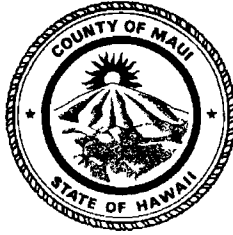


ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
Corporation Counsel


EDWARD S. KUSHI
First Deputy

LYDIA A. TODA
Risk Management Officer
Tel. No. (808) 270-7535
Fax No. (808) 270-1761

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

February 28, 2017

MEMO TO: Donald S. Guzman, Chair
Parks, Recreation, Energy, and Legal
Affairs Committee

FROM: Brian A. Bilberry 
Deputy Corporation Counsel

SUBJECT: Litigation Matter – Settlement Proposals re the *Matter of the Tax Appeals of Auwahi Wind Energy, LLC* [Tax Appeal Nos. 15-1-0238, 16-1-0275, 16-1-0328] (PRL-1)

Our Department respectfully requests the opportunity to discuss with the Committee the above-referenced Tax Appeals, including settlement options following disposition of a related tax appeal case. The Tax Appeal Court in *Auwahi Wind Energy, LLC v. County*, Tax Appeal No. 16-1-0275 granted an appeal filed by the Tax Appellant regarding real property operated as a wind farm, identified as TMK No. (2) 1-9-001-006 and located at 20100 Pi'ilani Highway, Hana, Hawai'i. Following the disposition of this related appeal, it is anticipated Auwahi Wind Energy, LLC will be requesting stipulated judgments of the above-captioned tax appeals related for the wind farm located on the same property.

It is anticipated that an executive session may be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee. A proposed settlement resolution and a copy of the Notice of Appeals for Tax Appeal Tax Appeal Nos. 15-1-0238, 16-1-0275, 16-1-0328 are attached.

Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your anticipated assistance in this matter.

Attachments

Resolution

No. _____

AUTHORIZING SETTLEMENT IN THE MATTERS
OF THE TAX APPEALS OF AUWAHI WIND ENERGY, LLC,
TAX APPEAL NOS. 15-1-0238, 16-1-0275, 16-1-0328

WHEREAS, Tax Appellant AUWAHI WIND ENERGY, LLC has filed multiple tax appeals in the Tax Appeal Court of the State of Hawai'i, contesting Tax Appellee COUNTY OF MAUI'S assessment of real property operated as a wind farm, identified as Tax Map Key No. (1) 1-9-001-006 and located at 20100 Pi'ilani Highway, Hana, Hawai'i, for tax years 2014, 2015 and 2016; and

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, seeks to reach a resolution of this case by way of a negotiated settlement; and

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under the terms set forth and discussed in an executive meeting before the Parks, Recreation, Energy, and Legal Affairs Committee; and

WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by way of a

Resolution No. _____

negotiated settlement by the Department of the Corporation Counsel, the Council wishes to authorize the settlement; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

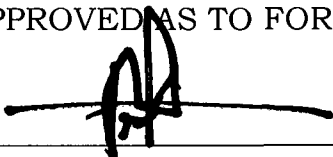
1. That it hereby approves settlement of these cases under the terms set forth in an executive meeting before the Parks, Recreation, Energy, and Litigation Affairs Committee; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreements on behalf of the County in these cases, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

3. That it hereby authorizes the Director of Finance to satisfy said settlements of these cases, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY:



BRIAN A. BILBERRY
Deputy Corporation Counsel
County of Maui

RECEIVED
CORPORATION COUNSEL

2015 MAR 31 PM 2: 32

CADES SCHUTTE
A Limited Liability Law Partnership

VITO GALATI 2611-0
CHRISTOPHER T. GOODIN 8562-0
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4216
Telephone: (808) 521-9200

Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

TAX APPEAL COURT
STATE OF HAWAII
FILED

2015 MAR 27 AM 11: 37

KATHLEEN HANAWAHINE

CLERK

IN THE TAX APPEAL COURT

STATE OF HAWAI'I

In the Matter of the Tax Appeal

of

AUWAHI WIND ENERGY LLC,

CASE NO. TX 15-1-0238
APPELLANT AUWAHI WIND ENERGY
LLC's NOTICE OF APPEAL TO THE TAX
APPEAL COURT; EXHIBITS A & B;
CERTIFICATE OF SERVICE

**APPELLANT AUWAHI WIND ENERGY LLC's NOTICE OF
APPEAL TO THE TAX APPEAL COURT**

Pursuant to Hawai'i Revised Statutes ("HRS") § 232-17 and Rule 2 of the Rules of the Tax Appeal Court of the State of Hawai'i, Taxpayer-Appellant Auwahi Wind Energy LLC ("Auwahi") submits this notice of appeal and states as follows:

BACKGROUND

1. Auwahi has a business address of 101 Ash Street, San Diego, California 92101.
2. The property is located at Ulupalakua Ranch on the southeast coast of Maui and identified by Tax Map Key No. (2) 1-9-001-006 (the "Property").
3. The Property is leased by Auwahi from Ulupalakua Ranch, Inc.

4. Under the lease, Auwahi is required to pay certain real property taxes for the Property and the term of the Lease is greater than fifteen years.

5. The County of Maui (the "County") has incorrectly classified wind turbines and towers ("Turbines") located at the Property as "real property" (the "Turbine Classification").

6. The County first made the Turbine Classification in the 2013 tax year.

7. By letter dated April 4, 2013, Auwahi appealed the assessment to the Board of Review for the County of Maui (the "Board of Review").

8. By decision and order dated September 13, 2013, the Board of Review declined to make any adjustment of the assessment.

9. On October 8, 2013, Auwahi appealed the Board of Review's decision and order to this Court.

10. Thereafter, the County again classified the Turbines as "real property" in the assessment for the 2014 tax year.

11. By letter dated April 25, 2014, Auwahi advised the County's Real Property Tax Division that, based on its appeal in 2013, Auwahi had automatically appealed for the 2014 tax year pursuant to Rule 5-203-19 of the Rules of Procedure and Forms of the Board of Review.

12. Rule 5-203-19 of the Rules of Procedure and Forms of the Board of Review states: "In every case in which a taxpayer has an appeal of an assessment pending before the tax appeal court, the taxpayer shall not be required to file a notice of second appeal of the assessment with the board; provided that the tax appeal court has not decided before April 9 preceding the tax year of the second appeal and, provided further, the director gives notice that the assessment has not been changed from the assessment which is the subject of the tax court appeal."

13. The assessment of real property includes, among other things, a determination of whether equipment qualifies as “real property.”

14. If the equipment is determined to qualify as “real property,” the value of the equipment is included in the assessment.

15. Like the challenged 2013 assessment, the 2014 assessment classified the Turbines as “real property.”

16. Therefore, Auwahi was not required to file a notice of second appeal with the Board.

17. In the April 25, 2014 letter to the County, Auwahi asked what, if any, further action was required for the second appeal.

18. Thereafter, Auwahi communicated with the County and its counsel requesting a hearing before the Board of Review for the 2014 Assessment.

19. By email dated February 17, 2015, the County’s counsel advised Auwahi to fill out a tax appeal form so that the Board of Review could take up the matter.

20. Although the 2014 tax year appeal was automatic and timely, and an appeal form was unnecessary, subject to and without waiving these points, Auwahi submitted the appeal form to move the process along as requested by the County’s counsel.

21. A true and correct copy of the letter dated February 23, 2015, from Auwahi to the County with enclosures is attached hereto as Exhibit A.

22. By letter dated February 25, 2015, the County’s Real Property Tax Division returned the application form and asserted that it was untimely.

23. A true and correct of the February 25, 2015 letter from the County to Auwahi is attached hereto as Exhibit B.

24. Auwahi thereafter confirmed with the County's attorney that there were no further steps Auwahi needed to take at the Board of Review level before proceeding with an appeal to this Court for the 2014 tax year.

25. Auwahi now appeals the 2014 assessment to this Court.

26. Enclosure 5 to Exhibit A, which is from the County's website, shows that the Turbines were classified as "real property."

27. For the 2014 tax year, based on the Turbine Classification, the amount of real property taxes in controversy is no less than \$477,963.87.

28. The Turbines are not properly classified as "real property" and the taxes should therefore be reduced by \$477,963.87.

29. To date, the amount of court costs paid by Auwahi total \$100.00.

**THE TURBINES ARE NOT "REAL PROPERTY" UNDER THE
HAWAI'I CONSTITUTION**

30. The 2014 Assessment is invalid under the Hawai'i Constitution.

31. Article III, Section 3 of the Hawai'i Constitution grants the County authority to tax "real property" and matters specifically delegated by the legislature.

32. All remaining taxing authority is reserved to the State.

33. Auwahi's turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Auwahi's Turbines can be unbolted and removed without any harm to either the equipment or the land.

34. Auwahi's Turbines are not necessary to the utility of the land.

35. The Turbines could only be used for the particular business of a wind farm.

36. The Turbines are devoted entirely to the business conducted on the Property.

37. The Turbines are not integrated with and of permanent utility to the land regardless of future use.

38. If the land were devoted to any use other than the electricity-generation business, the Turbines would simply get in the way.

39. The Turbines would have no significant value to someone other than another wind farmer.

40. If some other business were to use the Turbines, the cost to operate and maintain them would be much too high to make economic sense.

41. Because wind conditions can vary, sometimes unpredictably, the Turbines cannot guaranty a steady flow of electrical power.

42. At times, due to either lack of wind or wind in excess of the Turbines' maximum capacity, the Turbines have to be shut down.

43. If someone wanted to use the Turbines as a source of electrical power to be used on the Property itself, the Turbines would not be a reliable source of continuous and steady power.

44. Auwahi's Turbines were not intended to be permanent additions to the land.

45. The Turbines were installed with a view of serving a business purpose, not with a view of permanence.

46. Auwahi expects to repair, modify, or possibly upgrade the Turbines for its business.

47. The reason the Turbines are bolted to concrete foundations is to stabilize the Turbines for use in the wind-farm business.

48. The Turbines were not built on-site from construction blueprints.

49. Instead, they were purchased as commercially available hardware with some assembly required.

50. The turbines came with an instruction booklet from the manufacturer.

51. Auwahi did not have to obtain a building permit, or submit plans and drawings, for the Turbines.

52. Under Auwahi's lease for the Property, Auwahi may remove the Turbines at any time.

53. Upon termination of the lease, Auwahi must remove the Turbines from the premises.

54. Any uncertainty as to whether the Turbines qualify as "real property" must be resolved in favor of Auwahi.

55. Concluding that the Turbines are personal property, and not real property, promotes uniformity and consistency in the tax laws, given that the state and federal taxing authorities have already so concluded.

56. Accordingly, the Turbines are not "real property" under the Hawai'i Constitution. *See Kaheawa Wind Power, LLC v. County of Maui*, 2014 WL 6609079, at *8-*9 (Haw. Ct. App. 2014) (concluding that wind turbines did not qualify as "real property" under a prior version of the Maui County Code and relying on *Zangerle v. Republic Steel Corp.*, 60 N.E. 2d 170 (1945), as the case that "most appropriately guides [the] decision in this case"), *cert. rejected*, 2015 WL 745424 (Haw. Feb. 19, 2015); *Zangerle*, 60 N.E.2d 170 (interpreting the meaning of the word "improvements" in the Ohio Constitution for real property tax purposes).

57. Because the Turbines are not “real property” and the 2014 Assessment imposes taxes on the Turbines as “real property,” it follows that the assessment is illegal under the Hawai‘i Constitution.

58. The Maui County Code was amended in 2013 to include within the definition of “real property” the following: “Any and all wind energy conversion property that is used to convert wind energy to a form of usable energy, including, but not limited to, a wind charger, windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines, and substation, and other such components.” MCC § 3.48.005.

59. Because the Turbines do not qualify as “real property” under the Hawai‘i Constitution, the Maui County Code’s definition is invalid insofar as it classifies the Turbines as “real property.”

60. Based on the County’s erroneous classification of the Turbines:

a. The total assessment value exceeds more than twenty percent of the total market value of the “real property” in light of the erroneous classification of the Turbines. *See* MCC § 3.48.605(A); HRS § 232-3(1).

b. The assessment creates a lack of uniformity or inequality, brought about by inability of the methods used or error in the application of the methods to the property involved. *See* MCC § 3.48.600(B); HRS § 232-3(2).

c. The assessment is illegal based at least the Constitution of the State of Hawai‘i. *See* MCC § 3.48.600(D); HRS § 232-3(4).

WHEREFORE, Auwahi respectfully requests that the Court enter judgment:

A. Determining that the real property assessment value for the Property for the 2014 tax year is reduced in light of the erroneous classification of the Turbines.

B. Ordering that the County's 2014 real property tax assessments be amended such that the assessment value for the Property for the 2014 tax year is reduced in light of the erroneous classification of the Turbines.

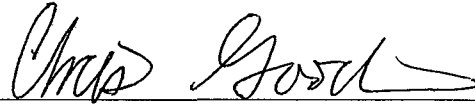
C. Ordering a refund of any and all amounts paid on, or with respect to, the challenged portion of the assessment for the 2014 tax year based on the erroneous classification of the Turbines, together with interest as provided by law.

D. Determining that MCC § 3.48.005 is invalid insofar as it classifies the Turbines as "real property."

E. Granting all other and further relief as the Court deems just and proper.

DATED: Honolulu, Hawai'i, March 27, 2015.

CADES SCHUTTE
A Limited Liability Law Partnership



VITO GALATI
CHRISTOPHER T. GOODIN
Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

IN THE TAX APPEAL COURT

STATE OF HAWAI'I

In the Matter of the Tax Appeal

of

AUWAHI WIND ENERGY LLC,

CASE NO.

TX 15-1-0238

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing document was
duly served on the person below by U.S. Mail:

PATRICK WONG, ESQ.
Corporation Counsel
RICHARD ROST, ESQ.
Deputy Corporation Counsel
200 S. High Street
Kalana O Maui Building, 3d Floor
Wailuku, Hawai'i 96793

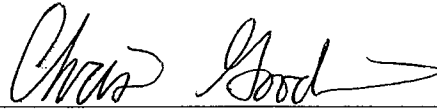
REAL PROPERTY TAX ADMINISTRATOR
County of Maui, Real Property Tax Division
70 E. Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

REAL PROPERTY TAX ASSESSOR
County of Maui, Real Property Tax Division
70 E. Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

DIRECTOR OF TAXATION
State of Hawai'i, Department of Taxation
830 Punchbowl Street, Room 221
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, March 27, 2015.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in cursive script, appearing to read "Chris Goodin", written over a horizontal line.

VITO GALATI
CHRISTOPHER T. GOODIN
Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

February 23, 2015

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Board of Review for the County of Maui
County of Maui Service Center
Service Center, Suite A16
70 East Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

Vito Galati
Direct Line: (808) 521-9347
Direct Fax: (808) 540-5074

Christopher T. Goodin
Direct Line: (808) 521-9296
Direct Fax: (808) 540-5090
E-mail: cgoodin@ca des.com

Re: Auwahi Wind Energy LLC; 2013-2014 and 2014-2015 Real Property
Tax Appeal; TMK No. (2) 1-9-001-006

Dear Ladies and Gentlemen:

This office represents Auwahi Wind Energy LLC ("Auwahi") in the above-referenced real property tax appeal. As I have discussed with Marcy Martin and Deputy Corporation Counsel Richard Rost, based on Auwahi's appeal of the 2013-2014 assessment, Auwahi has automatically appealed the 2014-2015 assessment pursuant to Rule 5-203-19 of the Rules of Procedure and Forms of the Board of Review.

For some time, we have been requesting a hearing with the Board of Review for the 2014-2015 appeal. By email dated February 17, 2015, Mr. Rost asked Auwahi to fill out the form entitled Taxpayer's Notice and Receipt of Real Property Tax Appeal. Mr. Rost stated that filing out the form should result in the Board of Review taking up the matter. Enclosed is a copy of the February 17, 2015 email.

The 2014-2015 appeal was automatic and timely, and the appeal form is not necessary to appeal the 2014-2015 assessment. Subject to and without waiving that point, and to move this process along, Auwahi has enclosed the completed appeal form. Given that the 2014-2015 appeal is part of the 2013-2014 appeal, Auwahi has also enclosed a copy of its appeal letter for the 2013-2014 appeal.

To the extent that an additional filing fee is required for the 2014-2015 appeal, an additional filing fee is enclosed. Also enclosed are: (1) a letter of authorization

C S

Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Tel: 808.521-9200
Fax: 808.521-9210
www.cades.com

Kona Office
75-170 Hualalai Road, Suite B-303
Kailua Kona, Hawaii 96740
Tel: 808.329-5811
Fax: 808.326-1175

Maui Office
444 Hana Highway, Suite 204
Kahului, Hawaii 96732
Tel: 808.871-6016
Fax: 808.871-6017

Board of Review for the County of Maui
February 23, 2015
Page 2

stating that my office is authorized to represent Auwahi for the 2014-2015 appeal; and (2) a printout from the County's website showing the assessment information.

Finally, the 2013-2014 appeal letter referenced the related case of *In re Appeal of Kaheawa Wind Power, LLC*, T.A. No. 10-1-1246. At the time the letter was submitted, the Tax Appeal Court had concluded that Kaheawa's wind turbines and towers were not taxable "real property." Subsequently, the Tax Appeal Court's ruling was affirmed by the Hawai'i Intermediate Court of Appeals. The County applied for further review of that ruling with the Hawai'i Supreme Court, which rejected the County's application. Under these decisions, Auwahi's wind turbines and towers are not taxable "real property." Copies of the decisions are enclosed.

Please advise me of what, if any, further action is required in this matter.

Very truly yours,



Vito Galati
Christopher T. Goodin
for
CADES SCHUTTE
A Limited Liability Law Partnership

Enclosures:

1. February 17, 2015 Email from Richard Rost
2. Appeal Instructions and Form
3. Filing Fee
4. Letter of Authorization
5. Printout with 2014 Assessment Information
6. Appellate Decisions in the *Kaheawa* case
7. 2013-2014 Appeal Letter

Christopher Goodin

From: Richard Rost <Richard.Rost@co.maui.hi.us>
Sent: Tuesday, February 17, 2015 3:34 PM
To: Christopher Goodin
Subject: Auwahi Wind
Attachments: Appeal Instr Form 2.17.15.pdf

Hi Chris,

The Real Property Tax Division has provided me the attached form, which they request be filled out for Auwahi's tax appeal. While I recognize Auwahi's position is that an appeal has already been submitted, filling out and submitting the attached form should result in the Board of Review taking the matter up. Please let me know if you have any questions.

In addition, please be aware that the deadline to file 2015 tax appeals is April 9, 2015. The same form can be used for that, if Auwahi intends to appeal.

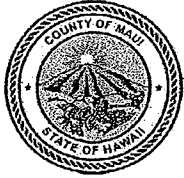
Thanks.

-Richard

NOTICE: The information in this transmittal (including attachments, if any) is privileged and confidential and is intended only for the recipient(s) listed above. Any review, use, disclosure, distribution or copying of this transmittal is prohibited except by or on behalf of the intended recipient.

If you have received this transmittal in error, please notify me immediately by reply email and destroy all copies of the transmittal. Thank you.

ENCLOSURE 1



County of Maui - Department of Finance
Real Property Assessment Division
Service Center, Suite A16
70 E. Kaahumanu Avenue, Kahului, HI 96732
(808) 270-7297 Fax (808) 270-7884

APPEAL INSTRUCTIONS AND FORM

INSTRUCTIONS FOR FILING AN APPEAL WITH THE BOARD OF REVIEW

1. Complete form DFT-595 *Taxpayer's Notice and Receipt of Real Property Tax Appeal*. Keep a copy of your completed form for your records. Read and follow instructions carefully. **Incomplete notices of appeal shall not be filed or accepted by the board.** (Chapter 203 Rules of Procedure and Forms for the Board of Review)
1. Enter the tax map key and land classification found on the assessment notice. A separate appeal must be filed for each land classification under appeal.
2. Enter the assessment year under appeal. (See Maui County Code 3.48.595)
3. Enter the appellant's name, mailing address and phone number(s). If the appellant has a contractual obligation to pay the property tax, the appellant must submit proof of such obligation with the appeal. The appeal form must be signed by the appellant or his representative. Any person representing an appellant must have a letter of authorization.
4. To indicate the basis for the appeal, check off the appropriate ground(s) of appeal. Evidence used to support the ground(s) of appeal such as an appraisal report, sales contract, construction cost estimate, etc. should be submitted with this form.
5. If appealing the assessed valuation, enter the appellant's opinion of value.
6. **Two complete sets of your evidence and appeal form must be provided.**
7. **At the time of filing, the fee of \$75.00 must be submitted with each appeal.** Do not send cash. Checks should be made payable to the **County of Maui**. If for any reason, the filing fee is not included with your appeal, (this includes checks that are non-negotiable due to being stale-dated, post-dated, or unsigned, etc.) your appeal will not be filed or accepted by the board. (Chapter 203 Rules of Procedure and Forms for the Board of Review)
8. The 2014 appeal deadline is Wednesday, April 9, 2014. If the appeal is delivered in person, the **Real Property Assessment Division** must receive the appeal form by 4:00 p.m., April 9, 2014. If the appeal is mailed, it must be postmarked on or before, April 9, 2014. **To ensure your application is received, we recommend mailing this application via certified mail with return receipt requested along with a self-addressed stamped envelope for the return of a copy of your processed application for your records. One application per envelope.**
10. The Board of Review Address is: Board of Review, County of Maui Service Center, 70 E. Kaahumanu Avenue, Suite A16, Kahului, HI 96732.
11. Even though there is an appeal pending, you must pay all taxes by the due dates or penalty and interest will be charged. Should you be successful in your appeal, any overpayment in taxes will be refunded to you as soon as procedurally possible.
12. Notification of the hearing date will be sent by certified mail. Notify the Real Property Assessment Division if any of the appellant's information requires updating.

BOARD OF REVIEW FOR THE COUNTY OF MAUI

#

TAXPAYER'S NOTICE AND RECEIPT OF REAL PROPERTY TAX APPEAL

The cost to be deposited by the taxpayer on appeal to the Board of Review shall be \$75 for each real property tax appeal.

ZONE	SEC.	PLAT	PAR.	CPR
GENERAL LAND CLASS				

Two complete sets of your evidence & appeal must be provided.

Notice is hereby given that _____ (Name of Taxpayer) (Print or Type)

whose mailing address is _____ hereby

appeals the assessment made for the purpose of real property taxation for the year _____ identified by the above tax key.

(Must be filled in if appealing assessed value)

What is your opinion of total assessment value?

