change in project ownership or a change in ownership of the land subject to the SP, which warrants a new proof of financial security to decommission the Project, shall be submitted to the Kaua'i PD for processing through the Planning Commission, within three (3) months of the ownership change.

The Applicant shall incorporate this condition in the license and/or lease agreement with the landowner, and said license and/or lease agreement shall be reviewed for approval by the Kaua'i PD.

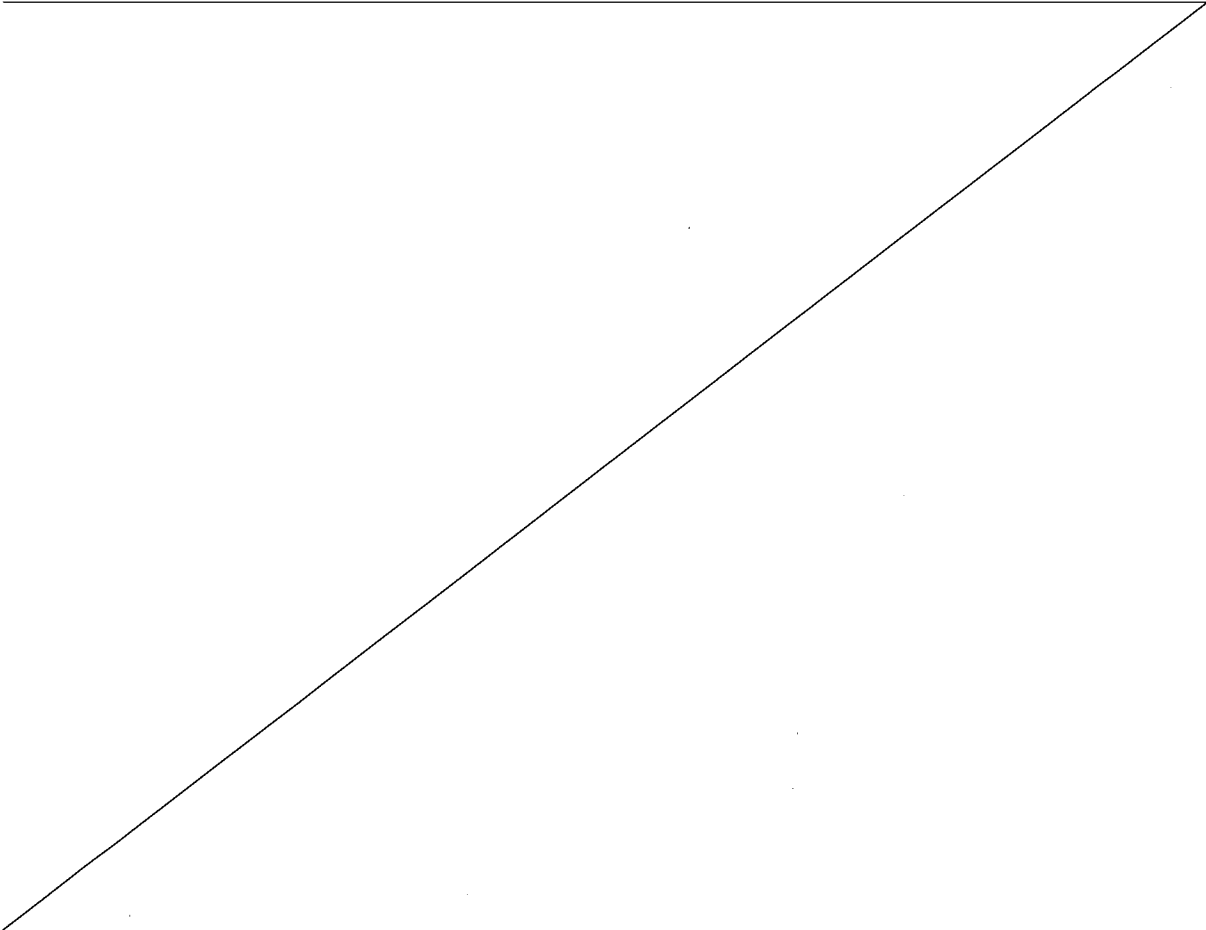
6. The Applicant shall mitigate impacts to fauna on site as follows:
 - a. Applicant shall develop an endangered species awareness training module, which shall include all potential endangered species that may frequent the Petition Area.
 - b. All construction workers and solar facility employees shall undergo endangered species awareness training prior to starting work.
 - c. In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upwards or spotlighting of structures, landscaping or the ocean shall be prohibited.
 - d. Barbed wire shall not be used on the top of any fencing.
 - e. Applicant shall monitor avian injuries occurring at the Petition Area, and report occurrences to the United States Fish and Wildlife Service.
7. The Applicant shall establish the Project within two (2) years of the date of the LUC's Decision and Order approving the SP. Requests for extension of this deadline shall be submitted to the Director of the Kaua'i PD prior to the expiration of the deadline. The LUC may grant an extension to the deadline to establish the Solar Project due to unforeseen circumstances that were beyond the control of the Applicant. This SP shall be valid for a period of thirty-five (35) years from the start of commercial operations, 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 SP's expiration. Approval of time extensions shall be required from the LUC.