Total \$ _____

(For Official Use)

County's total assessment value

Total \$ _____

(For Official Use)

Please indicate your ground(s) of appeal (must select at least one).
See Maui County Code 3.48.605

- My opinion of total assessment value is more than 20 percent below the County's total assessment value.
- There is a lack of uniformity or inequality, brought about by inability of the methods used or error in the application of the methods to the property involved.
- You have been denied an exemption to which you are entitled. Please indicate your opinion of the exemption amount \$ _____ and type of exemption _____
- The assessment methods are unconstitutional or in violation of State laws or County ordinances.
- The General Land Class is incorrect. Please indicate your opinion of general land class. _____

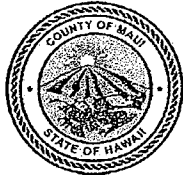
Remarks:

Taxpayer Checklist	
Filled All Required Fields	
Included 2 complete sets of evidence & appeal form	
Included check for \$75 payable to: County of Maui	
Signed form & entered contact information	

Received/Time stamped By: _____	
Entered By: _____	Date: _____

Signed: _____	Dated: _____
Print Name: _____	
Address* _____	
<small>*address required if the appeal is signed by a representative</small>	
Email _____	
Address: _____	
I can best be contacted at:	
Telephone: _____	<input type="radio"/> H <input type="radio"/> W <input type="radio"/> C
Local Contact: _____	<input type="radio"/> H <input type="radio"/> W <input type="radio"/> C

SEE INSTRUCTIONS - ALL HIGHLIGHTED FIELDS MUST BE FILLED TO SUBMIT APPEAL



County of Maui - Department of Finance
Real Property Assessment Division
Service Center, Suite A16
70 E. Kaahumanu Avenue, Kahului, HI 96732
(808) 270-7297 Fax (808) 270-7884

APPEAL INSTRUCTIONS AND FORM

INSTRUCTIONS FOR FILING AN APPEAL WITH THE BOARD OF REVIEW

1. Complete form DFT-595 *Taxpayer's Notice and Receipt of Real Property Tax Appeal*. Keep a copy of your completed form for your records. Read and follow instructions carefully. **Incomplete notices of appeal shall not be filed or accepted by the board.** (Chapter 203 Rules of Procedure and Forms for the Board of Review)
1. Enter the tax map key and land classification found on the assessment notice. A separate appeal must be filed for each land classification under appeal.
2. Enter the assessment year under appeal. (See Maui County Code 3.48.595)
3. Enter the appellant's name, mailing address and phone number(s). If the appellant has a contractual obligation to pay the property tax, the appellant must submit proof of such obligation with the appeal. The appeal form must be signed by the appellant or his representative. Any person representing an appellant must have a letter of authorization.
4. To indicate the basis for the appeal, check off the appropriate ground(s) of appeal. Evidence used to support the ground(s) of appeal such as an appraisal report, sales contract, construction cost estimate, etc. should be submitted with this form.
5. If appealing the assessed valuation, enter the appellant's opinion of value.
6. Two complete sets of your evidence and appeal form **must** be provided.
7. **At the time of filing, the fee of \$75.00 must be submitted with each appeal.** Do not send cash. Checks should be made payable to the **County of Maui**. If for any reason, the filing fee is not included with your appeal, (this includes checks that are non-negotiable due to being stale-dated, post-dated, or unsigned, etc.) your appeal will not be filed or accepted by the board. (Chapter 203 Rules of Procedure and Forms for the Board of Review)
8. The 2014 appeal deadline is Wednesday, April 9, 2014. If the appeal is delivered in person, the **Real Property Assessment Division** must receive the appeal form by 4:00 p.m., April 9, 2014. If the appeal is mailed, it must be postmarked on or before, April 9, 2014. **To ensure your application is received, we recommend mailing this application via certified mail with return receipt requested along with a self-addressed stamped envelope for the return of a copy of your processed application for your records.** One application per envelope.
10. The Board of Review Address is: Board of Review, County of Maui Service Center, 70 E. Kaahumanu Avenue, Suite A16, Kahului, HI 96732.
11. Even though there is an appeal pending, you must pay all taxes by the due dates or penalty and interest will be charged. Should you be successful in your appeal, any overpayment in taxes will be refunded to you as soon as procedurally possible.
12. Notification of the hearing date will be sent by certified mail. Notify the Real Property Assessment Division if any of the appellant's information requires updating.

BOARD OF REVIEW FOR THE COUNTY OF MAUI

#

TAXPAYER'S NOTICE AND RECEIPT OF REAL PROPERTY TAX APPEAL

The cost to be deposited by the taxpayer on appeal to the Board of Review shall be \$75 for each real property tax appeal.

ZONE	SEC.	PLAT	PAR.	CPR
1	9	001	006	0000
GENERAL LAND CLASS <u>Agricultural/Conservation</u>				

Two complete sets of your evidence & appeal must be provided.

Notice is hereby given that <u>AUWAHI WIND ENERGY LLC</u>	(Name of Taxpayer) (Print or Type)
whose mailing address is <u>101 ASH STREET, HQ07, SAN DIEGO, CA 92101-3017</u> hereby	
appeals the assessment made for the purpose of real property taxation for the year <u>2014</u> identified by the above tax key.	

(Must be filled in if appealing assessed value)	
What is your opinion of total assessment value?	
Total	\$ <u>1,033,100</u>

(For Official Use)	
County's total assessment value	
Total	\$ _____

(For Official Use)

Please indicate your ground(s) of appeal (must select at least one)
See Maui County Code 3.48.605

- My opinion of total assessment value is more than 20 percent below the County's total assessment value.
- There is a lack of uniformity or inequality, brought about by inability of the methods used or error in the application of the methods to the property involved.
- You have been denied an exemption to which you are entitled. Please indicate your opinion of the exemption amount \$ _____ and type of exemption _____
- The assessment methods are unconstitutional or in violation of State laws or County ordinances.
- The General Land Class is incorrect. Please indicate your opinion of general land class. _____

Remarks:

Taxpayer Checklist	
Filled All Required Fields	
Included 2 complete sets of evidence & appeal form	
Included check for \$75 payable to: County of Maui	
Signed form & entered contact information	

Received/Time stamped By: _____	
Entered By: _____	Date: _____

Signed: _____	Dated: _____
Print Name: <u>Vito Galati</u>	
Address* <u>1000 Bishop Street</u>	
<u>Honolulu, HI 96813</u>	
*address required if the appeal is signed by a representative	
Email _____	
Address: _____	
I can best be contacted at:	
Telephone: <u>521-9347</u>	<input type="radio"/> H <input checked="" type="radio"/> W <input type="radio"/> C
Local Contact: <u>521-9347</u>	<input type="radio"/> H <input checked="" type="radio"/> W <input type="radio"/> C

SEE INSTRUCTIONS - ALL HIGHLIGHTED FIELDS MUST BE FILLED TO SUBMIT APPEAL

02/23/15
00021418 County of Maui

CADES SCHUTTE LLP
No. 66665

DATE	INVOICE NO.	MATTER NO.	REFERENCE	AMOUNT
02/23/15	30488	22482-0004	Filing fee re: Appeal	75.00

TOTAL: 75.00

CADES SCHUTTE LLP
1000 BISHOP STREET, 12TH FLOOR
P.O. BOX 939
HONOLULU, HAWAII 96808

Main Office
FIRST HAWAIIAN BANK
Honolulu, Hawaii
59-101
1213

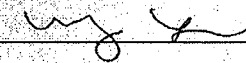
No. 66665
02/23/15

PAY Seventy-Five Dollar(s) and 00 cents

\$75.00

**CLIENT COST ADVANCE
VOID AFTER SIX MONTHS**

TO THE ORDER OF County of Maui, Director of Finance



Counter signature required if over \$500.00

⑈066665⑈ ⑆121301015⑆ 01132954⑈

ENCLOSURE 3



James R. Asay
Director – Corporate Tax

Sempra Energy
101 Ash Street, HQ07
San Diego, CA 92101-3017

Tel: 619-696-4836
Mob: 619-207-8329
Fax: 619-696-3060
jasay@sempra.com

Board of Review for the County of Maui
County of Maui Service Center
70 East Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

Re: Auwahi Wind Energy LLC; 2013-2014 and 2014-2015 Real Property Tax Appeal; TMK
No. (2) 1-9-001-006

Ladies and Gentlemen:

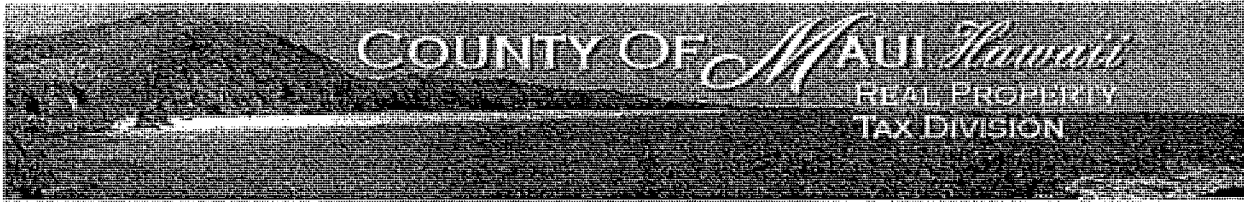
I am Director – Corporate Tax of Sempra Energy, a parent company of Auwahi Wind Energy LLC (“Auwahi”). Auwahi has authorized the law firm of Cades Schutte LLP to represent Auwahi before the Board of Review in connection with the above appeal for the 2014-2015 tax year. This letter also confirms that Auwahi is obligated to pay the subject real property taxes.

Respectfully,

A handwritten signature in cursive script that reads 'James R. Asay'.

James R. Asay
Director – Corporate Tax
Sempra Energy

ENCLOSURE 4



[Recent Sales in Neighborhood](#)
[Recent Sales in Area](#)

[Previous Parcel](#)

[Next Parcel](#)

[Return to Main Search Page](#)

[Maui Home](#)

Owner and Parcel Information

Owner Name	ULUPALAKUA RANCH INC Fee Owner AUWAHI WIND ENERGY LLC Leasee Show All Owners and Addresses	Today's Date	February 19, 2015
Mailing Address	HC 1 BOX 901 KULA HI 96790	Parcel Number	190010060000
Location Address	20100 PIILANI HWY	Parcel Map	Show Parcel Map
Neighborhood Code	1242-5	Land Area	5252.872 Acres
Legal Information		Parcel Note	Ag Dedication

[Generate Owner List By Radius](#)

Assessment Information [Show Historical Assessments](#)

Year	Tax Class	Market Land Value	Agricultural Land Value	Assessed Land Value	Building Value	Total Assessed Value	Total Exemption Value	Total Net Taxable Value
2014	AGRICULTURAL	\$ 3,586,300	\$ 531,500	\$ 531,500	\$ 82,064,800	\$ 82,596,300	\$ 0	\$ 82,596,300
2014	CONSERVATION	\$ 75,800	\$ 600	\$ 600	\$ 0	\$ 600	\$ 0	\$ 600

Agricultural Assessment Information

Acres	Description	Assessed Value
4105.893	PASTUR E 20YR	\$ 24,635
101	PASTUR E 20YR	\$ 606
82.107	PRIMARY SITE	\$ 410,500
963.872	WASTE LAND	\$ 96,400

This parcel has land in agricultural usage and therefore agricultural usage assessments have been made.

Current Tax Bill Information [2014 Tax Payments](#) [Show Historical Taxes](#)

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2014-2	Real Property Tax	02/20/2015	\$ 242,008.98	\$ 0.00	\$ 242,008.98	\$ 0.00	\$ 0.00	\$ 0.00	\$ 242,008.98

Tax bill is computed to 02/20/2015

Commercial Improvement Information

Building Number	Building Type	Structure	Year Built	Eff Year Built	% Complete	Building Square Footage	Sketch	Value
1	SEMPRA OFFICE/WAREHOUSE	WAREHS STEEL W2	2012		75 %	6,774	Sketch Building 1	\$ 501,000
Section	Floor #	Area	Perimeter	Usage	Wall Height	Exterior Wall	Construction	
01	01	1920	176	WAREHOUSE	10	5	METAL WAREHOUSE	
02	01	1920	176	WAREHOUSE	14	5	METAL WAREHOUSE	
02	E1	300	48	OFF ENCL WAREHSE	14	NONE	NONE	
01	E1	1920	128	OFF ENCL WAREHSE	10	NONE	NONE	
02	E2	714	0	OFF ENCL WAREHSE	14	NONE	NONE	

Accessory Information

Building Number	Description	Dimensions/Units	Year Built	Percent Complete	Value
1	WIND POWER TURBINE	0x0 3,000 / 8	2012	100 %	\$ 81,563,800

Sales Information

Sale Date	Price	Instrument #	Instrument Type	Valid Sale or Other Reason	Document Type	Record Date	Land Court #	Land Court Cert
-----------	-------	--------------	-----------------	----------------------------	---------------	-------------	--------------	-----------------

02/09/2012	\$ 0	A44490529	Easements	Grant of easement	03/07/2012
11/28/2009	\$ 0	09-197252	Easements	Conservation easement	12/29/2009
10/21/2008	\$ 1,290	09-85901	Lease	Assignment lease, sub lease etc.	06/04/2009
06/29/2006	\$ 0	06-122528	Lease	Lease	07/03/2006

Permit Information

Date	Permit Number	Reason	Permit Amount
10/15/2012	B20121255	New commercial bldg	\$ 1,300,000
08/16/2012	B20120943	Other see notes	\$ 108,000
08/16/2012	B20120942	Other see notes	\$ 108,000
08/16/2012	B20120941	Other see notes	\$ 108,000
08/16/2012	B20120940	Other see notes	\$ 108,000
08/16/2012	B20120939	Other see notes	\$ 108,000
08/16/2012	B20120938	Other see notes	\$ 108,000
08/16/2012	B20120937	Other see notes	\$ 108,000
08/16/2012	B20120936	Other see notes	\$ 108,000
03/28/2012	B20120315	Other see notes	\$ 100,000
03/28/2012	B20120314	Other see notes	\$ 100,000
08/31/2006	B20061939	Other see notes	\$ 35,000

[Recent Sales in Neighborhood](#)
[Recent Sales in Area](#)

[Previous Parcel](#)

[Next Parcel](#)

[Return to Main Search Page](#)

[Maui Home](#)

The Maui County Tax Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. Website Updated: February 14, 2015

© 2010 by the Maui County Tax Assessor's Office | Website design by [qpublic.net](#)

Electronically Filed
Intermediate Court of Appeals
CAAP-12-0000728
20-NOV-2014
09:45 AM

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

---oOo---

In the Matter of the Tax Appeal of
KAHEAWA WIND POWER, LLC,
Taxpayer-Appellant-Appellee/Cross-Appellant,
v.
COUNTY OF MAUI, Appellee-Appellant/Cross-Appellee.

NO. CAAP-12-0000728

APPEAL FROM THE TAX APPEAL COURT
(TX. NO. 10-1-1246 and Consolidated Cases
TX NOS. 10-1-1247, 10-1-1248, 10-1-1249 & 11-1-0035)

NOVEMBER 20, 2014

FOLEY, PRESIDING JUDGE, FUJISE, and GINOZA, JJ.

OPINION OF THE COURT BY GINOZA, J.

In this consolidated tax appeal, the County of Maui (County) appeals, and Kaheawa Wind Power, LLC (Kaheawa) cross-appeals, from a Final Judgment issued on July 24, 2012, by the Tax Appeal Court of the State of Hawaii (Tax Appeal Court).¹

This case arises from Kaheawa's challenges to real property assessments issued by the County for taxing property on Maui (Property) that Kaheawa leases from the State of Hawaii (State). Kaheawa operates a business on the Property producing

¹ The Honorable Gary W.B. Chang presided.

electrical power from wind energy, with the power generated by twenty wind turbines. There are two issues before us on appeal: first, whether the wind turbines located on the Property could be considered in the "building" valuation for the real property assessments under the Maui County Code (MCC); and second, whether property assessments issued by the County in 2010 validly assessed the Property for retroactive taxes applicable to the years 2007-2009.

In its appeal, the County asserts that the Tax Appeal Court erred by ruling that the wind turbines could not be considered in the "building" valuation for the real property assessments, and thus, erred in granting Kaheawa's motion for partial summary judgment and denying the County's motion for partial summary judgment on this issue.

In its cross-appeal, Kaheawa contends that the Tax Appeal Court erred by granting partial summary judgment to the County as to the retroactive assessments of the Property for taxes. Kaheawa asserts that a factual dispute exists over when the County discovered that Kaheawa was leasing the Property, which made the Property taxable and which affects whether the assessments were timely. Kaheawa also contends that the Tax Appeal Court erred in holding that the County had an unlimited time period in which to add the Property as "omitted property" for assessment and taxing purposes.

We affirm the Tax Appeal Court's Final Judgment and hold that: (1) the wind turbines do not constitute "real property" for tax purposes under the MCC; and (2) the County was entitled to retroactively assess the Property for taxes in this case because the MCC does not create an express or implied time limit in which the County must add "omitted property" to tax assessment lists.

I. Case Background

A. Stipulated Facts

The parties agreed to stipulated facts, which provide in relevant part:

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

1. This consolidated action is a real property tax appeal, filed by Kaheawa with respect to the parcel of land identified as Tax Map Key 4-8-001-001-6001 (the "Subject Property"). The present consolidated action involves tax years 2007 through 2011.

2. The Subject Property is located in the West Maui mountain area, roughly three miles mauka from Maalaea harbor. The Subject Property is leased from the State of Hawaii. Kaheawa acquired a leasehold interest in the Subject Property by executing General Lease No. S-5731 dated January 19, 2005 (the "Lease"). . . .

3. The Taxpayer-Appellant, Kaheawa, is engaged in the business of producing electrical power from wind energy. There are currently 20 wind turbines located on the Subject Property, each capable of independently generating approximately 1.5 megawatts of electricity. This is a commercial power-generating business; the electricity is sold to Maui Electric Company, Limited (on an "as-available" basis) and ultimately used by businesses and/or consumers.

. . . .

5. On or about May 17, 2010, the County issued an "AMENDED NOTICE OF PROPERTY ASSESSMENT" for each of the 2007, 2008 and 2009 tax years. . . .

6. On or about March 15, 2010, the County issued a "NOTICE OF PROPERTY ASSESSMENT" for the 2010 tax year. . . .

7. On or about March 15, 2011, the County issued a "NOTICE OF PROPERTY ASSESSMENT" for the 2011 tax year. . . .

8. The County is treating the turbines and the towers on which the turbines are mounted as real property included in "building" value for real property tax assessment purposes. Kaheawa asserts that the turbines and the associated towers are equipment and machinery, moveable and not real property.

9. The turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Kaheawa does not dispute that the poured concrete slabs are affixed to the land,¹ and thus are real property, included within "building" value for real property tax purposes.

10. The turbines and the towers are bolted in place. They can be unbolted and removed without any harm to either the equipment or the land.

. . . .

13. The turbines and towers were purchased as commercially available hardware.²

. . . .

19. For building permit purposes, Kaheawa had to submit plans and drawings for the concrete foundation slabs. Kaheawa did not have to obtain a building permit, or submit plans and drawings, for the turbines and the towers.

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

20. The towers came with an instruction booklet from the manufacturer, as opposed to a set of blueprints for construction drawn by an architect. . . .

21. When the turbines and towers were purchased and placed in service, Kaheawa claimed a Capital Goods Excise Tax Credit for Hawaii state income tax purposes. Under HRS §235-110.7, the Capital Goods Excise Tax Credit only applies to "tangible personal property" that meets certain requirements. Thus, in order to get the credit, the property involved must be "tangible personal property." HRS §235-110.7(e) says that:

"Tangible personal property" does not include tangible personal property which is an integral part of a building or structure . . .

22. The Department of Taxation of the State of Hawaii allowed the Capital Goods Excise Tax Credit claimed by Kaheawa.

23. Kaheawa's Lease specifically requires the removal of the turbines and towers at the end of the Lease term, subject to a right of the Lessor to elect to take ownership. . . .

¹ "Affixed" meaning that the slabs could not be removed without significant damage to the slabs themselves and/or the surrounding land.

² As with many products, "Some assembly required."

B. Procedural History

Kaheawa initiated this action by filing appeals with the Tax Appeal Court from the respective notices and amended notices of property assessment issued by the County for the years 2007 through 2011. In its appeals, Kaheawa challenged the County's treatment of alleged personal property as being part of the building value. Kaheawa also challenged the County's issuance of amended notices in 2010 that retroactively assessed the Property for the previous years of 2007, 2008, and 2009.²

On January 18, 2012, Kaheawa filed a motion for partial summary judgment, arguing that the wind turbines and towers are not real property for purposes of real property taxes. On January 19, 2012, the County filed a cross motion on the same issue. At a February 13, 2012 hearing, the Tax Appeal Court held

² These separate appeals were consolidated into a single action before the Tax Appeal Court.

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

that the wind turbines and towers do not constitute real property for real property tax assessment purposes. On April 9, 2012, the Tax Appeal Court filed an order denying the County's motion for summary judgment, and also an order granting Kaheawa's motion for partial summary judgment, holding as a matter of law that "the towers and turbines which are located on the subject property are not within the definition of 'real property' for purposes of the real property tax."

The Tax Appeal Court's April 9, 2012 orders thus determined that the wind turbines and towers could not be included in the real property valuation for the assessments. Because the assessments covered more than just the wind turbines and towers, a remaining issue was whether the County properly issued amended notices of property assessment in 2010 retroactive back to 2007, 2008, and 2009.

On June 7, 2012, the County filed a motion for partial summary judgment, arguing that the 2010 amended notices of property assessment for 2007, 2008, and 2009 were proper. The County explained that up until 2005, the Property was exempt from taxation because it is owned by the State and real property owned by the State is exempt from property taxes under MCC § 3.48.530 (2014). In 2005, the State leased the Property to Kaheawa, and thus the Property became taxable. The County argued that although the amended property assessments were not issued until May 17, 2010, the assessments were proper and not invalid due to their timing.

On June 22, 2012, Kaheawa filed a memorandum in opposition to the County's motion for partial summary judgment, arguing that summary judgment was inappropriate. Specifically, Kaheawa argued that the County "discovered" the lease when the County received the lease with other recorded documents in 2005, and that upon discovering the lease, the County had a duty to add the Property to the tax assessment list within a reasonable time.

On July 16, 2012, the Tax Appeal Court held a hearing on the County's motion for partial summary judgment and granted the motion. The Tax Appeal Court's subsequent order stated that

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

"[t]he Court finds that there is not an express or implied time limitation on the County of Maui's ability to make real property tax assessments, and thus the County was legally entitled to make retroactive assessments of the subject property."

On July 24, 2012, the Tax Appeal Court entered the Final Judgment.

On August 22, 2012, the County filed a notice of appeal from the Final Judgment challenging the grant of partial summary judgment to Kaheawa regarding the wind turbines. On August 23, 2012, Kaheawa filed a notice of appeal from the Final Judgment challenging the grant of partial summary judgment to the County regarding the retroactive assessments.³

II. Standard of Review

We review the Tax Appeal Court's grant of summary judgment *de novo*. *Kamikawa v. Lynden*, 89 Hawai'i 51, 54, 968 P.2d 653, 656 (1998). Moreover, "[i]nasmuch as the facts here are undisputed and the sole question is one of law, we review the decision of the Tax Appeal Court under the right/wrong standard." *Id.* (citations and internal quotation marks omitted).

In this case, we must interpret provisions of the Maui County Code.

When interpreting a municipal ordinance, we apply the same rules of construction that we apply to statutes. The interpretation of a statute is a question of law reviewable *de novo*. The purpose of the ordinance may be obtained primarily from the language of the ordinance itself; however, in order to construe the ordinance in a manner consistent with its purpose, the language must be read in the context of the entire ordinance.

³ On September 10, 2012, the Tax Appeal Court entered a First Amended Final Judgment, but there is nothing in the record to indicate the basis for this amended judgment. It appears that the First Amended Final Judgment is a nullity because it was entered after the notices of appeal were filed and without any jurisdictional basis. "Generally, the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case." *TSA Int'l Ltd. v. Shimizu Corp.*, 92 Hawai'i 243, 265, 990 P.2d 713, 735 (1999). Granted, Rule 4 of the Hawai'i Rules of Appellate Procedure provides a few limited exceptions to the general rule, but, otherwise, a trial court may not usually make substantive changes to a judgment after the filing of the notice of appeal unless the presiding appellate court issues an order that remands the case to the trial court for that purpose. *Life of the Land v. Ariyoshi*, 57 Haw. 249, 252, 553 P.2d 464, 466 (1976).

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Weinberg v. City & Cnty. of Honolulu, 82 Hawai'i 317, 322, 922 P.2d 371, 376 (1996) (citations and internal quotation marks omitted).

III. Discussion

A. The Wind Turbines Are Not "Real Property" Pursuant To MCC § 3.48.005

The County contends that the Tax Appeal Court erred in granting partial summary judgment to Kaheawa on the basis that the wind turbines are not taxable "real property" under MCC § 3.48.005 (2012).⁴ The County does not assert that any material facts are in dispute, but argues that the Tax Appeal Court erred in interpreting applicable provisions of the MCC.

At the time the County assessed Kaheawa's Property relevant to this case,⁵ MCC § 3.48.005(B) defined "real property" as follows:

"Property" or "real property" means and includes all land and appurtenances thereof and the buildings, structures, fences, and improvements erected on or affixed to the same, and any fixture which is erected on or affixed to such land, building structures, fences and improvements, including all machinery and other mechanical or other allied equipment and the foundations thereof, whose use thereof is necessary to the utility of such land, buildings, structures, fences, and improvements, or whose removal therefrom cannot be accomplished without substantial damage to such land, buildings, structures, fences, and improvements, excluding, however, any growing crops.

Given the arguments of the parties, the County's appeal turns on whether the wind turbines are either "improvements" or "fixtures" within the definition of "real property" under MCC § 3.48.005.

⁴ We note that, although the Tax Appeal Court's ruling held that both the wind turbines and towers were not taxable real property, the County's points of error and briefing on appeal only contend error with regard to the *wind turbines*. We thus limit our review to whether the wind turbines could be included in the assessments as real property.

⁵ It does not change our analysis, but we note that subsequent to the relevant period in this case, the Maui County Council amended the definition of "real property" in MCC § 3.48.005 and added language pertaining to "wind energy conversion property that is used to convert wind energy to a form of usable energy[.]" MCC § 3.48.005 (2013).

1. The Exemption In MCC § 3.48.520 Does Not Help To Define "Improvement"

The County first contends that the wind turbines are taxable as "alternate energy improvements." To be clear, the County does not point to any provision in the MCC that provides for a tax on alternate energy improvements. Rather, the County points to the provisions in MCC § 3.48.520 (2014) that set forth a tax exemption related to alternate energy improvements.

MCC § 3.48.520 provides, in relevant part:

3.48.520 Alternate energy improvements.

A. As used in this section, "alternate energy improvement" means any construction or addition, alteration, modification, improvement, or repair work undertaken upon or made to any building which results in:

1. The production of energy from a source, or uses a process which does not use fossil fuels, nuclear fuels or geothermal source. Such energy source may include but shall not be limited to solid wastes, wind, solar, or ocean waves, tides, or currents. Alternate energy production or energy byproducts transferred, marketed, or sold on a commercial basis shall not qualify for exemption under the provisions of this section. . . .

. . . .

B. The value of all improvements in the county (not including a building or its structural components, except where alternate energy improvements are incorporated into the building and then only that part of the building necessary to such improvement) actually used for an alternate energy improvement shall be exempted from the measure of the taxes imposed by this chapter.

(Emphasis added.)

The County argues that, because MCC § 3.48.005 taxes "improvements" to the land, we must consider the exemption in MCC § 3.48.520 because it is critical in determining whether the wind turbines are "improvements." In sum, the County's position is that MCC § 3.48.520 contemplates alternative energy improvements, including wind energy improvements, and the County chose to exempt from taxation only those alternative energy improvements not used for commercial purposes. Although this argument might have surface appeal, the actual language of MCC § 3.48.520 does not support the County's position and at most creates ambiguity.

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

The County argues extensively that we must give significant effect to the "or" contained in the definition of "alternate energy improvement" in MCC § 3.48.520, subsection (A). Apparently in recognition of the fact that the wind turbines are not attached to or part of any building, the County argues that the definition of "alternate energy improvement" in subsection (A) applies to any "construction" or any "addition, alteration, modification, improvement, or repair work undertaken upon or made to any building[,]" which results in "[t]he production of energy from a source, or uses a process which does not use fossil fuels, nuclear fuels or geothermal source." The County's argument concludes that the wind turbines in this case are within the standard definition of "construction,"⁶ and thus are an "alternate energy improvement." In our view, the County's arguments miss the mark and lead to ambiguity.

The County's arguments ignore the actual tax exemption language, which is set out in MCC § 3.48.520, subsection (B). Subsection (B) provides in relevant part that "[t]he value of all improvements in the county . . . actually used for an alternate energy improvement shall be exempted from the measure of the taxes imposed by this chapter." (Emphasis added.) Thus, if anything, MCC § 3.48.520 recognizes that there may be "improvements" that are "used for an alternate energy improvement[,]" (emphasis added) but it does not suggest the reverse -- that all "alternate energy improvements" are "improvements" for purposes of MCC § 3.48.005. Based on our reading of MCC § 3.48.520, that provision does not dictate that the wind turbines in this case are "improvements" under MCC § 3.48.005.

We further note that Hawai'i courts have held that the rule of strict construction applies in tax cases and if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer. See *Narmore v.*

⁶ Relying on the definition provided in *Black's Law Dictionary* (7th ed. 1999), the County offers the definition of "construction" as "[t]he act of building by combining or arranging parts or elements; the thing so built."

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Kawafuchi, 112 Hawai'i 69, 82, 143 P.3d 1271, 1284 (2006), superseded by statute on other grounds, HRS §§ 232-16, -17 (Supp. 2013); *In re Fasi*, 63 Haw. 624, 629, 634 P.2d 98, 103 (1981); *In re Hawaiian Tel. Co.*, 61 Haw. 572, 578, 608 P.2d 383, 388 (1980). At a minimum, we conclude there is doubt as to the County's construction of the exemption in MCC § 3.48.520 as indicating that the wind turbines must be taxable "improvements" under MCC § 3.48.005.

2. The Wind Turbines Are Not "Improvements"

The County next argues that the wind turbines are taxable under the standard definition of "improvements." The County urges this court to apply the Black's Law Dictionary definition, which defines "improvement" as "[a]n addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance." *Black's Law Dictionary* 826 (9th ed. 2009). Considering the particular issue before us, we disagree that the broad definition of "improvement" advanced by the County applies to the wind turbines in this case.⁷

As recognized in the parties' stipulation, Kaheawa asserts that the wind turbines are equipment and machinery. The County, in its opening brief, also expressly recognizes that "[t]he turbines are plainly machinery." (Emphasis added.) In MCC § 3.48.005, certain types of "machinery" are incorporated as part of the description of a "fixture." Given this context, and reading MCC § 3.48.005 as a whole, applying the broad definition of improvement asserted by the County would ignore the more specific language related to fixtures and machinery. As Kaheawa points out, the Hawai'i Supreme Court has recognized the doctrine of statutory construction known as *noscitur a sociis*, which helps to guide our interpretation of MCC § 3.48.005 in this case.

There is a rule of construction embodying the words *noscitur a sociis* which may be freely translated as "words of a feather flock together," that is, the meaning of a word is to be judged by the company it keeps. This is really a

⁷ We make no comment on whether the definition of "improvement" proposed by the County may apply in other circumstances.

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

particular rule under the general rule of interpretation that the meaning to be given to a writing is controlled by the context; taken from the context, both words and sentences may be made to mean something very different from what the authors intended.

Advertiser Publ'g Co. v. Fase, 43 Haw. 154, 161 (Haw. Terr. 1959); see also *State v. Deleon*, 72 Haw. 241, 244, 813 P.2d 1382, 1384 (1991) (citing *Advertiser* for the above proposition); *In re Pac. Marine & Supply Co.*, 55 Haw. 572, 578, 524 P.2d 890, 895 (1974) (applying *noscitur a sociis* in an appeal from the Tax Appeal Court). As further elaborated,

[n]oscitur a sociis may be explained as a doctrine of statutory construction that requires that the more general and the more specific words of a statute must be considered together in determining the meaning of the statute, and that the general words are restricted to a meaning that should not be inconsistent with, or alien to, the narrower meanings of the more specific words of the statute.

In re Pac. Marine & Supply Co., 55 Haw. at 578 n.5, 524 P.2d at 895 n.5 (emphasis added); see also *Kam v. Noh*, 70 Haw. 321, 326, 770 P.2d 414, 418 (1989) (noting as to statutory construction that "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole[]").

If the County's broad interpretation of an improvement was applied in this case, the language in MCC § 3.48.005 related to fixtures and machinery would be rendered meaningless.

It is a cardinal rule of statutory construction that the courts are bound, if possible, to give effect to all parts of a statute, and no sentence, clause or word shall be construed as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute.

In re Ainoa, 60 Haw. 487, 490, 591 P.2d 607, 609 (1979); see also *Potter v. Hawaii Newspaper Agency*, 89 Hawai'i 411, 422, 974 P.2d 51, 62-63 (1999) ("Our rules of statutory construction require us to reject an interpretation of [a] statute that renders any part of the statutory language a nullity."). The term "improvements" still encompasses a variety of things and is not rendered

meaningless by our interpretation of MCC § 3.48.005.⁸ But here, it cannot apply to "machinery" which is specifically addressed as part of the "fixture" analysis.

We must therefore consider whether the wind turbines are the type of "machinery" that come within the parameters of "fixture" set forth in MCC § 3.48.005.

**3. The Wind Turbines Are Not "Fixtures" As Provided
In MCC § 3.48.005**

The relevant part of MCC § 3.48.005 related to "fixtures" provides that "real property" includes

any fixture which is erected on or affixed to such land, building structures, fences and improvements, including all machinery and other mechanical or other allied equipment and the foundations thereof, whose use thereof is necessary to the utility of such land, buildings, structures, fences, and improvements, or whose removal therefrom cannot be accomplished without substantial damage to such land, buildings, structures, fences, and improvements, excluding, however, any growing crops.

We first note that the parties have stipulated that the wind turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Kaheawa does not dispute that the concrete slabs are affixed to the land and that the slabs are thus part of the real property. Given these facts, the County contends, and Kaheawa does not raise any counter argument, that the turbines are affixed to the real property.

Thus, the wind turbines are "fixtures" and consequently "real property" in this case if: (1) the use of the wind turbines is necessary to the utility of the land, buildings, structures, fences, and improvements; or if (2) the removal of the wind

⁸ An "improvement" is broader than a "fixture." In general terms, a fixture by definition is an improvement to real property, but an improvement to real property need not be a fixture. Stated another way, a fixture is a former chattel which, while retaining its separate physical identity, is so connected with the reality [sic] that a disinterested observer would consider it a part thereof, whereas an improvement, after being installed, may not have an identity separate from the overall system or building in which it is located.

35A Am. Jur. 2d *Fixtures* § 2 (2001) (footnote omitted).

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

turbines cannot be accomplished without substantial damage to the land, buildings, structures, fences, and improvements. See MCC § 3.48.005.

The parties do not dispute that removal of the wind turbines can be accomplished without damage to the land or any structures or improvements. The parties have stipulated that the turbines and towers are bolted in place and that "[t]hey can be unbolted and removed without any harm to either the equipment or the land." Moreover, the County does not argue that there are any disputed facts indicating that damage would result from removal of the wind turbines. Thus, the wind turbines are *not* "fixtures" under that prong.

However, the parties dispute whether the wind turbines are "necessary to the utility of [the] land, buildings, structures, fences, and improvements[.]" The County argues that the land is in use as a wind farm, and the wind turbines are absolutely necessary to that utility. Kaheawa argues instead that the proper construction of MCC § 3.48.005 requires that the machinery be necessary to the general inherent utility of the land or realty. The MCC provides no guidance as to whether "utility" should be construed to mean general utility or utility that is specific to the particular business or use of land at the time. We therefore look to traditional common law "fixture" analysis for guidance. See *Peters v. Weatherwax*, 69 Haw. 21, 27, 731 P.2d 157, 161 (1987) ("[T]he interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter." (citation and internal quotation marks omitted)).

Traditional common law "fixture" analysis supports Kaheawa's assertion that the "utility" in question refers to the general inherent utility of the land or realty. The traditional common law test for determining whether an item of personal property has become a "fixture" requires three elements:

- (1) the actual or constructive annexation of the article to the realty,
- (2) the adaptation of the article to the use or purpose of that part of the realty with which it is connected, and
- (3) the intention of the party making the

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

annexation to make the article a permanent accession to the freehold.

35A Am. Jur. 2d *Fixtures* § 4 (emphasis added); see *Cartwright v. Widemann*, 9 Haw. 685, 690-91 (Haw. Kingdom 1892) superseded on other grounds, RLH § 8871 (1945), as recognized in *Hess v. Paulo*, 38 Haw. 279 (Haw. Terr. 1949); *Arizona Dep't of Revenue v. Arizona Outdoor Advertisers, Inc.*, 41 P.3d 631, 633-34 (Ariz. Ct. App. 2002); *Perez Bar & Grill v. Schneider*, 2012 WL 6105324, 2012-Ohio-5820, at ¶16 (Ohio Ct. App. 2012);⁹ 8 Richard R. Powell, *Powell on Real Property* § 57.05[2][a], at 57-29 (Michael Allen Wolf ed., 2012); 5 *Thompson on Real Property* § 46.01(e), at 710 (David A. Thomas & N. Gregory Smith eds., 2007).

For purposes of this case, in determining how to construe "utility" in MCC § 3.48.005, we focus on the second element of the traditional fixture test -- "the adaptation of the article to the use or purpose of that part of the realty with which it is connected[.]" Although we recognize that courts throughout the country are not consistent in how they view this part of the test, we believe the discussion in *Zangerle v. Republic Steel Corp.*, 60 N.E.2d 170 (Ohio 1945) most appropriately guides our decision in this case. In *Zangerle*, a company that operated steel plants challenged the tax assessment of machinery and equipment as improvements on the land rather than as personal property. *Id.* at 173. Addressing the second part of the traditional fixture test, the Ohio Supreme Court relied on the following:

The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises, or locus in quo. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this

⁹ Pursuant to the Ohio Supreme Court's "Supreme Court Rules for the Reporting of Opinions" (Rep.Op.R.), "[t]he Supreme Court hereby designates the Supreme Court website as the *Ohio Official Reports* for opinions of the courts of appeals and the Court of Claims as of July 1, 2012." Rep.Op.R. 3.2. Additionally, "[a]ll opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published." Rep.Op.R. 3.4. *Perez Bar & Grill*, decided on December 10, 2012, can be found on the Ohio Supreme Court website.

purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business which may be of a temporary duration, become subservient to the realty and acquire and retain its legal character.

Id. at 177 (citation and internal quotation marks omitted).

The principles discussed in *Zangerle* are consistent with the only Hawai'i case that appears to touch on this issue. In *Cartwright*, the Supreme Court of the Kingdom of Hawai'i held that machinery used as part of an iron works company (including lathes, an emery wheel, a drill press, a milling machine, a shaping machine and a grinding machine), most of which were fastened to the flooring of a building or overhead, were not fixtures. 9 Haw. at 688-89. The court noted that the machines were removable without injury to themselves or to the building. *Id.* at 689. Significantly, the court also stated that "moveable machines, whose number and permanency are contingent upon the varying conditions of the business differ from engines and boilers and other articles secured by masonry and designed to be permanent and indispensable to the enjoyment of the freehold." *Id.* at 691.

The principles in *Zangerle* have also been reaffirmed in more recent Ohio cases and recognized in a legal treatise. See *In re Jarvis*, 310 B.R. 330, 337-39 (Bankr. N.D. Ohio 2004) (relying on *Zangerle* and recognizing that chattel specific to the type of business conducted on the realty will retain its character as personal property); *Perez Bar & Grill*, 2012 WL 6105324, 2012-Ohio-5820, at ¶18 (quoting *Zangerle*); 8 Powell, *supra*, § 57.05[4][b], at 57-40 (citing *Zangerle* and stating that "[t]he distinction between chattel and realty should be acknowledged inasmuch as realty is capable of many varying uses and accordingly that which may be indispensable for one particular use may be dispensable for another[.]"); see also *Rothermich v. Union Planters Nat'l Bank*, 10 S.W.3d 610, 617 (Mo. Ct. App. 2000) (holding that a bowling alley's pin-setting machines were not fixtures and, as to the "adaptation" element in

the fixture test, "[t]he item in question should be peculiarly adapted to the real property or premises[]" and "[a]n item usable at other locations is not peculiarly adapted for use on the land in question[]").

The County concedes it knows of no case in which wind turbines like those in this case have been treated as real property. Kaheawa, however, notes that in *Energrey Enterprises, Inc. v. Oak Creek Energy Systems, Inc.*, 119 B.R. 739, 742 (E.D. Cal. 1990), a federal district court held that the towers, motors, machinery, turbines and other related articles of wind towers were *not* fixtures, whereas the foundations of the wind towers were fixtures. *Energrey Enterprises* dealt with whether a mechanic's lien existed, but the issue was resolved in part based on general fixture law and thus the case has persuasive value.

In this case, the wind turbines are only necessary to the utility of the land or realty given the particular business that Kaheawa is currently operating. The wind turbines are not accessory or useful to the land "whatever business may be carried on upon it[.]" *Zangerle*, 60 N.E.2d at 177. Thus the wind turbines are not "fixtures" and are not "real property."

We therefore agree with the Tax Appeal Court's ruling that the wind turbines are not "real property" under the MCC for purposes of the real property tax. Summary judgment in favor of Kaheawa on this issue was proper.

B. The MCC Provides No Time Limit In Which The County Must Make "Omitted Property" Assessments

In its cross-appeal, Kaheawa argues that the Tax Appeal Court erred in granting partial summary judgment to the County on the issue of the retroactive property assessments. As previously noted, the County issued amended notices of property assessment in 2010 for each of the years 2007, 2008, and 2009.

The parties do not dispute the County's position that while State property is not taxable under the MCC, the Property became taxable once it was leased by the State to Kaheawa. The parties have stipulated that the lease between the State and Kaheawa is dated January 19, 2005. Moreover, based on the

declaration and deposition testimony of Marcy Martin (Martin), the Property Technical Officer for the County's Real Property Tax Division, the lease was recorded and included in a disc of recorded documents that was provided to the County sometime in the early part of 2005. According to Martin, due to a backlog of documents and a lack of manpower, the County did not discover that the Property had become taxable until December 2008. Martin further attested that, once it was determined that the Property was taxable, the County sought to assess its value, requested information from Kaheawa which Kaheawa did not provide and which delayed the assessment, and the County ultimately assessed the Property based on a valuation manual.

Kaheawa contends on appeal that the Tax Appeal Court erroneously concluded that it was immaterial when the County discovered Kaheawa's lease of the Property, and relatedly, that the Tax Appeal Court erred in holding that the County had an unlimited time period in which to make "omitted property" assessments of the Property after the County discovered the omission. Kaheawa argues that the County had notice of the Property's non-exempt status upon receiving the disc containing a copy of the lease in 2005 and improperly failed to make an assessment until five years later. Kaheawa further points to Martin's deposition in which she testified that she and others in the tax division could see the wind turbines installed on the Property. Kaheawa urges that we interpret MCC § 3.48.165(A) (2014) as mandating the County to act *upon its discovery* of property that has been omitted from the assessment lists, such that the County's delinquent assessments for tax years 2007, 2008, and 2009 are illegal and void.

The County responds that Kaheawa's arguments fail because, under a proper reading of the relevant MCC provisions, there is no time limitation on adding omitted property to assessment lists and, even if there were such time limitations, the MCC provides that an untimely assessment is not illegal or invalid.

We need not and thus do not reach Kaheawa's argument that there is a genuine issue of material fact as to when the County discovered the lease, because we agree with the Tax Appeal Court's determination that the date the County discovered the lease is not a material fact in this case. The Tax Appeal Court was correct that under the MCC "there is not an express or implied time limitation on the County of Maui's ability to make real property tax assessments, and thus the County was legally entitled to make retroactive assessments of the subject property."

Pursuant to MCC § 3.48.135 (2014), each tax year the County prepares "from the records of taxable properties a list in duplicate of all assessments made[.]" MCC § 3.48.140 (2014) allows for changes in the assessment lists as follows:

3.48.140 Changes in assessment lists.

Except as specifically provided in this chapter, no changes in, additions to, or deductions from the real property tax assessments on the assessment lists prepared as provided in Section 3.48.135 shall be made except to add thereto property or assessments which may have been omitted therefrom[.]

(Emphasis added.)

MCC § 3.48.165(A) also addresses adding omitted property to assessment lists. This section provides in relevant part that, "if for any other reason any real property has been omitted from the assessment lists for any year or years, the director shall add to the lists the omitted property." (Emphasis added.)

MCC § 3.48.145 (2014) provides that assessments are valid even if not completed within the time required by law:

3.48.145 Validity of assessments.

No assessment or act relating to the assessment or collection of taxes under this chapter shall be illegal or invalidate such assessment, levy, or collection on account of mere informality, nor because the same was not completed within the time required by law[.]

A plain reading of the MCC provisions referenced above establishes that they expressly allow for the retroactive assessment of properties for taxing purposes, and they do not

contain a time limit in which the County can place "omitted property" on the assessment lists. See *Weinberg*, 82 Hawai'i at 322, 922 P.2d at 376; *Ross v. Stouffer Hotel Co. (Hawai'i)*, 76 Hawai'i 454, 461, 879 P.2d 1037, 1044 (1994) ("It is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning.").