8. On or before December 31 of each year that the SP is in effect, the Applicant or its successor shall file an annual report to the LUC, OP, and the Kaua‘i PD that demonstrates the Applicant’s compliance with conditions of the SP.
9. Major modifications to: (1) the Project plans, including but not limited to significant increases in the number of PV panels; (2) amendments to the conditions of approval; (3) significant expansions of the Petition Area; or (4) change in uses of the Petition Area 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 Petition Area are subject to review and approval by the Director of the Kaua‘i PD.
10. The Applicant and/or landowner shall notify the Director of Kaua‘i PD of:
 - a. Any change or transfer of licensee on the Petition Area.
 - b. Any change in uses on the Petition Area.
 - c. Termination of any uses on the Petition Area; and/or
 - d. Transfer in ownership of the Petition Area.
11. Enforcement of the conditions of the SP shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause as to the reason the SP should not be revoked if the Planning Commission has reason to believe that there has been a failure to perform the conditions herein.
12. If the photovoltaic array creates a hazardous condition for pilots or motorists, the facility operator shall immediately mitigate the hazard upon notification by the State Department of Transportation, Airports Division, or the Federal Aviation Administration.

13. If required to mitigate visual impacts, new landscaping shall be installed and maintained around the solar Project to screen it when viewed from Aka Road or Kōloa Road. The Kaua‘i PD shall determine whether additional landscape screening is necessary and the degree to which it is provided.
14. In the event that historic resources, including human skeletal remains, structural remains, cultural deposits, artifacts, sand deposits, or sink holes, are identified during demolition and/or construction activities, all work shall cease in the immediate vicinity of the find, the find shall be protected from additional disturbance, and the State Historic Preservation Division (“SHPD”) and Kaua‘i Island Burial Council, as applicable, shall be contacted immediately. Without any limitation to any other condition found herein, if any burials or archaeological or historic sites are discovered during the course of construction of the facility, all construction activity in the vicinity of the discovery shall stop until the issuance of an archaeological clearance from the SHPD that mitigation measures have been implemented to its satisfaction. An Archaeological Monitoring Plan (“AMP”) that satisfies the requirements of section 13-279-4, HAR, shall be prepared to guide monitoring and be reviewed and accepted by SHPD before work begins.
15. The Applicant shall comply with the requirements of the State Department of Health, the County’s Fire Department, the County's Department of Water, and the County's Department of Public Works, as well as any other applicable government agencies.
16. The Applicant shall develop and utilize Best Management Practices (“BMP’s”) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the Project to abutting properties.