Kaheawa, however, emphasizes the language in MCC § 3.48.165(A) that states that the County "shall add to the lists the omitted property[.]" and argues that once the real property tax division knew that the lease existed, and thus that the Property had become taxable, the County had a duty to put the Property on the assessment list in a timely manner. First, even assuming there was some time limit implied in MCC § 3.48.165(A), MCC § 3.48.145 explicitly states that an assessment is not illegal or invalid because it "was not completed within the time required by law[.]" Therefore, the date on which the County "discovered" the Property's non-exempt status is not material under the provisions of the MCC. Second, Kaheawa fails to cite authority that supports its position that a mandatory duty to add omitted property to assessment lists thereby creates a time limit under which delinquent actions are deemed illegal or void.

Kaheawa cites to *Jack Endo Electric Inc. v. Lear Siegler, Inc.*, 59 Haw. 612, 616, 585 P.2d 1265, 1269 (1978) and *Aspinwall v. Tanaka*, 9 Haw. App. 396, 404, 843 P.2d 145, 149 (1992) for the proposition that the County's failure to follow the mandate of MCC § 3.48.165(A) -- which Kaheawa circuitously alleges is to add the omitted property to assessment lists upon discovery of the lease -- "render[s] the proceeding to which it relates illegal and void." However, *Endo* and *Aspinwall* have no bearing here because neither case stands for the proposition that mandatory language in a statute somehow creates a time limit when no such time limit exists in the applicable statute.¹⁰

¹⁰ *Endo* and *Aspinwall* involved the interpretation of statutes that allegedly contained mandatory language and in each case the court noted that
(continued...)

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Based on our reading of the relevant MCC provisions, the County was authorized to retroactively assess the Property and there is no time limit delineated in the MCC in which the County must add omitted property to assessment lists.

We further recognize, however, that there may be circumstances in which retroactive tax assessments may violate constitutional rights. In a footnote in its reply brief, Kaheawa raised for the first time the argument that the retroactive imposition of taxes presents due process concerns, citing to *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) and *In re Tax Appeal of County of Maui v. KM Hawaii Inc.*, 81 Hawai'i 248, 915 P.2d 1349 (1999). Kaheawa does not indicate that it raised this issue in the Tax Appeal Court and clearly did not raise the issue in its opening brief on appeal. Thus, we could deem this argument waived. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) and (7). However, because it is a significant issue that bears addressing, we consider it here. See *Clark v. Arakaki*, 118 Hawai'i 355, 360 n.5, 191 P.3d 176, 181 n.5 (2008) (noting that despite violations of HRAP Rule 28, "because of the importance of the issue raised," the court would address the arguments on the merits).

As expressed by the United States Supreme Court in *McKesson* and reiterated by the Hawai'i Supreme Court in *KM Hawaii*:

[T]he retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased, though beyond some temporal point the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation," depending on "the nature of the tax and the circumstances in which it is laid."

¹⁰ (...continued)

"if the provision is mandatory, the failure to follow it will render the proceeding to which it relates illegal and void. If the provision is directory, however, the observance of the provision will not be necessary to the validity of the proceeding." *Endo*, 59 Haw. at 616, 585 P.2d at 1269; *Aspinwall*, 9 Haw. App. at 404, 843 P.2d at 149 (block quote format and brackets omitted).

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

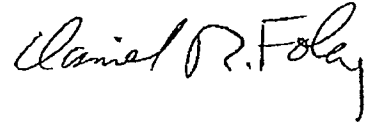
McKesson, 496 U.S. at 40 n.23 (citation omitted); *KM Hawaii*, 81 Hawai'i at 257 n.12, 915 P.2d at 1358 n.12 (citation omitted). In this case, the Property was retroactively assessed for tax purposes in 2010 going back to the tax years 2007, 2008, and 2009. The only harm that Kaheawa argues in this case resulting from the retroactive assessments was surprise, in that it had not planned for the taxes. Given these circumstances, Kaheawa has failed to present a basis for us to determine that the tax burden is "so harsh and oppressive as to transgress the constitutional limitation[.]" Therefore, Kaheawa's due process argument does not have merit in this case.

In sum, the Tax Appeal Court properly granted summary judgment to the County with regard to the retroactive assessments in this case.

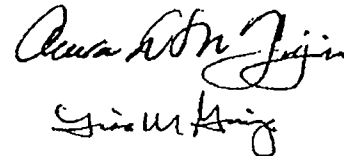
IV. Conclusion

Based on the foregoing, we affirm the Final Judgment issued on July 24, 2012, in the Tax Appeal Court of the State of Hawai'i.

Richard B. Rost
Deputy Corporation Counsel
County of Maui
for Appellee-Appellant/
Cross-Appellee



Ronald I. Heller
(Brian W. Tilker,
Austin F. McCullough
with him on the briefs)
(Torkildson Katz, Moore, Hetherington
& Harris)
for Taxpayer-Appellant-Appellee/
Cross-Appellant



Vito Galati
Christopher T. Goodin
(Cades Schutte LLP)
on the briefs for *Amici Curiae*
Auwahi Wind Energy LLC

Richard Wallsgrove
(Blue Planet Foundation)
on the briefs for *Amicus Curiae*
Blue Planet Foundation

Electronically Filed
Supreme Court
SCWC-12-0000728
19-FEB-2015
01:51 PM

SCWC-12-0000728

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Tax Appeal of
KAHEAWA WIND POWER, LLC,
Respondent/Taxpayer/Appellant-Appellee/Cross-Appellant,

vs.

COUNTY OF MAUI,
Petitioner/Appellee-Appellant/Cross-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000728; TX. NO. 10-1-1246 and Consolidated Cases TX
NOS. 10-1-1247, 10-1-1248, 10-1-1249 & 11-1-0035)

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Petitioner/Appellee-Appellant/Cross-Appellee County of
Maui's Application for Writ of Certiorari, filed on January 16,
2015, is hereby rejected.

DATED: Honolulu, Hawai'i, February 19, 2015.

Patrick K. Wong and
Richard B. Rost
for petitioner

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

Ronald I. Heller and
Brian W. Tilker
for respondent

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson



April 4, 2013

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Board of Review for the County of Maui
County of Maui Service Center
70 East Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

Vito Galati
Direct Line: (808) 521-9347
Direct Fax: (808) 540-5074

Christopher T. Goodin
Direct Line: (808) 521-9296
Direct Fax: (808) 540-5090
E-mail: cgoodin@cades.com

Certified Article Number

7196 9008 9111 2936 5089

SENDERS RECORD

Re: Auwahi Wind Energy LLC; 2013-2014 Real Property Tax Appeal;
TMK No. (2) 1-9-001-006

Dear Ladies and Gentlemen:

This office represents Auwahi Wind Energy LLC ("Auwahi") in the above-referenced real property tax appeal. See attached Ex. 1 ¶ 2 (Asay declaration). Auwahi hereby submits its notice and receipt of real property tax appeal, which is attached as Exhibit 2. Also attached are a check for \$75.00 to the County of Maui ("County"), see Ex. 3, and a self-addressed stamped envelope for the return of a copy of the processed notice and receipt of real property tax appeal, see Ex. 4.

The crux of this appeal is that the County has incorrectly classified wind turbines and towers ("Turbines") located at Auwahi's wind farm as "real property" and assessed the land value at \$449,400 and the building value at \$84,766,300, for a total assessed value of \$85,215,700. Of the \$84,766,300 building value, \$84,173,200 is attributable to the Turbines. Ex. 1 at 5; Ex. 5 at 2 (4/1/13 County appraisal document). As detailed below, the State of Hawai'i Tax Appeal court has already ruled that wind Turbines are not "real property" under the Maui County Code ("MCC"). Ex. 6 at 2 (4/9/12 order). Nor are they "real property" under Hawai'i Constitution, which generally only allows the County to tax "real property." For these reasons, as well as any other reasons raised prior to or at any hearing in this matter, Auwahi respectfully asks the Board of Review to reduce the assessed building value to \$593,100, for a total assessed value of not more than \$1,042,500.

ENCLOSURE 7

Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Tel: 808.521-9200
Fax: 808.521-9210
www.cades.com

Kona Office
25-170 Hualalai Road, Suite B-303
Kailua Kona, Hawaii 96740
Tel: 808.329-5811
Fax: 808.376-1175

I. BACKGROUND

The property at issue in this appeal (the “Property”) is located at Ulupalakua Ranch on the southeast coast of Maui. Ex. 1 ¶ 3 (Asay declaration). The Property is leased by Auwahi from Ulupalakua Ranch, Inc. Ex. 7 (lease); Ex. 8 (assignment of lease). Under the lease, Auwahi is required to pay certain real property taxes for the Property and the term of the Lease is greater than fifteen years. Ex. 7 at 4–5 (§ 6), 9 (¶ 11.1). Accordingly, Auwahi has the right to appeal the assessment. See MCC §§ 3.48.150(A), 3.48.600; Hawai‘i Revised Statutes (“HRS”) § 232-1.

At the Property, Auwahi is engaged in the business of using wind power to produce electricity, which is sold to Maui Electric Company Limited. Ex. 1 ¶ 4. The wind farm’s eight wind turbines generate enough electricity to power approximately 10,000 typical Maui homes and help the State of Hawai‘i to reach its goal of securing 40% of its electricity from renewable sources by 2030. *Id.*; HRS § 269-92(a)(4); see also 2009 Haw. Sess. L. Act 155, § 10. In line with its renewable energy goals, the State of Hawai‘i has given another wind farm on Maui a capital goods excise tax credit for the Turbines because it found the Turbines to qualify as “tangible personal property.” Ex. 9 at 5 (¶ 21) (stipulation of facts in the case of *In re Appeal of Kaheawa Wind Power, LLC*, T.A. No. 10-1-1246 (the “Kaheawa case”)). Auwahi expects to be eligible to claim the credit with its 2012 Hawai‘i income tax return, which will be filed later this year, because the Turbines qualify as “tangible personal property.” Ex. 1 ¶ 4.

The County, however, has taken a different view. For tax year 2013, the County has classified Auwahi’s wind turbines and towers as “real property” and assessed the building value at \$84,766,300. *Id.* ¶ 5. Of that amount, \$84,173,200 is attributable to the Turbines. *Id.* Auwahi disputes, among other things, the County’s classification and asserts that the Turbines are personal property, not real property, for taxation purposes.

II. THE STATE TAX APPEAL COURT HAS CONCLUDED THAT TURBINES ARE NOT “REAL PROPERTY” UNDER THE MCC.

In deciding this issue, the Board of Review will not be writing on a blank slate. Just last year, the Tax Appeal Court¹ concluded that wind Turbines do not qualify

¹ The Tax Appeal Court is authorized to review the Board of Review’s decisions. See MCC §§ 3.48.595, 3.48.650(A); HRS § 232-17.

as “real property” under the MCC. Specifically, the Court ruled that, “as a matter of law, the towers and turbines which are located on the subject property are not within the definition of ‘real property’ for purposes of the real property tax.” Ex. 6 at 2 (4/9/12 order in the *Kaheawa* case) (emphasis in original).

The Tax Appeal Court’s reasoning is straightforward:

1. The Turbines are “machinery” or “equipment.”
2. For “machinery” or “equipment” to qualify as “real property” under the MCC, it must either be (a) not removable without “substantial damage to [the] land” or (b) “necessary to the utility of [the] land.” MCC § 3.48.005(B).² In light of this provision, the

² MCC § 348.005(B) (“‘Property’ or ‘real property’ means and includes all land and appurtenances thereof and the buildings, structures, fences, and improvements erected on or affixed to the same, and any fixture which is erected on or affixed to such land, building structures, fences and improvements, including all machinery and other mechanical or other allied equipment and the foundations thereof, whose use thereof is necessary to the utility of such land, buildings, structures, fences, and improvements, or whose removal therefrom cannot be accomplished without substantial damage to such land, buildings, structures, fences, and improvements, excluding, however, any growing crops.” (emphasis added)).

The Maui County Council subsequently amended this definition to include, among other things, “wind energy conversion property,” such as “wind turbine, tower and electrical equipment.” Maui County Ordinance No. 4013 § 1 (2013). The amendment, however, does not take effect until assessment year 2014, *see id.* § 3, so it has no application in this matter which concerns assessment year 2013. Further, the County Council cannot change the intent behind the applicable version of the ordinance through a subsequent amendment that does not have retroactive effect. *See State v. Dudoit*, 90 Hawai‘i 262, 268 n.3, 978 P.2d 700, 706 n.3 (1999) (“The legislature cannot change the intent behind a statute through subsequent amendments that do not have retroactive effect.”); *Rees v. Carlisle*, 113 Hawai‘i 446, 452, 153 P.3d 1131, 1137 (2007) (“When interpreting a municipal ordinance, we apply the same rules of construction that we apply to statutes.”). Moreover, the fact that the County Council found it necessary to amend the definition to include wind turbines and towers shows that the applicable version of the MCC may be ambiguous as to whether turbines and towers qualify as “real property.” As explained below in Section III, point 5, any such ambiguity must be construed in

Tax Appeal Court focused on “the particular phrase relating to machinery and equipment.” Ex. 10 at 57:8–9 (2/13/12 Tr.).

3. The Turbines are merely bolted in place and may thus be removed without substantial damage to the land. As the Tax Appeal Court put it, the Turbines are “virtually completely removable.” *Id.* at 56:3.
4. The Turbines are not necessary to the utility of the land because, if the land were used for anything but a wind farm, the turbines would simply get in the way. As the Tax Appeal Court explained: “[W]hen we talk about utility of [the] land, we are talking about the general inherent utility of the land and what it can be used for, whether it’s a pineapple cannery or a commercial business or commercial space leasing business. I think we have to look at the general utility of the land rather than the specific chosen use of the taxpayer” *Id.* at 57:11–18.
5. Thus, the Turbines do not constitute “real property” under the MCC. *Id.* at 58:4–7; Ex. 6 at 2 (4/9/12 order).³

The Tax Appeal Court does not stand alone. Its decision is in line with what appears to be the only published case in the country to address whether wind Turbines qualify as “real property.” In the case of *In re Oak Creek Energy Farms, Ltd.*,⁴ the court held that wind turbines and towers used on a wind farm did not

favor of the taxpayer. Finally, Auwahi specifically reserves the right to challenge the applicability and constitutionality of any real property tax imposed pursuant to the amended ordinance for assessment year 2014.

³ The Tax Appeal Court’s ruling is presently pending on appeal before the Hawai’i Intermediate Court of Appeals, which has yet to issue a decision in the case. In the case before the intermediate court of appeals, Auwahi submitted a brief explaining why the Tax Appeal Court correctly concluded that Kaheawa’s Turbines do not qualify as “real property.”

⁴ 107 B.R. 266 (Bankr. E.D. Cal. 1989), *aff’d*, 107 B.R. 266 (E.D. Cal. 1989), *aff’d*, No. 90-16559, 1992 U.S. App. LEXIS 3529 (9th Cir. Mar. 4, 1992).

qualify as “fixtures,” “improvements,” or “real property” under a mechanic’s lien statute. The court reasoned that the towers and turbines were not intended to be permanent, as there was no evidence that “they were to remain upon one cement block foundation, never to be repaired by being disassembled.” 107 B.R. at 269. Further, “the very nature of the turbines’ function dictated that they be movable” for purposes of the electricity-generation business in the event that the wind conditions changed in the area. 1992 U.S. App. LEXIS 3529, at *2. Also, “[i]t was certainly implied that the towers would be removed or dismantled for repair situations.” 107 B.R. at 270.

The Tax Appeal Court’s decision also fits into the broader context of judicial decisions finding that the following articles do not qualify as “real property” or “fixtures” to real property: “kilns on concrete slabs, an oxygen furnace used for the manufacture of steel, a caging system for an egg production facility, a hydraulic boat lift that rests on the floor of a harbor channel, and a radio transmission tower.” *Jarvis v. Wells Fargo Fin. (In re Jarvis)*, 310 B.R. 330, 338 (Bankr. N.D. Ohio 2004) (collecting cases; citations omitted).

III. AUWAHI’S TURBINES ARE NOT “REAL PROPERTY” UNDER THE MCC.

Just like the Turbines in the *Kaheawa* case and the *Oak Tree* case, Auwahi’s Turbines do not qualify as “real property.” Specifically:

1. Auwahi’s Turbines are “machinery” or “equipment.” Ex. 1 ¶ 6 (Asay declaration).
2. Auwahi’s turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Auwahi’s Turbines can be unbolted and removed without any harm to either the equipment or the land. *Id.* ¶ 7.
3. Auwahi’s Turbines are not necessary to the utility of the land. *Id.* ¶ 8.
 - a. The Turbines could only be used for the particular business of a wind farm. They are devoted entirely to the business conducted on the property. The Turbines are not integrated with and of permanent utility to the land regardless of future use. *Id.* ¶ 9.

- b. In fact, if the land were devoted to any use other than the electricity-generation business, the Turbines would simply get in the way. The Turbines would have no significant value to someone other than another wind farmer. If some other business were to use the Turbines, the cost to operate and maintain them would be much too high to make economic sense. Further, because wind conditions can vary, sometimes unpredictably, the Turbines cannot guaranty a steady flow of electrical power. At times, due to either lack of wind or wind in excess of the Turbines' maximum capacity, the Turbines have to be shut down. Thus, if someone wanted to use the Turbines as a source of electrical power to be used on the Property itself, the Turbines would not be a reliable source of continuous and steady power. *Id.* ¶ 10.
4. On top of that, Auwahi's Turbines are not "real property" for the additional reason that they were not intended to be permanent additions to the land. *Id.* ¶ 11.
 - a. As noted, the Turbines were installed with a view of serving a business purpose, not with a view of permanence. *Id.* ¶ 9.
 - b. The very nature of the Turbines' function requires that they be movable for purposes of the electricity-generation business in the event that the wind conditions changed in the area. Auwahi expects to repair, modify, or possibly upgrade the Turbines for its business. *Id.* ¶ 12; Ex. 7 at 2 (§ 2(a)) (lease).
 - c. The Turbines can be unbolted and removed without any harm to either the equipment or the land. The reason the Turbines are bolted to concrete foundations is to stabilize the Turbines for use in the wind-farm business. The Turbines were not built on-site from construction blueprints. Instead, they were purchased as commercially available hardware with some assembly required. The turbines came with an instruction booklet from the

manufacturer. Auwahi did not have to obtain a building permit, or submit plans and drawings, for the Turbines. Ex. 1 ¶¶ 7, 13 (Asay declaration).

- d. Under Auwahi's lease, Auwahi may remove the Turbines at any time. Ex. 7 at 8 (§ 9) (lease). And, upon termination of the lease, Auwahi must remove the Turbines from the premises. *Id.* at 28 (§ 19.6).
5. Any uncertainty as to whether the Turbines qualify as "real property" must be resolved in favor of Auwahi.
 - a. If the MCC is found to be ambiguous as to whether Turbines qualify as "real property," the MCC must be construed in favor of the taxpayer. *See In re Appeal of Hawaiian Tel. Co.*, 61 Haw. 572, 578, 608 P.2d 383, 388 (1980).
 - b. Under property law, if there is any doubt as to whether personal property has become real property, the article must be deemed personal property. *See Jarvis*, 310 B.R. at 338–39. So, if there is any doubt, it must be resolved in favor of concluding that the Turbines are personal property.
 6. Finally, concluding that the Turbines are personal property, and not real property, promotes uniformity and consistency in the tax laws, given that the state and federal taxing authorities have already so concluded.
 - a. The United States Internal Revenue Service has accepted the classification of wind turbines as tangible personal property for purposes of energy credits and depreciation methods. *See* 26 U.S.C. §§ 48(a)(3) (energy credit), 168(e)(3)(B)(iv) (depreciation) (Internal Revenue Code); IRS Private Letter Ruling 9007042, 1989 PLR LEXIS 3612, at *8 (Nov. 1, 1989).

- b. The State of Hawai'i Department of Taxation classifies the Turbines as personal property. In fact, the State approved another Maui wind farm's claim for a capital good excise tax credit under HRS § 235-110.7(e) with respect to its Turbines because it found the Turbines to qualify as "tangible personal property," Ex. 9 at 5 (¶ 21) (stipulation of facts in the *Kaheawa* case), and Auwahi expects to receive this credit when it submits its 2012 tax return later this year, Ex. 1 ¶ 4 (Asay declaration). According to the State, "all property in the nature of machinery (other than structural components of a building or other inherently permanent structure) shall be considered tangible personal property even though located outside a building. For example, a gasoline pump, hydraulic car lift, or automatic vending machine, although annexed to the ground, shall be considered tangible personal property." Hawai'i Administrative Rules § 18-235-110.7-04(b)(2). Similar to "production machinery" and "hydraulic car lift[s]," the Turbines, "although [bolted] to the ground, [should] be considered tangible personal property." *See id.* The Turbines are not "inherently permanent structures." *See id.*
- c. Consistent with the views of the state and federal taxing authorities, the Turbines remain "personal property" and have not been converted to "real property."

IV. THE TURBINES ARE NOT "REAL PROPERTY" UNDER THE HAWAII CONSTITUTION.

The assessment is not only invalid under the MCC, but also under the Hawai'i Constitution. Article III, Section 3 of the Hawai'i Constitution grants the County authority to tax "real property" and matters specifically delegated by the legislature. All remaining taxing authority is reserved to the State.⁵ For the reasons

⁵ Haw. Const. Art. VIII, § 3 ("The taxing power shall be reserved to the State, except so much thereof as may be delegated by the legislature to the political subdivisions, and except that all functions, powers and duties relating to the taxation of real property shall be exercised exclusively by the counties . . .").

already stated, the Turbines do not qualify as “real property.” Because the Turbines are not “real property” and the assessment imposes taxes on the Turbines as “real property,” it follows that the assessment is illegal under the Hawai‘i Constitution. *Cf. State v. Medeiros*, 89 Hawai‘i 361, 370, 973 P.2d 736, 745 (1999) (“Because the state has not empowered the city to impose such a tax, the ordinance was invalid.”).

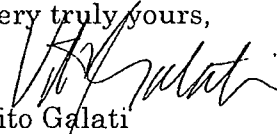
V. THE REAL PROPERTY ASSESSMENT VALUE SHOULD BE REDUCED TO NOT MORE THAN \$1,042,500.

Based on the County’s erroneous classification of the Turbines as well as any other errors shown prior to or at any hearing before the Board of Review:

1. The total assessment value exceeds more than twenty percent of the total market value of the “real property.” The County assessed the total value of the Property at \$85,215,700, made up of a land value of \$449,400 and a building value of \$84,766,300. Of the building value, \$84,173,200 is attributable to the Turbines. Ex. 1 ¶ 5; Ex. 5 at 2 (4/1/13 County appraisal document). When the Turbines’ value is removed from the equation, the correct total assessment value of the “real property” is not more than \$1,042,500 for the 2013 tax year. *See* MCC § 3.48.605(A); HRS § 232-3(1).
2. The assessment creates a lack of uniformity or inequality, brought about by inability of the methods used or error in the application of the methods to the property involved. *See* MCC § 3.48.600(B); HRS § 232-3(2).
3. The assessment is illegal based at least on the MCC and the Constitution of the State of Hawai‘i. *See* MCC § 3.48.600(D); HRS § 232-3(4).

Auwahi reserves the right to submit additional evidence and argument prior to or at any Board of Review hearing. *See* MCC § 3.48.655(C); Board of Review Rules § 5-203-18(d); HRS § 232-15.

Very truly yours,



Vito Galati
Christopher T. Goodin
for
CADES SCHUTTE
A Limited Liability Law Partnership

Attached Exhibits:

1. 4/4/13 Declaration of James Asay (two copies)
2. Notice and receipt of real property tax appeal (two copies)
3. Check for \$75.00 to the County of Maui
4. Self-addressed stamped envelope
5. 4/1/13 Commercial / Industrial Review Document, Maui, HI, for No. 1-9-001-006-0000, provided by Lewis dela Cruz, Real Property Tax Appraiser for the County of Maui (two copies)
6. 4/9/12 order in the case of *In re Appeal of Kaheawa Wind Power, LLC*, T.A. No. 10-1-1246 (Tax Appeal Court of the State of Hawai'i) (two copies)
7. 6/29/06 Lease Agreement by and between Ulupalakua Ranch, Inc. and Shell WindEnergy, Inc. (two copies)
8. 10/21/08 Assignment of Lease by and between Shell WindEnergy and Auwahi Wind Energy LLC (two copies)
9. 12/1/11 Stipulation of Facts in the case of *In re Appeal of Kaheawa Wind Power, LLC*, T.A. No. 10-1-1246 (Tax Appeal Court of the State of Hawai'i) (two copies without exhibits)
10. 2/13/12 transcript of proceedings in the case of *In re Appeal of Kaheawa Wind Power, LLC*, T.A. No. 10-1-1246 (Tax Appeal Court of the State of Hawai'i) (two excerpted copies)

IN THE BOARD OF REVIEW OF THE COUNTY OF MAUI

In the Matter of the Tax Appeal of
AUWAHI WIND ENERGY LLC,
Taxpayer/Appellant,
vs.
COUNTY OF MAUI,
Appellee.

DECLARATION OF JAMES R. ASAY

I, James R. Asay, hereby declare as follows:

1. I am a Senior Tax Manager of Sempra Energy, a parent company of Auwahi Wind Energy LLC (“Auwahi”), and make this declaration in support of Auwahi’s real property tax appeal.
2. Auwahi has authorized the law firm of Cades Schutte LLP to represent Auwahi before the Board of Review in connection with the above appeal for the 2013 tax year.
3. The property at issue in this appeal with Tax Map Key No. (2) 1-9-001-006 (the “Property”) is located at Ulupalakua Ranch on the southeast coast of Maui.
4. At the Property, Auwahi is engaged in the business of using wind power to produce electricity, which is sold to Maui Electric Company Limited. The wind farm’s eight wind turbines generate enough electricity to power approximately 10,000 typical Maui homes and help the State of Hawai’i to reach its goal of securing 40% of its electricity from renewable sources by 2030. Auwahi expects to be

EXHIBIT 1

eligible to claim a capital goods excise tax credit for its Turbines with its 2012 Hawai'i income tax return, which will be filed later this year, because the Turbines qualify as "tangible personal property."

5. For the tax year 2013, the County has classified Auwahi's wind turbines and towers as "real property." The total assessed building value was \$84,766,300. Of that amount, \$84,173,200 was attributable to the Turbines. Attached to the letter from Vito Galati and Christopher T. Goodin to the Board of Review (the "Letter") as Exhibit 5 are two true and correct copies of a document entitled Commercial / Industrial Review Document, Maui HI for No. 1-9-001-006-0000 dated April 1, 2013. I received the document from Lewis dela Cruz, a Real Property Tax Appraiser for the County, by e-mail on April 1, 2013.

6. Auwahi's Turbines are machinery and equipment.

7. Auwahi's turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Auwahi's Turbines can be unbolted and removed without any harm to either the equipment or the land.

8. Auwahi's Turbines are not necessary to the utility of the land.

9. The Turbines could only be used for the particular business of a wind farm. They are devoted entirely to the business conducted on the property. The Turbines are not integrated with and of permanent utility to the land regardless of future use.

10. If the land were devoted to any use other than the electricity-generation business, the Turbines would simply get in the way. The Turbines would have no

significant value to someone other than another wind farmer. If some other business were to use the Turbines, the cost to operate and maintain them would be much too high to make economic sense. Further, because wind conditions can vary, sometimes unpredictably, the Turbines cannot guaranty a steady flow of electrical power. At times, due to either lack of wind or wind in excess of the Turbines' maximum capacity, the Turbines have to be shut down. Thus, if someone wanted to use the Turbines as a source of electrical power to be used on the Property itself, the Turbines would not be a reliable source of continuous and steady power.

11. Auwahi's Turbines were not intended to be permanent additions to the land.

12. The very nature of the Turbines' function requires that they be movable for purposes of the electricity-generation business in the event that the wind conditions changed in the area. Auwahi expects to repair, modify, or possibly upgrade the Turbines for its business.

13. The reason the Turbines are bolted to concrete foundations is to stabilize the Turbines for use in the wind-farm business. The Turbines were not built on-site from construction blueprints. Instead, they were purchased as commercially available hardware with some assembly required. The turbines came with an instruction booklet from the manufacturer. Auwahi did not have to obtain a building permit, or submit plans and drawings, for the Turbines.

14. Attached to the Letter as Exhibit 7 are two true and correct copies of a Lease Agreement dated June 29, 2006, by and between Ulupalakua Ranch, Inc. and Shell WindEnergy, Inc.

15. Attached to the Letter as Exhibit 8 are two true and correct copies of an Assignment of Lease dated October 21, 2008, by and between Shell WindEnergy and Auwahi Wind Energy LLC.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: San Diego, California, April __, 2013.

JAMES R. ASAY

IN THE BOARD OF REVIEW OF THE COUNTY OF MAUI

In the Matter of the Tax Appeal of
AUWAHI WIND ENERGY LLC,
Taxpayer/Appellant,
vs.
COUNTY OF MAUI,
Appellee.

DECLARATION OF JAMES R. ASAY

I, James R. Asay, hereby declare as follows:

1. I am a Senior Tax Manager of Sempra Energy, a parent company of Auwahi Wind Energy LLC (“Auwahi”), and make this declaration in support of Auwahi’s real property tax appeal.
2. Auwahi has authorized the law firm of Cades Schutte LLP to represent Auwahi before the Board of Review in connection with the above appeal for the 2013 tax year.
3. The property at issue in this appeal with Tax Map Key No. (2) 1-9-001-006 (the “Property”) is located at Ulupalakua Ranch on the southeast coast of Maui.
4. At the Property, Auwahi is engaged in the business of using wind power to produce electricity, which is sold to Maui Electric Company Limited. The wind farm’s eight wind turbines generate enough electricity to power approximately 10,000 typical Maui homes and help the State of Hawai’i to reach its goal of securing 40% of its electricity from renewable sources by 2030. Auwahi expects to be

eligible to claim a capital goods excise tax credit for its Turbines with its 2012 Hawai'i income tax return, which will be filed later this year, because the Turbines qualify as "tangible personal property."

5. For the tax year 2013, the County has classified Auwahi's wind turbines and towers as "real property." The total assessed building value was \$84,766,300. Of that amount, \$84,173,200 was attributable to the Turbines. Attached to the letter from Vito Galati and Christopher T. Goodin to the Board of Review (the "Letter") as Exhibit 5 are two true and correct copies of a document entitled Commercial / Industrial Review Document, Maui HI for No. 1-9-001-006-0000 dated April 1, 2013. I received the document from Lewis dela Cruz, a Real Property Tax Appraiser for the County, by e-mail on April 1, 2013.

6. Auwahi's Turbines are machinery and equipment.

7. Auwahi's turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Auwahi's Turbines can be unbolted and removed without any harm to either the equipment or the land.

8. Auwahi's Turbines are not necessary to the utility of the land.

9. The Turbines could only be used for the particular business of a wind farm. They are devoted entirely to the business conducted on the property. The Turbines are not integrated with and of permanent utility to the land regardless of future use.

10. If the land were devoted to any use other than the electricity-generation business, the Turbines would simply get in the way. The Turbines would have no

significant value to someone other than another wind farmer. If some other business were to use the Turbines, the cost to operate and maintain them would be much too high to make economic sense. Further, because wind conditions can vary, sometimes unpredictably, the Turbines cannot guaranty a steady flow of electrical power. At times, due to either lack of wind or wind in excess of the Turbines' maximum capacity, the Turbines have to be shut down. Thus, if someone wanted to use the Turbines as a source of electrical power to be used on the Property itself, the Turbines would not be a reliable source of continuous and steady power.

11. Auwahi's Turbines were not intended to be permanent additions to the land.

12. The very nature of the Turbines' function requires that they be movable for purposes of the electricity-generation business in the event that the wind conditions changed in the area. Auwahi expects to repair, modify, or possibly upgrade the Turbines for its business.

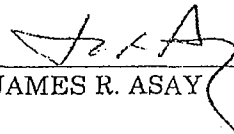
13. The reason the Turbines are bolted to concrete foundations is to stabilize the Turbines for use in the wind-farm business. The Turbines were not built on-site from construction blueprints. Instead, they were purchased as commercially available hardware with some assembly required. The turbines came with an instruction booklet from the manufacturer. Auwahi did not have to obtain a building permit, or submit plans and drawings, for the Turbines.

14. Attached to the Letter as Exhibit 7 are two true and correct copies of a Lease Agreement dated June 29, 2006, by and between Ulupalakua Ranch, Inc. and Shell WindEnergy, Inc.

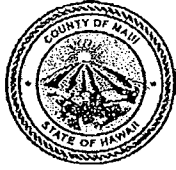
15. Attached to the Letter as Exhibit 8 are two true and correct copies of an Assignment of Lease dated October 21, 2008, by and between Shell WindEnergy and Auwahi Wind Energy LLC.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: San Diego, California, April 4, 2013.



JAMES R. ASAY



County of Maui - Department of Finance
Real Property Tax Division
Service Center, Suite A16
70 E. Kaahumanu Avenue, Kahului, HI 96732
(808) 270-7297 Fax (808) 270-7884

APPEAL INSTRUCTIONS AND FORM

INSTRUCTIONS FOR FILING AN APPEAL WITH THE BOARD OF REVIEW

1. Complete form DFT-595 *Taxpayer's Notice and Receipt of Real Property Tax Appeal*. Keep a copy of your completed form for your records. Read and follow instructions carefully. Incomplete notices of appeal shall not be filed or accepted by the board. (Chapter 203 Rules of Procedure and Forms for the Board of Review)
2. Enter the tax map key and land classification found on the assessment notice. A separate appeal must be filed for each land classification under appeal.
3. Enter the assessment year under appeal. (See Maui County Code 3.48.595)
4. Enter the appellant's name, mailing address and phone number(s). If the appellant has a contractual obligation to pay the property tax, the appellant must submit proof of such obligation with the appeal. The appeal form must be signed by the appellant or his representative. Any person representing an appellant must have a letter of authorization.
5. To indicate the basis for the appeal, check off the appropriate ground(s) of appeal. Evidence used to support the ground(s) of appeal such as an appraisal report, sales contract, construction cost estimate, etc. should be submitted with this form.
6. If appealing the assessed valuation, enter the appellant's opinion of value.
7. Two complete sets of your evidence and appeal form must be provided.
8. At the time of filing, the fee of \$75.00 must be submitted with each appeal. Do not send cash. Checks should be made payable to the County of Maui. If for any reason, the filing fee is not included with your appeal, (this includes checks that are non-negotiable due to being stale-dated, post-dated, or unsigned, etc.) your appeal will not be filed or accepted by the board. (Chapter 203 Rules of Procedure and Forms for the Board of Review)
9. The 2013 appeal deadline is Tuesday, April 9, 2013. If the appeal is delivered in person, the Real Property Tax Division must receive the appeal form by 4:00 p.m., April 9, 2013. If the appeal is mailed, it must be postmarked on or before, April 9, 2013. To ensure your application is received, we recommend mailing this application via certified mail with return receipt requested along with a self-addressed stamped envelope for the return of a copy of your processed application for your records. One application per envelope.
10. The Board of Review Address is: Board of Review, County of Maui Service Center, 70 E. Kaahumanu Avenue, Suite A16, Kahului, HI 96732.
11. Even though there is an appeal pending, you must pay all taxes by the due dates or penalty and interest will be charged. Should you be successful in your appeal, any overpayment in taxes will be refunded to you as soon as procedurally possible.
12. Notification of the hearing date will be sent by certified mail. Notify the Real Property Tax Division if any of the appellant's information requires updating.

BOARD OF REVIEW FOR THE COUNTY OF MAUI

#

TAXPAYER'S NOTICE AND RECEIPT OF REAL PROPERTY TAX APPEAL

The cost to be deposited by the taxpayer on appeal to the Board of Review shall be \$75 for each real property tax appeal.

ZONE	SEC.	PLAT	PAR.	CPR
1	9	001	006	0000
GENERAL LAND CLASS		Agricultural		

Two complete sets of your evidence & appeal must be provided.

Notice is hereby given that Auwahi Wind Energy LLC
(Name of Taxpayer) (Print or Type)
 whose mailing address is 910 Louisiana Street, Houston, Texas 77002 hereby
 appeals the assessment made for the purpose of real property taxation for the year 2013 identified by the above tax key.

(Must be filled in if appealing assessed value)

What is your opinion of total assessment value?
 Total \$ 1,042,500.00

(For Official Use)

County's total assessment value
 Total \$ _____

(For Official Use)

Please indicate your ground(s) of appeal (must select at least one)
 See Maui County Code 3.48.605

- My opinion of total assessment value is more than 20 percent below the County's total assessment value.
- There is a lack of uniformity or inequality, brought about by inability of the methods used or error in the application of the methods to the property involved.
- You have been denied an exemption to which you are entitled. Please indicate your opinion of the exemption amount \$ _____ and type of exemption _____
- The assessment methods are unconstitutional or in violation of State laws or County ordinances.
- The General Land Class is incorrect. Please indicate your opinion of general land class. _____

Remarks:

The letter from Vito Galati and Christopher T. Goodin to the Board of Review attached herewith is incorporated by reference as if fully set forth herein.

Taxpayer Checklist
Filled All Required Fields
Included 2 complete sets of evidence & appeal form
Included check for \$75 payable to: County of Maui
Signed form & entered contact information

Received/Time stamped By: _____
 Entered By: _____ Date: _____

Signed: *Vito Galati* Dated: 04/04/13
 Print Name: Vito Galati
 Address* 1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813
*address required if the appeal is signed by a representative
 Email Address: vgalati@cades.com
 I can best be contacted at:
 Telephone: (808) 521-9347 H W C
 Local Contact: (808) 521-9347 H W C

SEE INSTRUCTIONS - ALL HIGHLIGHTED FIELDS MUST BE FILLED TO SUBMIT APPEAL

04/04/13
00021418 County of Maui

CADES SCHUTTE LLP
No. 60698

DATE	INVOICE NO.	MATTER NO.	REFERENCE	AMOUNT
04/04/13	19342	22482-0004	Filing fee re: Tax Appeal	75.00

TOTAL: 75.00

CADES SCHUTTE LLP
1000 BISHOP STREET, 12TH FLOOR
P.O. BOX 939
HONOLULU, HAWAII 96808

Main Office
FIRST HAWAIIAN BANK
Honolulu, Hawaii
59-101
1213

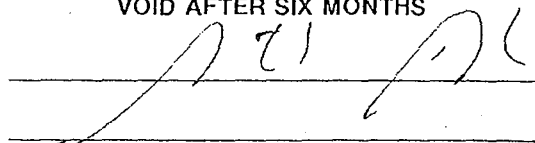
No. 60698
04/04/13

PAY Seventy-Five Dollar(s) and 00 cents

\$75.00

TO
THE
ORDER
OF
County of Maui

CLIENT COST ADVANCE
VOID AFTER SIX MONTHS



Counter signature required if over \$500.00

⑈060698⑈ ⑆⑆2⑆30⑆0⑆5⑆ 0⑆⑆32954⑈



NO POSTAGE STAMP NECESSARY
POSTAGE HAS BEEN PREPAID BY

ca des · schutte

a limited liability law partnership

1000 Bishop Street, Suite 1200
Honolulu, HI 96813-4212

TO

Vito Galati
Christopher T. Goodin
Cades Schutte
A Limited Liability Law Partnership
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

22482-4

APR 01, 2013
02:40 PM

COMMERCIAL / INDUSTRIAL REVIEW DOCUMENT
MAUI, HI

PAGE: 1
CA321

1-9-001-006-0000

ALT ID:
MAP/ROUTE HAN

CARD 1 OF 1
FIELD REVIEW FLAG ()

TIEBACK:

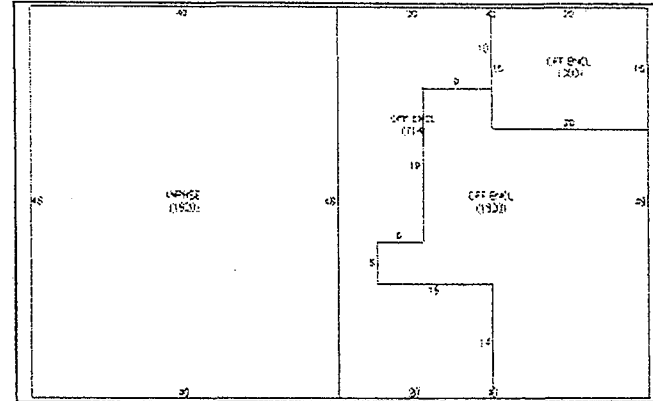
TAX CODE 5 ZONING A/51/60 X TAX DIST MAUI COUNTY OF MAUI
ADDRESS 20100 PIILANI HWY

NBHD 1242-5 RESTRICTIONS L /Lewis /
LUC 500 --O W N E R S H I P D A T A-- S A L E S D A T A--
LVG UNIT ULUPALAKUA RANCH INC DATE TYPE PRICE S V
CLASS 5 02/09/12
BOOK/PAGE: HC 1 BOX 901 11/28/09 1,290
10/21/08
06/29/06
KULA HI 96790 9302

----- PROPERTY FACTORS -----
TOPO 1/ / LEVEL / /
UTIL 8/ / NONE / /
ST/RD 1/ CONCRETE /
TRAFFIC 1 GOOD ACCESS

-----ENTRANCE INFORMATION-----
DATE CD INFO CD ID
01/18/13 P1 7 LC
07/19/12 P1 5 LC
02/29/88 R3 3 006

----- LOCATION FACTORS -----
FRONTING DD Agricultural dedication 3.48.350
LOCATION C CRITHAB LAND ADJ %
PARKING TYPE QUANTITY PROXIMITY
AVAIL / /
PARCEL HAS NON GOVTCONSERVATION EASEMEN:



----- LAND DATA -----

TY	LN CD	ACRES	SQFT/UNITS	PRICE	INFL	-FAC	BASE SIZE	BASE RATE	INCF /DECR	LAND-VAL
ACI	1 85	4105.8930		599.99	4	-85	2	4,000.00	4,000.00	2,463,500
		PASTURE/ PITT 5						ADJ FACTOR (CA14)	1.0000	
ACI	3 86	101.0000		600.00	4	-85	2	4,000.00	4,000.00	60,600
		PASTURE/ PITT 6						ADJ FACTOR (CA14)	1.0000	
ACI	4 15	82.1070		3,999.66			2	4,000.00	4,000.00	328,400
		PRIMARY SITE/PITT 5						ADJ FACTOR (CA14)	1.0000	
ACI	7 95	963.8720		100.01			2	100.00	100.00	96,400
		WASTELAND/ PITT 5						ADJ FACTOR (CA14)	1.0000	

----- C A L P T A B L E -----

----- APARTMENT INFORMATION -----
USE MDL RATE COUNT BED BATH HALF OTHER UNITS ADJ

GROSS LN CODE VALUE LAND-VAL
TOTAL ACRES 5,252.8720 TOTAL LAND-VALUE 2,948,900
TOT SIZE ***** NBHD 5 ZONE 0 LOC 0 UTILITY 0 STREET 0
LAND ADJ ADJ FACTOR (CA11) 1.0000 ADJ FACTOR (AA44)

MISC. IMPROVEMENTS 0
GROSS BUILDING SUMMARY VALUE 0
DESCR -----
----- BUILDING PERMIT RECORD -----
DATE NUMBER AMOUNT PURPOSE STATUS
10/15/12 B20121255 1,300,000 NEW COM BL I
08/16/12 B20120943 108,000 OTHER C
08/16/12 B20120938 108,000 OTHER C

EXHIBIT 5

APR 01, 2013
02:40 PM

COMMERCIAL / INDUSTRIAL REVIEW DOCUMENT
MAUI, HI

PAGE: 2
CA321

1-9-001-006-0000

ALT ID:
MAP/ROUTE HAN

CARD 1 OF 1
FIELD REVIEW FLAG ()

TAX YEAR 2014

TIEBACK:

BLDG	1	YR	BLT	2012	EFF	YR	#	UNITS	1	STRUCTURE	342	WHSE	ST	W2	GRADE	W2	ID.	UNITS	1	SEMPRA	OFFICE/WARE	INV	RAT
LN	LNUM	CODE	DESCRIPTION	BUILDING OTHER FEATURES / ATTACHED IMPROVEMENTS		MEAS1	MEAS2	STOPS	IU	UNIT COST	PRICE												
1	1	SP3	SPRINKLER GOOD			3840			1	3.96	15,220												
2	1	AC2	CENTRAL AC AV			2634			1	13.17	34,680												

INTERIOR / EXTERIOR INFORMATION

LINE	SCT	FRM	TO	YRBLT	WDTH	LGTH	AREA	USE	PERM	TYPE	HT	EXT	INT	CON	FIN	PTN	HT	AC	PLB	LT	FEAT	RCN	BASE	RCN	PER	SFPHY	FUN	%RENT	%	GD	%	COMP
1	01	01	01	2012			1920	176	045	00	10	5	5		3	0	0	0	0	1	49,900	135,993	44.84	3	3			100				
								WAREHOUSE				MTL	MTL		ABO	NONE	NON	NON	NON							AV	AV					
2	02	01	01	2012			1920	176	045	00	14	5	5		3	0	1	0	1			0	115,507	60.16	3	3		100				
								WAREHOUSE				MTL	MTL		ABO	NONE	A/C	NON	NON							AV	AV					
3	02	E1	E1	2012			300	48	085	00	14	5	5		2	0	0	0	3			0	25,557	85.19	3	3		100				
								OFF ENCL WA				MTL	MTL		NOR	NONE	NON	NON	NOR							AV	AV					
5	01	E1	E1	2012			1920	128	085	00	10	5	5		3	0	1	3	3			0	126,605	65.94	3	3		100				
								OFF ENCL WA				MTL	MTL		ABO	NONE	A/C	ABO	NOR							AV	AV					
6	02	E2	E2	2012			714	0	085	00	14	5	5		3	0	1	2	3			0	38,592	54.05	3	3		100				
								OFF ENCL WA				MTL	MTL		ABO	NONE	A/C	NOR	NOR							AV	AV					