17. The Applicant shall develop and operate the facility, including the implementation of measures to mitigate potential impacts of the Project, in substantial compliance with the representations made to the Planning Commission and the LUC as reflected in the Planning Commission's Decision and Order and this Decision and Order. Such mitigation measures include, but are not limited to, the use of temporary and permanent BMPs to ensure that the development and operation of the Project does not result in an increase in stormwater runoff that adversely impacts downstream properties. Failure to so develop the Petition Area may result in revocation of the SP.
18. To the extent possible within the confines of union requirements and applicable prohibitions against discrimination in employment, the Applicant shall seek to hire Kaua'i contractors, and shall seek to employ residents of Kaua'i in temporary construction and permanent jobs. It is recognized that the Applicant may have to employ non-Kaua'i residents for particular skilled jobs where no qualified Kaua'i resident possesses such skills. For the purpose of this condition, the Planning Commission shall relieve the Applicant of this requirement if the Applicant is subjected to anti-competitive restraints on trade or other monopolistic practice.
19. The Applicant shall implement to the extent possible sustainable building techniques and operational methods for the Project, such as Leadership in Energy and Environmental Design ("LEED") standards or another comparable state approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy fixtures, low energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.

- 20. The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the Project may create, or to revoke the permit through the proper procedures should conditions of approval not be complied with or be violated.
- 21. The Applicant is advised that additional government agency conditions may be imposed. It shall be the Applicant's responsibility to resolve those conditions with the respective agencies.
- 22. Prior to building permit submittal, the Applicant shall hold a public meeting for residents in the areas of Lāwa'i, 'Ōma'o, Kōloa, Kalāheo and Po'ipū to review the construction plans for the solar Project to solicit input and mitigate where possible concerns raised.



ADOPTION OF ORDER


This ORDER shall take effect upon the date this ORDER is certified by this Commission.


Done at Honolulu, Hawai'i, this 22nd, day of November, 2017, per motion on November 8, 2017 in Līhu'e, Kaua'i.

LAND USE COMMISSION

STATE OF HAWAI'I

APPROVED AS TO FORM


Deputy Attorney General

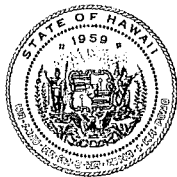
By 
ARNOLD WONG
Chairperson and Commissioner

Filed and effective on:

11/22/17

Certified by:


DANIEL E. ORODENKER
Executive Officer



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Kaua'i, Hawai'i , Tax Map Key)	
(4) 2-6-003:001 (portion).)	
)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following

AS INDICATED BELOW on November 22, 2017:

LEO R. ASUNCION, JR., AICP, Director Office of Planning, State of Hawai'i 235 South Beretania Street 6 th Floor, Leiopapa A Kamehameha Bldg. Honolulu, Hawai'i 96813	(HAND DELIVERY)
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DAWN TAKEUCHI-APUNA, ESQ. Deputy Attorney General Department of the Attorney General 425 Queen Street Honolulu, Hawai'i 96813 Attorney for the Office of Planning	(HAND DELIVERY)
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MICHAEL DAHILIG, Director Planning Department, County of Kaua'i	(CERTIFIED MAIL, RETURN RECEIPT REQUESTED)
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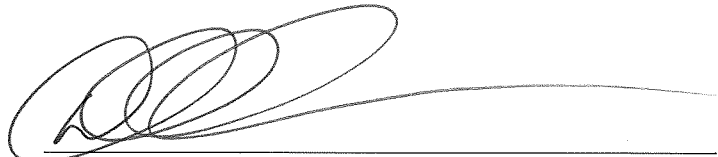
4444 Rice Street
Līhu'e, Kaua'i, Hawai'i 96766

KAUA'I COUNTY PLANNING COMMISSION (CERTIFIED MAIL, RETURN
c/o Planning Department, County of Kaua'i RECEIPT REQUESTED)
4444 Rice Street
Līhu'e, Kaua'i, Hawai'i 96766

JODI HIGUCHI, ESQ. (CERTIFIED MAIL, RETURN
Office of the County Attorney RECEIPT REQUESTED)
4444 Rice Street, Suite 220
Līhu'e, Kaua'i, Hawai'i 96766
Attorney for Kaua'i County Planning Department

BENJAMIN M. MATSUBARA, ESQ. (CERTIFIED MAIL, RETURN
CURTIS T. TABATA, ESQ. RECEIPT REQUESTED)
888 Mililani Street, Third Floor
Honolulu, Hawai'i 96813
Attorneys for Applicant

DATED: Honolulu, Hawai'i 11/22/17.



DANIEL E. ORODENKER
Executive Officer