OTHER BUILDING AND YARD IMPROVEMENTS

TYPE	DESCRIPTION	YEAR	EFF	SIZE	GRD	QN	MODS	C	F	%COMP	MA%	ADJFACT	VALUE	
WPT	WINDMILL	2012		3000	A	8		A	A			100	1.0000	84173200

TOTAL OBY VALUE

84,173,200

PARKING DATA

COVERED	0	UNCOVERED	0
TOTAL SQUARE FEET:			3,840
BASE R.C.N.			442,257
			115.17 /SQFT
GRADE FACTOR			1.05
ADJ R.C.N.			464,370
			120.93 /SQFT
OVERALL % GOOD			100
R.C.N.L.D.			464,370
			120.93 /SQFT
NO IDENT UNITS			1
% COMP			75
TOTAL R.C.N.L.D.			348,278
ADJUSTMENT FACTOR (CA31)			1.7030
TOTAL YARD IMP VALUE			84,173,200
OTHER:			0
TOTAL CARD VALUE			84,766,300
ECF			% (CA11)

APR 01, 2013
02:40 PM

1-9-001-006-0000

COMMERCIAL / INDUSTRIAL REVIEW DOCUMENT
MAUI, HI

PAGE: 3
CA321

ALT ID:
MAP/ROUTE HAN

CARD 1 OF 1
FIELD REVIEW FLAG (

TAX YEAR 2014
)

TIEBACK:

PARCEL TOTAL		COST APPROACH		PARCEL SUMMARY VALUES		INCOME APPROACH	
LAND SIZE	228,815,104 LAND	2,948,900	.01 /SQFT	LAND	0	.00 /SQFT	
BLDG SIZE	3,840 IMP	84,766,300	22,074.56 /SQFT	IMP	0	.00 /SQFT	
	TOTAL	87,715,200	22,842.50 /SQFT	TOTAL	0	.00 /SQFT	
ADJUSTED R.C.N.		464,370	120.93 /SQFT				
OVERALL % GOOD		75					
R.C.N.L.D.		348,278	90.70 /SQFT				
(INCLUDES PERCENT COMPLETE - SEE CARD DETAIL)							
BLDG ADJ FACTOR (CA31)		1.7030					
TOTAL YARD IMP VALUE		84,173,200					
TOTAL OTHER IMP VALUE		0					
TOTAL IMP VALUE		84,766,317					
ECF	0%						
ADJ TOTAL IMP VALUE		84,766,317					
IMP VALUE		84,766,300		ADJ TOTAL IMP VALUE * BLDG ADJ FACTORS (AA44):		* (CA11): 1.0000	
LAND VALUE		2,948,900					
TOTAL VALUE		87,715,200					

		PREVIOUS YEARS VALUES		PREV YEARS APPRAISED VALUES			
		LAND	BUILDING	LAND	BUILDING		
		2,948,900	84,766,300	2,948,900	84,766,300		

CURRENT LAND		2,948,900		BUILDING	84,766,300	TOTAL	87,715,200
ASSESSED LAND		450,000		BUILDING	84,766,300	TOTAL	85,216,300
REVIEW CODE	1	COST APPROACH		REVIEW REASON	0	COST	
REVIEW DATE				REVIEWER ID			
ESTIMATE LAND				BUILDING		TOTAL	
REVIEW CODE		REVIEW REASON					
REVIEW DATE				REVIEWER ID			
REVIEW STATUS	3						
MAINTAINED ON	28-MAR-13		STATUS				

TORKILDSON, KATZ, MOORE
HETHERINGTON & HARRIS
Attorneys at Law
A Law Corporation

RONALD I. HELLER 2721
700 Bishop Street, 15th Floor
Honolulu, Hawaii 96813-4187
Telephone: (808) 523-6000

Attorney for Taxpayer-Appellant
KAHEAWA WIND POWER, LLC

1
TAX APPEAL COURT
STATE OF HAWAII
FILED

2012 APR -9 PM 12:36

KATHLEEN HANAWAHINE

CLERK

TAX APPEAL COURT
OF THE STATE OF HAWAII

In the Matter of the Appeal of
KAHEAWA WIND POWER, LLC,
Taxpayer-Appellant.
4-8-001-001-6001

T. A. No. 10-1-1246
and consolidated cases

ORDER GRANTING "TAXPAYER-
APPELLANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT"
FILED JANUARY 18, 2012

Hearing Date:

Date: February 13, 2012
Time: 9:00 a.m.
Judge: Hon. Gary W.B. Chang

ORDER GRANTING "TAXPAYER-APPELLANT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT" FILED JANUARY 18, 2012

Taxpayer-Appellant KAHEAWA WIND POWER, LLC's Motion for Partial Summary
Judgment, filed on January 18, 2012, came on for hearing on Monday, February 13, 2012 before
the Hon. Gary W.B. Chang. Richard Rost appeared on behalf of Appellee COUNTY OF MAUI
and Ronald I. Heller appeared on behalf of Taxpayer-Appellant KAHEAWA WIND POWER, LLC.

The Court having reviewed and considered the written submissions of the parties in support of, or opposition to, the Motion, and having heard the arguments of counsel, and finding good cause,

IT IS HEREBY ORDERED that Taxpayer-Appellant's Motion For Partial Summary Judgment filed on January 18, 2012 shall be, and is hereby, **GRANTED**. The Court finds that there is no genuine dispute as to any material fact relevant to the present motion, and as a matter of law, the towers and turbines which are located on the subject property are not within the definition of "real property" for purposes of the real property tax.

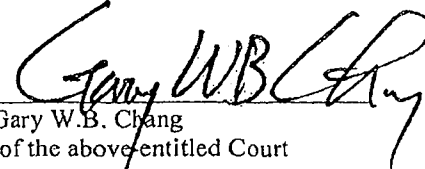
The issues remaining for decision in this case are:

- (1) The actual fair market value of the taxable real property, for each tax year at issue in these consolidated cases (2007 through 2011).
- (2) For each of the tax years 2007, 2008, and 2009, whether or not the "Amended Notice of Property Assessment" issued on or about May 17, 2010 was a valid and lawful assessment, or was an unlawful and invalid attempt to make a retroactive tax assessment.
 - a. Whether or not the position taken by the Assessor (with respect to the time of making the assessments) in this case is not only wrong, but clearly frivolous and unjustified, such that the Taxpayer should therefore receive an award of all of its costs and expenses in this action, including but not limited to attorneys' fees.
- (3) For tax year 2010, whether or not the "Notice of Property

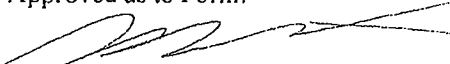
Assessment" issued on or about March 15, 2010 was a valid and properly issued assessment, and if so whether or not the Taxpayer-Appellant filed a timely appeal.

APR - 9 2012

Dated: Honolulu, Hawaii February __, 2012.

By 
Hon. Gary W.B. Chang
Judge of the above-entitled Court

Approved as to Form:


RICHARD ROST
Attorney for Taxpayer-Appellee
County of Maui

In the Matter of the Appeal of KAHEAWA WIND POWER, LLC, T.A. No. 10-1-1246 and consolidated cases; **ORDER GRANTING "TAXPAYER-APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT" FILED JANUARY 18, 2012**

LEASE AGREEMENT
(Auwahi, Maui Property)
Tax Map Key No. 1-9-01:006(2)

THIS LEASE AGREEMENT (this "Lease") is made and executed to be effective as of June 29, 2006 (the "Effective Date") by and among ULUPALAKUA RANCH, INC., a Hawaii corporation, whose business address is HC1, Box 901, Kula, Hawaii 96790 (together with its successors and assigns hereunder, "Owner"), and SHELL WINDENERGY, INC., a Delaware corporation, whose business address is One Shell Plaza, 910 Louisiana Street, Houston Texas 77002 (together with its successors and assigns hereunder, "Tenant"), and in connection herewith Owner and Tenant agree, covenant and contract as follows:

RECITALS:

A. Owner is the owner of approximately 5,252.87 acres of land (the "Land") situated in the County of Maui, identified as Tax Map Key No. (2) 1-9-001-006 and more particularly described in Schedule I attached to and made a part of this Lease, together with all and singular (i) the right (subject to compliance with all applicable laws and permitting requirements) to install, maintain and operate on the Land wind-powered, electricity-generating turbines and similar, related and incidental equipment used in using wind power for purposes of generating electricity; (ii) any wind use and air use rights on or pertaining to the Land, subject to applicable laws, which Owner may hold (the "Wind Use Rights"); and (iii) all other rights, interests, privileges and appurtenances pertaining to the Land, including any easements and other rights as may be necessary for ingress, egress and maintenance of the Land and any and all right, title and interest of Owner in and to adjacent roads, streets, alleys or rights-of-way subject to the exceptions listed in Schedule V, attached hereto (such items in clause (iii) collectively, the "Other Appurtenances").

B. Owner by this Agreement intends to grant to Tenant and Tenant intends to accept from Owner the right to lease the Land, the Wind Use Rights and certain Other Appurtenances (the Land, the Wind Use Rights and the Other Appurtenances herein collectively called the "Leased Property") for purposes of wind energy generation and related uses.

NOW, THEREFORE, for and in consideration of the mutual covenants and benefits herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

Section 1. Lease. Owner hereby leases to Tenant the Leased Property upon and subject to the terms and conditions hereof.

Section 2. Purpose and Scope of Lease; Commitment Regarding Potential Separate Hydrobanking Agreement. The Lease is for wind energy conversion to electricity on the Leased Property and other exploitation of the Wind Use Rights, including the collection and transmission of electric power by developing and operating wind powered electricity generating projects on the Leased Property, transmission of electric power by developing and operating

transmission facilities on other property, pursuant to transmission easements, and for related activities. Without limiting the generality of the foregoing, Tenant shall have the following rights and privileges under this Lease:

(a) the exclusive right to develop, erect, construct, install, replace, repair, relocate, remove, maintain, operate and use from time to time, wind turbines (and the foundations, footings and other appliances and fixtures for use with such wind turbines), underground and above-ground electrical transmission and communications lines related to the operation of wind turbines, electric transformers, energy storage facilities (subject to the limitation at the end of this section), telecommunications equipment, roads, meteorological towers and wind measurement equipment, control buildings, maintenance yards, and related facilities and equipment necessary and/or convenient for the operation and maintenance of one or more wind energy projects (as further defined in Section 9, "Wind Energy Projects") on the Leased Property (in such locations as Tenant shall determine from time to time in the exercise of its sole discretion subject to the restrictions listed herein); provided, however, that Tenant shall not place any WTGs (as defined in Section 9) on that portion of the Leased Property described on Schedule II attached hereto and incorporated herein by this reference (herein called the "Restricted Property");

(b) the exclusive right to capture and to convert all of the wind resources of the Land;

(c) the right to determine the feasibility of wind energy conversion and other power generation in connection with the Wind Energy Projects, including, but not limited to, conducting environmental studies, soil tests and studies of wind speed, wind direction and other meteorological data;

(d) the exclusive right to develop, erect, construct, install, replace, repair, relocate, remove, maintain, operate and use the following from time to time in connection with Wind Energy Projects on the Leased Property or on a Transmission Easement (as defined in Section 10), (i) a line or lines of poles or towers, together with such wires and cables as from time to time are suspended therefrom, and/or underground wires and cables, for the transmission of electrical energy and/or for communication purposes, and all necessary and proper anchors, support structures, foundations, footings, crossarms and other appliances and fixtures for use in connection with said towers, wires and cables; (ii) one or more substations or interconnection or switching facilities from which Tenant may interconnect to a utility transmission system or the transmission system of another purchaser of electrical energy; and (iii) roads associated with the foregoing (such towers, wires, cables, substations, facilities and other enumerated items in clauses (i), (ii) and (iii) are herein collectively called the "Transmission Facilities");

(e) the non-exclusive right in connection with the Tenant's use of the Leased Property, of pedestrian and vehicular ingress, egress and access over and across the Leased Property by means of roads and lanes thereon if existing, or

otherwise by such route or routes as Tenant may (subject to Section 12.7 below) construct or improve from time to time;

(f) the right of subjacent and lateral support to whatever is necessary for the operation and maintenance of improvements on the Leased Property and other property used in connection with Wind Energy Projects, including, without limitation, guy wires and supports;

(g) the right to permit the rotors of wind turbines located on adjacent properties to overhang the Leased Property (and the right to permit the rotors of wind turbines on the Leased Property to overhang any adjacent property owned by Owner); and

(h) the right to undertake any such purposes or other activities, whether accomplished by Tenant or a third party authorized by Tenant, that Tenant reasonably determines are necessary, useful or appropriate to accomplish any of the purposes or uses of the Lease set forth above.

Notwithstanding the generality of the foregoing, Tenant's rights under this Lease shall not include the right to install or operate power generating facilities or projects other than Wind Energy Projects (such as, for example, solar or geothermal energy projects), or to install and operate "hydrobanking" facilities by which the energy generated by the Wind Energy Projects is used to pump water to one or more high-level reservoirs from which the water is used to generate hydroelectric power. Owner and Tenant acknowledge that, in connection with the negotiation of this Lease, they have discussed the possibility of developing such a hydrobanking project in the future, and hereby agree to attempt in good faith to reach a mutually satisfactory agreement to develop or permit the development of such a project at such time as Tenant shall notify owner that it intends to develop the hydrobanking project.

Section 3. Uses Reserved by Owner. Subject to Section 13.3 below, Owner expressly reserves the right to use the Leased Property (excluding any Wind Use Rights) and to allow third parties to use the Leased Property (excluding any Wind Use Rights) for all purposes not granted to Tenant (including, without limitation, recreation, agriculture, ranching and, the exploration and development of mineral substances, if any, owned by Owner), so long as such uses do not unreasonably interfere with Tenant's operations on or enjoyment of the Leased Property and the rights granted by this Lease, and are in compliance with all laws and restrictions affecting the Leased Property. Owner will give forty-five (45) days' prior written notice to Tenant of any proposed new use of the Leased Property not otherwise reserved to Owner, and from time to time upon request of Tenant, will promptly provide evidence to Tenant of insurance with respect to Owner's use of the Leased Property, as required pursuant to Section 13.14 below. If Tenant notifies Owner within forty-five (45) days of receiving notice from Owner that interference with Tenant's use of such Leased Property will result from Owner's proposed use of the Leased Property, Owner and Tenant will work together in good faith to facilitate the compatibility of Owner's proposed use with Tenant's use of such property; it being understood that Tenant's failure to respond to Owner's notice of proposed use within forty-five (45) days of such notice shall be deemed to be approval of the proposed use. Notwithstanding anything to the contrary in this Section 3, Owner shall not use the Land for any hunting purposes except for

hunting commissioned by Owner for feral species eradication or control, provided, however, that Owner shall coordinate such eradication or control hunting activities with Tenant.

Section 4. Exclusiveness of Lease. The Lease and Tenant's rights and privileges with respect to Wind Use Rights hereunder shall be exclusive (other than as provided in Section 2(e) and Section 3 above) with respect to the Leased Property. Without limiting the generality of the foregoing, Owner covenants not to convey or authorize the exploitation of Wind Use Rights (other than facilities existing on the Leased Property on the Effective Date or non-commercial facilities installed to provide power to a specific improvement (for example, a wind-powered pump to provide water to a remote water trough)) or otherwise to grant or suffer any conflicting rights with respect to the Leased Property. Owner shall be entitled to enter into leases or other agreements allowing third parties to use the Leased Property to the same extent such use is permitted to Owner.

Section 5. Agreement to Subdivide and Release. Tenant agrees to determine, at the earliest practicable time and no event no later than seven (7) years after the date upon which the Wind Energy Project enters into commercial service by delivering power to a purchasing utility, which portions of the Leased Property are necessary for the Wind Energy Project. Upon determining which portions of the Leased Property are necessary for the Wind Energy Project, Tenant shall promptly notify Owner, and Owner thereafter shall have the right to subdivide the Leased Property or otherwise partition the Leased Property into separate parcels in accordance with Tenant's determination of which portions of the Leased Property are necessary for the Wind Energy Project, and Tenant shall cooperate with the subdivision process and release from this Lease those parcels not necessary for the Wind Energy Project, *provided, however,* Owner hereby agrees to bear all related costs and, upon Tenant's request, Owner shall record on title to the released parcels any restrictions that Tenant reasonably determines are necessary to prevent activities on the released parcels from materially interfering with Tenant's operations, which restrictions shall remain in force for the remainder of the Term. This provision shall not be construed to limit the rights of Owner and Tenant to otherwise, upon mutual agreement, subdivide the Leased Property.

Section 6. Term.

6.1 Option Term. The Lease shall initially be for a term (the "Option Term") commencing on the Effective Date and continuing until the earlier of (a) the date on which Tenant commences generating and selling electricity with at least 15 MW of installed nameplate rating generation capacity at the Leased Property ("Commencement of Operational Term"), or (b) the fifth anniversary of the Effective Date. If Commencement of Commercial Operations does not occur by the fifth anniversary of the Effective Date, Tenant shall have a single option to extend the Option Term for up to five (5) more years. In order to exercise such option Tenant must (a) provide written notice of exercise to Owner at least ninety (90) days prior to the last day of the Option Term, (b) at the time of such notice pay one hundred thousand dollars (US\$100,000) to Owner, and (c) at the time of such notice not be in default of its obligations under this Lease. If Tenant validly exercises this option, the Option Term shall continue until (a) the earlier of the Commencement of Commercial Operations or (b) the tenth anniversary of the Effective Date. If Commencement of Commercial Operations does not occur by the last day of

the Option Term, this Lease shall terminate and Tenant shall surrender the Leased Property in accordance with the terms hereof.

6.2 First Operational Term. If Commencement of Commercial Operations occurs within the Option Term, this Lease shall continue in effect for twenty-five (25) years from the Commencement of Commercial Operations (such period being called the "First Operational Term").

6.3 Second Operational Term; Renegotiation of Certain Terms. Tenant shall have the option to extend this Lease for an additional twenty five (25) years from the end of the First Operational Term (the "Second Operational Term"). In order to exercise this option, Tenant must give Owner written notice that it is exercising the option at least six (6) months prior to the last day of the First Operational Term and, at the time of such notice, not be in default under this Lease. The Option Term and, if applicable, the First and Second Operational Term are referred to in this Lease generally and collectively as the "Term".

6.4 Renegotiation of Certain Lease Terms; Expert Resolution. Owner and Tenant agree that if Tenant exercises its option to the Second Operational Term, the fees payable under this Lease for the Second Operational Term and certain other provisions should reflect then-prevailing fair market terms practice in comparable land transactions for wind energy generation facilities in the United States of America in the previous twenty-four (24) months. However, Owner and Tenant acknowledge that, as of the Effective Date of this Lease, it is not possible to meaningfully predict what fair market fees and terms will be at that time. Accordingly, Owner and Tenant have agreed to the following process:

(a) If Tenant validly exercises its option to extend this Lease for the Second Operational Term, all of the terms and conditions of this Lease shall remain in effect during that term, except that within forty five (45) days of Tenant's exercise of its option the parties shall in good faith negotiate amendments of Section 7 (Payments), Schedule III (Fee Structure), Section 12.2 (Tenant's Insurance), Section 13.14 (Owner's Insurance) and Section 21.2 (Limits on Liability) (the "Renegotiation Sections") effective as of the start of the Second Operational Term. The parties agree that the Renegotiation Sections shall be amended so that they are consistent with comparable land transactions for wind energy generation facilities in the United States of America in the previous twenty-four (24) months, provided that in no event shall Quarterly Payments provided in Schedule III be less than the minimum amounts per installed capacity, minimum Quarterly Payments, and percentages of Gross Revenues payable immediately prior to the commencement of the Second Operational Term (the "Renegotiation Standard"). The Renegotiation Standard shall not take into account any alternative real estate development options for the Leased Property that Owner may have at that time.

(b) If Owner and Tenant are not able to reach agreement on amendments to the Renegotiation Sections within forty-five (45) days of Tenant's exercise of its option, the terms of such amendments shall be determined by a panel of three (3) neutral experts (the "Experts"). In that case, Owner and Tenant shall each appoint one Expert, and the two Experts so appointed shall mutually select a third. If either party fails to select an Expert, or if the two so appointed are unable to agree on the third, then the parties shall submit a list wherein each party or its

appointed Expert shall propose an equal number of nominees, from which a judge of the United States District Court for the District of Hawaii shall appoint the needed Expert. The panel of Experts shall then apply the Renegotiation Standard to determine what amendments to the Renegotiation Sections should be made for the Second Operational Term. The decision of a majority of the Experts shall be binding upon the parties, and the Experts shall make their determination no later than thirty (30) days prior to the start of the Second Operational Term.

(c) Each Expert shall have at least fifteen (15) years experience in the wind energy business, economics, commercial real estate appraisal, or other areas of expertise that qualify them to determine the appropriate amendments to the Renegotiation Sections using the Renegotiation Standard. Any person appointed or selected as an Expert in accordance with the above provisions shall fully disclose to the parties any past, present or anticipated relationship, interest or duty which may, in the view of either party, materially conflict with the function under the appointment or may prejudice a determination (or both) and such person shall not serve as an Expert unless the parties agree to waive the conflict. Without limiting the foregoing, no person, without the prior written agreement of both parties, shall be appointed as an Expert who is (or has been at any time within the preceding six (6) years) an employee of either party or of an Affiliate (as defined in Section 18.1(a)) of either party or who is (or has been at any time within the preceding three (3) years) a consultant to or contractor of either party or of an Affiliate of either party or who holds any significant financial interest in either party. No person shall be appointed as an Expert who has not agreed to hold in confidence any and all information furnished by each of the parties in connection with the dispute under this Agreement, the existence of such dispute and his determination thereof.

(d) This appointment of the Experts shall only take effect after agreement has been reached between the parties and the Experts as to the Experts' remuneration. The arrangement agreed on shall be clearly set out in writing and shall be part of the agreement between the parties and the Experts.

(e) The Experts may request data, information or submissions as the Expert thinks fit (including other leases that Tenant or its Affiliates have recently entered into, provided, however, that Tenant and its Affiliates shall be under no obligation to breach or request the waiver of any applicable confidentiality provisions) and the parties shall use reasonable endeavours to comply promptly with such requests. All information supplied to the Expert in writing by a party shall be served by notice simultaneously to the other party. In the event that the Expert shall request oral submissions to be made, the Party requested to make such submissions shall give the other Party not less than four (4) business days' notice of the time and place where such submissions are to be made and shall promptly afford the other Party the opportunity to be present. Information and documents submitted to the Experts shall not be disclosed to third parties without the prior consent of the parties.

(f) The Experts may obtain such independent professional or technical advice (or both) as may be reasonably required by the Expert.

(g) If within a reasonable period (which shall not without the prior written consent of both parties exceed sixty (60) days after the acceptance by the Experts of their appointment) the Experts shall not have rendered a determination then (at the request of either party) a new panel of Experts shall be appointed under the provisions of this Section and upon the acceptance of the appointment by such new Experts the appointment of the previous Experts shall cease. However,

if the previous Expert shall have rendered a determination prior to the date upon which the new Expert accepts the appointment such determination shall be binding upon the Parties and the instructions to the new Expert shall be withdrawn.

(h) The Expert shall not act as an arbitrator but shall render a determination as an Expert and the law or legislation relating to arbitration shall not apply to such Expert or to the determinations or the procedure by which such determinations are reached.

(i) The determination of a majority of the Experts shall be final and binding upon the Parties save in the event of fraud, manifest error or failure by the Expert to disclose any relevant interest or duty in accordance with this Section 6.3.

(j) Each party shall bear the costs and expenses of all counsel, witnesses and employees retained by it. The costs and expenses of the Experts shall be apportioned between the Parties in a manner proportionate to the determination made by the Expert. The Expert determination shall address the proportions in which the Parties should bear the Expert's costs.

Section 7. Payments. In consideration of the rights granted under this Lease, Tenant agrees to pay Owner the amounts set forth in Schedule III attached to and made a part of this Lease, which amounts shall be paid to Owner at the times described on Schedule III.

Section 8. Financial Records and Audits.

8.1. Record-Keeping. Tenant shall maintain and keep full and accurate financial records relating to the Wind Energy Project in accordance with generally accepted accounting principles. Such records shall include without limitation records reflecting the Gross Revenues received by Tenant in connection with the Wind Energy Project and any other information necessary to verify Tenant's compliance with its payment obligations under Section 6.

8.2. Inspection and Audit Rights. Owner shall have the right to inspect Tenant's financial records relating to the Wind Energy Project upon ten (10) business days' notice. Tenant shall make its financial records available to Owner on the island of Maui either by physical delivery to Owner on Maui or by electronic transmission to Owner. Such delivery method shall be at Tenant's sole discretion. Not later than ninety (90) days following the end of each calendar year, Tenant shall provide Owner with a complete statement (the "Annual Statement") audited and signed by a certified public accounting firm of recognized national stature or by an officer of Tenant. The Annual Statement shall be certified and signed by an officer of Tenant, showing in reasonable detail satisfactory to the Owner Gross Revenues, and a reasonably detailed statement of any deductions and exclusions from Gross Revenues claimed by the Tenant, for the preceding year. Owner agrees to treat all such information, records and reports as confidential and, except in response to a valid court subpoena or proceeding shall not divulge any of the same to third parties without the prior written consent of the Tenant, which consent may be withheld at Tenant's sole discretion, provided that the foregoing shall not preclude Owner from disclosing the revenues it receives under this Lease as necessary in connection with Owner's accounting, tax planning and financings. In addition to the Annual Statement, Owner shall have the right to audit, at Owner's expense except as provided in the immediately following sentence, all records of Tenant relating

to the Wind Energy Project and statements furnished by the Tenant for purposes of determining payments due to Owner. If such an audit shall reveal errors or improper entries or similar facts which result in a difference in rent exceeding two percent (2%), all costs of such audit shall be borne by the Tenant. The Owner's right to audit shall include the right to take such steps as are generally deemed proper in auditing practices. Tenant shall cooperate in any audit made by Owner. After completion of the audit, whichever party is then owing money for an adjusting refund to the other by the audit shall pay the amount shown to be due for such refund within fourteen (14) days after completion of the audit by cash payment (together with interest) if to Owner or by credit against the next monthly rents due if to Tenant. Completion of the audit shall be deemed to occur at the time of delivery of the auditor's report to both Owner and Tenant.

Section 9. Ownership of Wind Energy Projects. Except as provided in Section 19.6, Owner shall have no ownership or other interest in any Improvements (as defined below), and Tenant may remove any or all such Improvements at any time. As used in this Lease, the term "Improvements" means all WTGs (as defined below), Transmission Facilities, structures, equipment, machinery, wire, conduit, fiber, cable, poles, materials and property of every kind and character constructed, installed and/or placed on, above or below the Leased Property by or on behalf of Tenant. "WTG" means any wind turbine generator or wind machine designed for the generation of electrical power from wind power, including without limitation, the associated towers, support structures, guy wires, braces and directly related equipment. This Lease contemplates that one or more Wind Energy Projects may be developed and operated on the Leased Property. Therefore, for purposes of this Lease, a single Wind Energy Project shall consist of any and all Improvements, including WTGs and Transmission Facilities, which are constructed, developed or operated on the Leased Property or on other property as an integrated system to generate via wind and deliver electrical power.

Section 10. Transmission Facilities Easement. Tenant shall have the right to grant to any utility, power provider or other party (collectively, "Transmission Facility Assignees") (a) the right to construct, operate and maintain the Transmission Facilities on the Leased Property and, (b) for purposes of access to and from such Transmission Facilities, the right of ingress and egress across portions of the Leased Property and other lands owned by Owner. In order to facilitate the assignment by Tenant of certain of its rights under this Lease to Transmission Facility Assignees (separate and apart from Tenant's other rights under this Lease) including, without limitation, Tenant's rights under Section 2(d), Owner shall, upon the request of Tenant at any time during the term of this Lease, grant to Tenant one or more exclusive, assignable easements upon, through, under, over, across and above portions of the Leased Property and land that is owned by Owner and that is adjacent to the Leased Property (a "Transmission Easement"), which Transmission Easement shall be in a location or locations mutually agreeable to the parties and substantially in the form set forth on Schedule IV; it being understood that such form shall be amended to include (i) reasonable changes requested by Tenant or Owner, provided that such changes do not unreasonably reduce Tenant or Owner's rights or increase Tenant or Owner's burdens thereunder, (ii) reasonable changes requested by MECO if the Transmission Easement is to be granted or assigned to MECO, and (iii) any changes required as a result of changes in law.

Section 11. Taxes.

11.1. Property Taxes and Assessments. Owner will pay prior to delinquency all real and personal property and other taxes, general and special assessments, and other charges of every description (collectively, "Taxes") levied or assessed against the Leased Property and all improvements thereon other than (a) the Improvements (b) any increase in property taxes (including "rollback" taxes) due to its use by Tenant and (c) any improvements placed on the Leased Property in connection with any Transmission Easement ("Taxes Attributable to Tenant"). Owner and Tenant acknowledge that as of the Effective Date the Taxes levied against the Land based on its current use for cattle ranching are \$60 per year. Owner shall provide Tenant with evidence that the entire Tax bill covering the Leased Property (other than the Tenant charges, as described in Section 11.2) has been paid at least twenty (20) days prior to the date(s) on which such Tax payment would be delinquent, any by such date(s) Tenant shall pay to Owner an amount equal to the Taxes Attributable to Tenant. If Owner does not provide Tenant with such evidence within five (5) days after receipt of written request for same or if the Tax bill has not been paid, Tenant may, but shall not be obligated to, pay the taxing authorities the entire amount (including, but not limited to, any interest and penalties set forth thereon) due on the Tax bill and Owner shall reimburse Tenant such amount, less the Taxes Attributable to Tenant, plus interest (computed from the date of Tenant's payment) at a rate equal to the lesser of (i) the prime rate of interest as quoted by JP Morgan Chase Bank or its successor (the "Contract Rate"), or (ii) the maximum rate allowed by applicable law, or Tenant may, at its sole discretion, offset such amount, together with such interest, against any payments due Owner under this Lease.

11.2. Rates and Other Charges. Tenant will pay directly all charges, duties, rates, and other outgoings of every description for electricity, gas, telephone, refuse collection, sewage disposal, water, or any other utilities or services to Tenant's improvements at the Land, whether assessed to or payable by the Owner or the Tenant

11.3. Tenant's Right to Contest. Tenant shall have the right to contest the validity and/or amount of such Taxes; provided that if such Taxes create a Lien (as defined in Section 13.4) on Owner's interest in the Leased Property, then Tenant may only contest such Taxes if the proceeding in which it contests such Taxes operates to prevent or stay their collection or Tenant removes any such Lien by bonding or otherwise. Owner agrees to render to Tenant all reasonable assistance in contesting the validity or amount of any such contested Taxes, including joining in the signing of any protests or pleading which Tenant may deem advisable to file; provided, however, that Tenant will reimburse Owner for its reasonable out-of-pocket expenses, including reasonable attorneys' fees incurred in connection with providing such assistance.

Section 12. Tenant's Representations, Warranties and Covenants. Tenant hereby represents, warrants and covenants to Owner as follows:

12.1. Tenant's Authority. Tenant has full power, authority, capacity and legal right to enter into, execute and deliver this Lease. Each person signing this Lease on behalf of Tenant is authorized to do so. This Lease constitutes a valid and binding agreement enforceable against Tenant in accordance with its terms.

12.2. Legal Status/Approvals. Tenant (a) is duly organized or formed, validly existing and in good standing under the laws of its state of organization or formation; and (b) has full power and authority to lease the Leased Property and carry on its business as now conducted. Tenant has all necessary approvals, governmental and otherwise, to execute and deliver this Lease and the execution and delivery of this Lease by Tenant will not place Tenant in default of any agreements to which Tenant is a party or bound.

12.3. Permits and Requirements of Governmental Authority. Tenant shall have the sole responsibility for obtaining any land use or environmental permits and approvals, building permits, environmental impact reviews or any other approvals required for the financing, construction, installation, relocation, replacement, maintenance, operation or removal of any Wind Energy Projects, Transmission Facilities or Improvements, including without limitation execution of applications for such approvals. Tenant shall have the right in its sole discretion, to contest by appropriate legal proceedings, brought in the name of Tenant or in the names of both Tenant and Owner where appropriate or required, the validity or applicability to the Leased Property, Transmission Facilities, Improvements or Wind Energy Projects of any law, ordinance, statute, order, regulation, Taxes or the like now or hereafter made or issued by any agency, bureau, commission, court, department, official, political subdivision, tribunal or other instrumentality of any government, whether federal, state or local, domestic or foreign (collectively "Governmental Authority(ies)"). Owner shall reasonably cooperate in such contest, at no liability or out-of-pocket expense to Owner. Any such contest or proceeding, including any maintained in the name of Owner, shall be controlled and directed by Tenant. If any permit or approval is required for the construction or operation of the Wind Energy Project, Owner shall have the right to review and reasonably approve or disapprove any proposed condition or term of such permit or approval that Owner reasonably determines is likely to materially and adversely affect Owner's cattle ranching, farming operations, security, conservation and reforestation efforts, or recreational use of the Leased Property or other lands, or a condition or term that requires Owner to open existing or future motor vehicle roads to public use (a "Problem Condition"). If Owner intends to disapprove a Problem Condition Owner shall first notify Tenant of Owner's objections to it, and shall work cooperatively with Tenant and the Governmental Authorities involved to resolve, mitigate or eliminate the Problem Condition to Owner's and Tenant's satisfaction and in a manner to minimize impact to the Wind Energy Project, and provided that Owner shall cooperate fully in meeting any deadlines and statutes of limitations imposed by the Governmental Authorities or set forth in applicable legal provisions, and that any failure by Owner to respond within such timeframes after it has been informed of the conditions or terms of any permits or approvals shall be construed as acceptance by the Owner of such condition or term. If the Governmental Authorities nevertheless insist on Problem Condition, Owner shall have the right to terminate this Lease at any time prior to the grant of the permit or approval containing the Problem Condition without liability, and upon reimbursement to Tenant of a ninety thousand dollar (US\$ 90,000) portion of the execution fee paid at the signing hereof, in which case Tenant shall withdraw all permit applications and surrender the Leased Property in accordance with the terms of this Lease. To facilitate Owner's rights under this Section Tenant shall promptly provide Owner with copies of all correspondence and communications with Governmental Authorities regarding its permit

applications and proposed conditions, and Owner shall be promptly notified of and entitled to attend all meeting and hearings with Governmental Authorities regarding potential permit conditions.

12.4. Liens. Tenant shall keep Owner's interest in the Leased Property free and clear of all Liens and claims of Liens for labor and services performed on, and materials, supplies or equipment furnished to, the Leased Property in connection with Tenant's use of the Leased Property; *provided, however*, that if (a) such a Lien does arise on Owner's interest in the Leased Property, (b) Tenant has a right to contest such Lien and (c) Tenant, within one hundred twenty (120) days after it receives notice of the filing of such Lien, either bonds around such Lien or establishes appropriate reserves therefor, or, otherwise, removes such Lien from the Leased Property pursuant to applicable law, then Tenant shall not be deemed to have breached this Section 12.4.

12.5. Hazardous Materials.

(a) Restriction on Use of Hazardous Materials. The Tenant shall not cause or permit any substance, material or waste which is now or hereafter classified as hazardous or toxic, or which is regulated under current or future federal, state or local laws or regulation (collectively "Hazardous Materials") to be processed, used, generated, stored in or about, disposed of about or upon, or transported to or from, the Land except (1) as necessary to the construction and operation of the Wind Energy Projects, or (2) commonly used consumer products containing components that may be classified as hazardous (e.g., cleaning supplies) as long as such materials are used for their intended purposes in the ordinary course of business operations on the Land and are not stockpiled in large quantities, or (3) the Owner has approved the use of specific Hazardous Material in advance, and (4) in each case the processing, use, generation, storage, disposal or transporting is strictly in accordance with Environmental Laws (as defined below). The Tenant and Persons (as defined in Section 18.1(a)) claiming through the Tenant shall comply with all Environmental Laws applicable to the use and occupancy of the Land, shall procure and maintain all necessary environmental permits or licenses required for operations on the Land and file with all Governmental Authorities any reports, business plans, notices and other disclosures required to be made under applicable Environmental Laws. The Tenant shall provide the Owner with copies of all such permits, reports, business plans, notice and disclosures, when obtained or filed. The Tenant shall cause all waste that is or may be a Hazardous Material to be stored offsite in accordance with Environmental Laws and provide the Owner, upon request, with a copy of all hazardous waste manifests. Notwithstanding the foregoing, (i) the obligation of Tenant shall in no case apply to any Hazardous Materials released or discharged by any tenant occupying the Land prior to Tenant, Owner or their agents, employees or contractors (collectively, "Owner's Environmental Condition") and (ii) Owner shall be responsible, at its cost, for such compliance with respect to any Owner's Environmental Condition.

"Environmental Laws" means and includes all federal, state or local laws, statutes, ordinances, rules, regulations and other requirements of any Governmental Authority, now or hereafter in effect, relating to environmental conditions, industrial hygiene or Hazardous Materials on, within, under or about the Land, including, but not limited to, the Federal Water Pollution Control Act, 33 U.S.C. Section 1251, et seq., the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq. the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Clean Water Act, 33 U.S.C. Section 1251, et seq., the Clean Air Act, 42 U.S.C. Section 7401 et seq., the Toxic Substances Control Act, 15 U.S.C. Sections 2601 through 2629, the Safe Drinking Water Act, 42 U.S.C. Sections 300f through 300j, the Occupational Safety and Health Act, 29 U.S.C. Section 651, et seq., the Oil Pollution Act, 33 U.S.C. Section 2701, et seq., the Emergency Planning and Community Right to Know Act, 42 U.S.C. Section 11001, et seq., the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the Federal Insecticide, Fungicide and Rodenticide Act, 15 U.S.C. Section 136, et seq., the Medical Waste Tracking Act, 42 U.S.C. Section 6992, and Hawaii laws regarding Management and Disposal of Infectious Waste; Hawaii Revised Statutes Section 321-21, Solid Waste, Hawaii Revised Statutes Chapter 340E, the provisions of Chapter 128D, Section 328-21, Chapter 340A, Chapter 340E, and Chapters 342B through P of the Hawaii Revised Statutes, as amended, or any judicial or administrative interpretation of such laws, rules or regulations, and any similar federal, state or local law, statute, ordinance, rule, regulation or requirement.

(b) *Notification.* The Tenant shall give prompt notice to the Owner if the Tenant becomes aware of (1) the occurrence of any accidental or intentional release, spilling, leaking, emitting, discharging, escaping, leaching, migrating, dumping or disposal into the air, land, surface water, or ground water of a Hazardous Material in quantities in excess of reportable quantities established pursuant to any applicable law or regulation (an "Environmental Event") on the Land or on adjoining property that threatens to affect the Land, or (2) any claims made or, to Tenant's knowledge, threatened, by any third party against the Tenant, Owner or the Land seeking damages, contribution, cost recovery, compensation, injunctive relief, specific performance, or other relief resulting from any actual or alleged release or discharge or from the existence or alleged existence of any Hazardous Materials on, within or under the Land (an "Environmental Claim"), or (3) any investigation or regulatory action is taken or threatened, or order issued in connection with or resulting from, the occupancy or use of the Land (an "Action"). The Tenant shall not enter into any settlement agreement, consent decree or other compromise with respect to any Environmental Claim in any way relating to the Land without first notifying the Owner and affording the Owner the opportunity to participate in any such investigation or Action. The notice shall describe the event giving rise to the notice and be accompanied by copies of any requests for information, claims, complaints, citations, summons, reports, notices,

warning or other communications in the possession of or reasonably available to, the Tenant relating to the matter disclosed in the notice. The Owner's receipt of notice shall not be deemed to create any obligation on the part of Owner to respond in any manner. The Owner shall have the right, but not the obligation, (1) to participate in all oral or written communications with Governmental Authorities concerning environmental conditions on or about the Land, (2) to join and participate in, and control, if the Owner so elects, any Action initiated in respect of any Environmental Claim against the Tenant and persons claiming through the Tenant, and (3) to negotiate, defend, approve and appeal any such Action.

(c) Remediation. The Tenant shall promptly undertake and diligently complete, at its sole cost and expense, without abatement of Rent all corrective and remedial measures necessary to restore the Land and any other land or ground water affected by an Environmental Event caused by Tenant to the condition existing immediately prior to the Environmental Event; provided, however, that the Tenant shall have no obligation to remediate the Land to the extent an Environmental Event results from a Owner's Environmental Condition. Unless an emergency situation exists that requires immediate action, the Tenant shall obtain the Owner's prior approval of all contemplated investigative, corrective or remedial measures, including, without limitation, the selection of an environmental consultant or contractor, the determination of the scope of work and sampling activities to be performed and the form and substance of all draft reports prepared by any consultant (before such reports are finalized). The Tenant shall promptly provide the Owner with the results of any test, investigation or inquiry made by the Tenant relating to Hazardous Materials on or about the Land. The presence of Hazardous Materials on the Land shall not be deemed an occurrence of destruction subject to the provisions of this Lease respecting destruction.

(d) Indemnity. The Tenant shall indemnify, defend and hold harmless the Owner against all Environmental Claims arising, in whole or in part, during or relating to the use or occupancy of the Land by the Tenant or any person claiming through the Tenant and against all costs and expenses incurred in defending any such Environmental Claim and in connection with any cleanup, remedial, removal or restorative work on or about the Land required to restore the Land as provided in this Lease. This indemnity shall expressly not extend to any Environmental Claims with respect to Owner's Environmental Claims or arising out of acts or omissions from and after the expiration of the Term unless the basis for such Environmental Claims occurred during the Term. Owner shall indemnify, defend and hold harmless the Tenant against all Environmental Claims arising, in whole or in part, with respect to Owner's Environmental Conditions or any other actions or conditions caused by Owner and against all costs and expenses incurred in defending any such Environmental Claim and in connection with any cleanup, remedial, removal or restorative work on or about the Land required to remedy Owner's Environmental Conditions.

(e) Survival. Owner's and Tenant's obligations under this Section shall survive the termination or expiration of this Lease.

12.6. Gates and Fences. Tenant acknowledges that Owner has a right to maintain locks on all exterior gates, provided that Owner shall provide Tenant with a key or with the combination to such locks. Tenant shall have the right to install gates where necessary or useful in connection with Tenant's use of the Leased Property, provided that Owner shall have the right to require Tenant to install a cattle guard in lieu of a gate and further provided that in installing such gates or cattle guards Tenant shall take all reasonable steps to minimize the impact on Owner's ranching operations. When installing a gate within Owner's existing fence, Tenant agrees to make or cause to be made such fence cuts, braces, and repairs that will be permanent and remain functional for the remaining life of the fences of which they are part and become incorporated within or the entire term of the Lease, whichever is longer. Should such cuts, braces, repairs or cattle guards as made by Tenant or Tenant's personnel become weakened or prove to be insecure or inadequate by reason of improper installation or fabrication and occur over and above normal wear, tear and use, Owner shall notify Tenant in writing. Tenant shall make or cause to be made adequate repairs or replacements of any such insecure or inadequate fencing, bracing, cattle guards or gates within ten (10) days of receiving notice thereof from Owner, weather permitting; *provided, however*, that in the event Owner deems it necessary to effect any such repairs or replacements without notice to Tenant because of the imminent escape or loss of livestock, Owner shall be authorized to effect any such repairs or replacements, and to be reimbursed by Tenant for the actual out-of-pocket costs incurred by Owner in this regard for reasonable and necessary materials and labor.

12.7. Roads and Soil Surfaces. Should Tenant exercise its right under this Lease to construct any road, lane, or route on the Leased Property, Tenant and Owner shall work cooperatively to find a mutually-agreeable location for said road, lane, or route that provides the access requested by Tenant. Tenant shall use reasonable efforts to use or improve the existing roads on the Leased Property in order to minimize new road construction. Tenant agrees that at the places where it trenches across any road or roads on the Leased Property, it will fully repair the road bed and surface of the road after any of its operations hereunder in such a way as that any road affected hereby will be kept in its normal condition except at those times when Tenant is actually trenching. Promptly after completion of construction, maintenance or removal operations in connection with the Lease, Tenant shall fill all ruts, holes and other depressions caused by such operations and restore all surfaces utilized to as near normal grade and level as practicable to do so. On areas not occupied by Improvements, Tenant shall re-plant native grass seed, but not crops or any other type of vegetation, on any portion of the Leased Property that was in native grassland prior to construction of any Improvement and on any area where replanting with native or other acceptable grass or other native plants is required by any Governmental Authority with authority to so require. Notwithstanding anything contained in this Section 12.7, while Tenant shall be responsible for repairing road damage caused by Tenant's operations on the Leased Property and for maintaining all roads constructed by Tenant, Tenant shall not otherwise have responsibility for maintenance of existing roads on the Leased Property or for repairing damage to such

roads caused by parties other than Tenant or Tenant's invitees (it being understood and agreed that Owner has the duty to promptly repair and/or replace Owner's roads so long as Owner continues to use them to a standard appropriate to Owner's ranching operations, all at Owner's sole cost and expense).

12.8. No Broker. Neither Tenant nor any of its Affiliates nor any of their respective officers, directors or employees has employed any broker or finder or incurred any liability for any brokers' fees, commissions or finders' fees as a result of the execution of this Lease.

12.9. Tenant's Insurance. Tenant shall procure and maintain during the Term of this Lease, at its sole cost and expense, a policy or policies of liability insurance with coverage amounts not less than a combined single limit of \$5,000,000 per occurrence and \$10,000,000 in the aggregate, insuring against any and all liability to the extent obtainable for injury or death of a person or persons or damage to property occasioned by or arising out of or in connection with the occupation and use of the Leased Property. Owner shall be named as an additional insured on such policy or policies, but only to the extent the Claims and Losses arise out of the actions, omissions, use or operations of a Tenant Party. Such policy or policies shall not be cancelable without at least thirty (30) days' prior written notice to Owner, and Tenant shall provide copies of certificates evidencing such coverage from time to time upon Owner's request. Notwithstanding anything to the contrary herein, Tenant may obtain such insurance from its, or its Affiliate's, captive insurance company, provided such captive insurance company is licensed to do business in the State of Hawaii and has a rating of AA or equivalent by AM Best.

12.10 Tenant Accepts the Property Strictly "As Is" and "With all Faults". The Leased Property is raw, rugged land. Accordingly, and notwithstanding any other provision of this Lease, Tenant acknowledges that except as specifically represented and warranted by Owner in this Lease:

(a) Owner makes no warranties or disclosures regarding the Leased Property, and any and all information supplied or made available by Owner, whether written or oral, prepared by Owner or another party, and whether in the form of maps, surveys, plats, reports, studies or plans, or any other type of materials or information, whatsoever, is furnished to Tenant solely as a courtesy and is without representation or warranty on the part of Owner, express or implied; and

(b) Tenant is entering into this Lease and accepting the Lease Property on a strictly "AS IS, WHERE IS, WITH ALL FAULTS" basis. Tenant further acknowledges that no representation, written or oral, has been made by Owner, its officers, agents or employees in order to induce Tenant to enter into this Lease. Tenant represents and warrants that neither Owner nor its officers, agents or employees has made any representation or statement to Tenant concerning the condition, development potential, merchantability, fitness for a particular purpose, or operation of the Leased Property, and Tenant expressly waives any duty by Owner to make any such disclosures. Tenant represents and warrants that Tenant is familiar

with the Leased Property and has made such independent investigation as Tenant deems necessary or appropriate in order for Tenant to enter into this Lease.

Section 13. Owner's Representations, Warranties and Covenants. Owner hereby represents, warrants and covenants to Tenant as follows:

13.1. Owner's Authority. Owner is the sole owner and holder of fee simple title to the surface estate of the Leased Property and all appurtenant rights thereto and is the sole owner of all of the Wind Use Rights. Owner has full power, authority, capacity and legal right to enter into, execute and deliver this Lease, and to assign, warrant, set-over, transfer and convey the Leased Property pursuant to the terms of this Lease. Each person signing this Lease on behalf of Owner is authorized to do so. This Lease constitutes a valid and binding agreement enforceable against Owner and the Leased Property in accordance with its terms.

13.2. Legal Status; Approvals. Owner, if other than an individual, (a) is duly organized or formed, validly existing and in good standing under the laws of its state of organization or formation; (b) is duly qualified to transact business and is in good standing in the state where the Leased Property is located; and (c) has full power and authority to own the Leased Property and carry on its business as now conducted and proposed to be conducted. Owner has all necessary approvals, governmental and otherwise, to own the Leased Property and to execute and deliver this Lease and the execution and delivery of this Lease by Owner will not place Owner in default of any agreements to which Owner is a party or bound.

13.3. No Interference; No Third Party Rights. Owner covenants and agrees that Tenant shall have the quiet use and enjoyment of the Leased Property in accordance with the terms of this Lease without hindrance or interruption from Owner or any other person or persons claiming by, through or under Owner. Without limiting the generality of the foregoing, Owner agrees that Owner will not and will cause the other Owner Parties (as defined in Section 15) not to construct or install any structure or other improvement that is within five hundred feet (500') of any WTG and/or which would interfere with the availability, accessibility, flow, frequency or direction of air and wind (the "Wind Regime") of the WTG without the written consent of Tenant. Further, Owner shall not, and shall cause the other Owner Parties not to, take any action that could (a) interfere with or impair the Wind Regime of the WTG, (b) in any way interfere with or impair the transmission of electric, electromagnetic or other forms of energy to or from the Leased Property (provided that this provision shall not restrict Owner's rights with respect to transmission and interconnection with electric grids that do not interfere with or impair Tenant's rights with respect to transmission and interconnection with electric grids), or (c) interfere with or impair Tenant's access to the Improvements or to the Leased Property for the purposes specified in this Lease, (d) interfere with any permits required for Tenant's use of the Leased Property, or (e) otherwise interfere with Tenant's intended use of the Leased Property. Owner shall not take any action or grant any third party any rights in the Leased Property that could materially interfere with the development, construction, installation, maintenance or operation of any Wind Energy Projects on the

Land or that could allow any party other than Tenant to exploit the Wind Use Rights on the Land or that could materially and adversely affect Tenant's use of the Leased Property. During the term of this Lease, in no event shall Owner grant any rights to any third party to develop, construct, install or maintain or operate any Wind Energy Projects on the Land, including without limitation, construction or upgrading of any Transmission Facilities, without Tenant's prior written consent, which consent may be withheld in Tenant's sole discretion.

13.4. Liens.

(a) Except as set forth on Schedule V hereto, Owner represents that as of the Effective Date there are no liens, encumbrances, leases, mortgages, deeds of trust, security interests, licenses, or other exceptions made or suffered by Owner (collectively, "Liens") encumbering or affecting all or any portion of the Leased Property.

(b) Except as set forth on Schedule V hereto, there are no currently existing options, rights of refusal, sales contracts, or other such rights in favor of any third parties relating to the Leased Property or any interest therein that could materially interfere with the development, construction, installation, maintenance or operation by Tenant of Wind Energy Projects or that allow any party other than Tenant to exploit the Wind Use Rights or that could materially and adversely affect Tenant's use of the Leased Property.

(c) Owner shall not, without the prior written consent of Tenant, create or permit to be created, any Liens with respect to the Leased Property or any part thereof, provided that Owner may with Tenant's consent, which consent shall not be unreasonably withheld, grant or create Liens, including, but not limited to, Liens (i) for utility and other purposes on the Leased Property, and (ii) in the form of mortgages securing loans made to Owner. In the event that on a date subsequent to the date hereof Tenant consents to a Lien, the holder of such Lien must concurrently execute and deliver to Tenant a Subordination and Non-Disturbance Agreement in a form reasonably acceptable to Tenant that provides that the holder of such Lien shall (1) subordinate such Lien to Tenant's interest under this Lease, (2) agree not to disturb Tenant's possession or rights under this Lease or terminate this Lease, so long as Owner is not entitled to terminate this Lease under the provisions hereof, (3) provide notice to Tenant and its lenders of defaults under the Lien documents, and (4) comply with such other requirements as may be reasonably required by Tenant or its lenders to protect the interests of Tenant or its lenders. Owner and Tenant agree that any Liens granted in violation of this Section shall be deemed void *ab initio*.

13.5. Requirements of Governmental Authorities. Subject to the limitations and termination right contained in Section 12.3, Owner shall reasonably cooperate with Tenant at no cost, obligation or liability to Owner in connection with (i) obtaining and complying with any land use or environmental permits and approvals, building permits, environmental impact reviews or any other approvals required for the financing,

construction, installation, relocation, replacement, maintenance, operation or removal of any Wind Energy Projects, Transmission Facilities or Improvements, including without limitation execution of applications for such approvals and (ii) providing affidavits or documents from Owner customarily required by title companies. In connection with any application by Tenant for a governmental use permit, approval, authorization or other consent, or any governmental review of any previously issued permit, including, without limitation, for the installation, continued operation, modification or replacement of Wind Energy Projects, Transmission Facilities or Improvements on the Leased Property, and subject to the terms of Section 12.3, Owner agrees to support and not oppose, in any way, whether directly or indirectly, any such application or approval, at any administrative, judicial or legislative level. Tenant shall be responsible for out of pocket expenses incurred by Owner in cooperating and supporting Tenant in the matters set forth herein.

13.6. Hazardous Materials. Owner represents that to the best of Owner knowledge there are no Hazardous Materials located on the Leased Property in any amount which would require reporting under applicable environmental laws, and the Leased Property has not been used for the generation, treatment, storage or disposal of Hazardous Materials and there are no underground storage tanks located on the Leased Property. Owner shall not violate any federal, state or local law, ordinance or regulation relating to the generation, manufacture, production, use, storage, release or threatened release, discharge, disposal, transportation or presence of any Hazardous Materials on or under the Leased Property.

13.7. No Litigation. Owner is not a party to any, and to Owner's best knowledge, there are no pending or threatened, legal, administrative, arbitral or other proceedings, claims, actions or governmental or regulatory investigations of any kind or nature whatsoever against Owner (a) challenging the validity or propriety of this Lease, the documents executed in connection herewith, and/or transactions contemplated in this Lease and/or such documents or (b) which could reasonably be expected to have a material adverse effect on the ownership, operation or value of the Leased Property or any part thereof or interest therein, including but not limited to any pending, or to Owner's knowledge, threatened condemnation, eminent domain or similar proceeding affecting the Leased Property or any part hereof or interest therein. Owner shall promptly (i) inform Tenant of any disagreements, disputes, threatened litigation or pending litigation between any Owner and any other party that may materially impact this Lease and/or Tenant's use of the Leased Property, (ii) promptly give Tenant copies of any notices, correspondence or other written or digital communication received by Owner in connection with any such disagreement, dispute, threatened litigation or pending litigation and (iii) vigorously defend against any such disagreement, dispute, threatened litigation or pending litigation, if the same will have, or could reasonably be expected to have, a material adverse effect on Tenant's use of the Leased Property.

13.8. Maintenance of Leased Property. Owner shall operate and maintain any of Owner's improvements at the Leased Property so as not to, and so as to cause third parties to not interfere with Tenant's uses of the Leased Property, provided that it shall be Tenant's sole responsibility to install or construct such fencing or improvements Tenant deems necessary for the purpose of preventing interference with Tenant's uses of the

Leased Property. Because the Leased Property is raw land Owner shall have no obligation other than as specifically set forth above to maintain the Lease Property.

13.9. Noise/Interference. Owner acknowledges and agrees that incident to the uses permitted by the Lease shall be the continuous creation of audible and electromagnetic noise and possible electrical interference, radio frequency interference or cell tower interference related to the maintenance, operation and use of the Wind Energy Projects, including WTGs, Transmission Facilities and other Improvements, and as further set forth in Section 15.4, Owner waives, on behalf of Owner and, to the extent allowed by law, the Owner Parties, the right to make any claims for Claims and Losses (as defined in Section 15.1) as a result thereof, provided, however, that this subsections shall not preclude Owner from bringing a claim for indemnity against Tenant against claims brought by third parties against Owner.

13.10. No Liability for Failure to Develop or Operate. Owner acknowledges and agrees that Tenant, in its sole discretion, may or may not elect to construct, install or develop WTGs, Wind Energy Projects, Transmission Facilities and/or Improvements on the Leased Property, and Tenant shall have no responsibility or liability to Owner or any other party in the event Tenant does not construct, install or develop WTGs, Wind Energy Projects, Transmission Facilities and/or Improvements on the Leased Property. Furthermore, nothing in this Lease may be interpreted as imposing on Tenant, or any other party, any obligation to continuously operate any Wind Energy Project constructed, developed or installed on the Leased Property, provided that Tenant's failure to commence operations or abandonment of the Wind Energy Project may have consequences under Sections 6.1 or 19.3, respectively.

13.11. Confidentiality. Owner and Tenant shall maintain in confidence, for the benefit each party, all information pertaining to the financial terms of or payments under this Lease, Tenant's site or product design, methods of operation, methods of construction, power production or availability of the Wind Energy Projects, the fact that any Wind Energy Project is to be constructed and/or operated on the Leased Property and the like, whether disclosed by or discovered by the other party (the "Confidential Information"), unless such information either (a) is in the public domain by reason of prior publication through no act or omission of the disclosing party, or (b) was already known to the disclosing party at the time of disclosure and which the disclosing party is free to use or disclose without breach of any obligation to any person or entity. A party not shall publish or otherwise disclose the other party's Confidential Information to others, except as necessary to financial advisors, consultants, retained experts, constituent entities of the party, lenders, and lawyers or other professionals, who receive such information under an obligation of confidentiality. In addition, Owner agrees and acknowledges that that the phrases "Shell", "Shell Oil Company", "Royal Dutch Shell", "Shell WindEnergy" and all derivations thereof and all logos, emblems and trademarks of all such entities (including, but not limited to the Shell "Pecten") (collectively, "Tenant's Intellectual Property") are and shall remain the property of Tenant, Shell Oil Company and other "Shell" entities as appropriate. Similarly, Tenant agrees and acknowledges that that the name "Ulupalakua Ranch" and all derivations thereof and all of Owner's logos, emblems and trademarks of all such matters (collectively, "Owner's Intellectual

Property”) are and shall remain the property of Owner and other “Owner” entities as appropriate. Neither party has any license or permission to use the other party’s Intellectual Property in any photographs, video recordings, computerized images, written materials or any other manner without the prior written consent of the party owning such Intellectual Property.

13.12. Non Foreign Owner. Owner is not a “foreign person” within the meaning of Section 1445(f)(3) of the Internal Revenue Code of 1986, as amended, and the related Treasury Department regulations, including temporary regulations.

13.13. No Broker. Neither Owner nor any of its Affiliates nor any of their respective officers, directors or employees has employed any broker or finder or incurred any liability for any brokers’ fees, commissions or finders’ fees as a result of the execution of this Lease.

13.14. Owner’s Insurance. Owner shall procure and maintain during the Term of this Lease, at its sole cost and expense, a policy or policies of insurance in amounts not less than a combined single limit of \$1,000,000 per occurrence and \$2,000,000 in the aggregate, insuring against any and all liability to the extent obtainable for injury or death of a person or persons or damage to property occasioned by or arising out of or in connection with Owner’s occupation and use of the Leased Property. Tenant shall be named as an additional insured on such policy or policies but only to the extent the Claims and Losses arise out of the acts, omissions, use or operations of an Owner Party. Such policy or policies shall not be cancelable without at least thirty (30) days’ prior written notice to Tenant, and Owner shall provide copies of certificates evidencing such coverage from time to time upon Tenant’s request.

Section 14. Estoppel Certificates. A party shall at any time, and from time to time, within fifteen (15) days after a written request by the other party, execute and deliver to the requesting party a written statement certifying that this Lease is in full force and effect (or modified and stating the modification). Such statement shall also state that, to the certifying party’s knowledge, there are no defaults existing at the time of execution of the certification, or (to the extent applicable) if existing, the nature of such defaults. If a party fails or refuses to deliver an Estoppel Certificate in the time required above, the party so failing shall, at the option of and without prejudice to other remedies available to the party requesting the Estoppel Certificate, be deemed to have certified the matters contained in the Estoppel Certificate submitted to such party in default.

Section 15. Indemnities, Releases and Management of Potential Liabilities.

15.1. Relevant Definitions. “Claims and Losses” means claims, damages, losses, liabilities, suits causes of action, and expenses, including but not limited to reasonable attorneys’ fees and costs of litigation. “Indemnify” means to indemnify, defend and hold harmless the person or entity entitled to be indemnified to the maximum extent permitted by law, subject to any limitations contained herein; the obligation to defend shall include the full right to settle any claims at no cost or obligation to the party being defended, who shall upon request cooperate reasonably in the defense. “Interference and Electrical Generating Facility Dangers” means

the following dangers associated with electrical generating facilities: audible and electromagnetic fields, electromagnetic noise, electrical interference, radio frequency interference or cell tower interference. "Owner Party" means any one of Owner or Owner's Affiliates, successors and assigns and all such parties' stockholders, members, partners, officers, directors, employees, agents, representatives, contractors, licensees, lessees, permittees, family members and invitees, and "Owner Parties" means two or more of such persons or entities. "Special Claims and Losses" means (i) consequential, incidental, special, punitive, exemplary or indirect damages of any kind or nature, regardless of the form of action, whether in contract, tort or otherwise (including, but not limited to, loss of profits or revenue and losses of rent, business opportunities and the like that may result from a loss of use of the Leased Property or any portion thereof or otherwise), and (ii) Claims and Losses resulting from or attributable to Interference and Electrical Generating Facility Dangers. "Tenant Party" means any one of Tenant or Tenant's Affiliates, successors and assigns and all such parties' stockholders, members, partners, officers, directors, employees, agents, representatives, contractors, licensees, permittees and invitees, and "Tenant Parties" means two or more of such persons or entities. "Unrelated Persons" means persons or entities that are not an Owner Party or a Tenant Party.

15.2. Indemnities Involving Only Owner Parties and Tenant Parties.

(a) Tenant's Indemnity. Tenant shall Indemnify each Owner Party from Claims and Losses suffered by the Owner Party or that a Tenant Party asserts against the Owner Party and that arise out of or result from a Tenant Party's actions, omissions, use or operations at the Leased Property, including any construction, operation or removal of the Wind Energy Projects, transmission facilities or improvements on the Leased Property by the Tenant, and specifically excluding any Claims and Losses to the extent caused by any Owner Party's actions or inactions, and Special Claims and Losses. Notwithstanding the foregoing, any Owner Claims and Losses for which Tenant is obligated to indemnify any Owner Party hereunder shall be reduced by any insurance proceeds actually received by such Owner Party for such Owner Claims and Losses.

(b) Owner's Indemnity. Owner shall Indemnify each Tenant Party from Claims and Losses suffered by the Tenant Party or that an Owner Party asserts against the Tenant Party and that arise out of or result from an Owner Party's actions, omissions, uses or operations at the Leased Property, and specifically excluding any Claims and Losses to the extent caused by any Tenant Party's actions or inactions, and Special Claims and Losses. Notwithstanding the foregoing, any Tenant Claims and Losses for which Owner is obligated to indemnify any Tenant Party hereunder shall be reduced by any insurance proceeds actually received by such Tenant Party for such Tenant Claims and Losses.

15.3. Indemnities Regarding Claims of Unrelated Persons.

(a) Tenant's Indemnity. Tenant shall Indemnify each Owner Party from Claims and Losses that an Unrelated Person asserts against the Owner Party and that arises out of or results from a Tenant Party's actions, omissions, use or operations at the Leased Property, but only to the extent the Claims and Losses arise out of the actions, omissions, use or operations of a Tenant Party. Tenant's obligation to Indemnify against such Claims and Losses specifically includes any Special Claims and Losses that the Unrelated Person may assert.

(b) Owner's Indemnity. Owner shall Indemnify each Tenant Party from Claims and Losses that an Unrelated Person asserts against the Tenant Party and that arises out of or results from an Owner Party's actions, omissions, uses or operations at the Leased Property, but only to the extent the Claims and Losses arise out of or result from the actions, omissions, use or operations of an Owner Party. Owner's obligation to Indemnify against Unrelated Person Claims and Losses specifically includes any Special Claims and Losses that the Unrelated Person may assert.

15.4. Release and Agreements Regarding Interference and Electrical Generating Facility Dangers. Owner hereby releases and discharges each Tenant Party from any Claims and Losses attributable to Interference and Electrical Generating Facility Dangers even if such Claims and Losses are caused by or allegedly caused by Tenant or any Tenant Party's sole, joint or concurrent negligence, strict liability or other legal fault.

15.5. Mitigation of Special Claims and Losses. Owner and Tenant each agree to use commercially reasonable best efforts to include in all contracts that they enter into during the Term allowing third parties to enter onto the Leased Property shall contain a mutually agreeable waiver and release of all Special Claims and Losses against the Owner Parties and Tenant Parties. Such waiver and release language shall be substantially in the form as set forth in Schedule VII, which may be modified from time to time by mutual agreement. Tenant shall also throughout the Term provide Owner with Tenant's current recommendations for avoiding or minimizing the risk of injuries or damage resulting from Interference and Electrical Generating Facility Dangers or other risks associated with the operation of Wind Energy Projects, which Owner may use as part of its company safety and risk management programs.

15.6 No Limitation; Survival. The provisions of this Section 15 do not limit or modify indemnity provisions contained in Section 12.5 (Hazardous Materials) or elsewhere in this Lease. This Section 15 shall survive the termination of this Lease.

Section 16. Road Coverings. Tenant may excavate from locations selected by Owner and use sand, gravel, caliche or other materials that may be appropriate for use as road coverings from the Land for the purpose of constructing roads, lanes or routes pursuant to Section 12.7. Upon termination of the Lease, or earlier cessation of use of such excavation areas, Tenant will cause all such excavation areas on the Leased Property to be returned to their approximate original condition as existed before the excavation, all at Tenant's sole cost and expense.

Section 17. Utilities. To the extent that Tenant's use of the Leased Property involves the joint use with Owner of water, electricity, gas, telephone services or other utilities, Tenant shall pay Owner Tenant's reasonably allocated share of such utilities within ten (10) days of the receipt from Owner of a request for such payment; it being understood that such payment request shall include documentation evidencing Tenant's allocable share of such utilities. Tenant may at its own cost construct its own water wells upon the Leased Property; in such event, Tenant will not be charged for use of the water from such wells, and Owner shall have the right to use and distribute to third parties for a fee all water from such wells in excess of the amount used by Tenant without payment of any fee to Tenant.

Section 18. Assignment.

18.1. Assignment by the Parties. This Lease and the rights of any party to this Lease and the Leased Property, Wind Energy Projects, Transmission Facilities and Improvements may be assigned, encumbered or mortgaged, in whole or in part, only as set forth in this Section 18.

(a) Assignment to Subsidiary or Affiliate. Upon twenty (20) days' notice and upon delivery to the other party of an executed original counterpart of an instrument by which an assignee assumes all rights and obligations under this Lease, either party may assign this Lease to an Affiliate. For purposes of this Agreement, an "Affiliate " shall mean, with respect to any Person, any other Person directly or indirectly controlling, controlled by or under common control with, such Person; for purposes of this definition, "control", "controlling", "controlled by" and "under common control" shall mean the possession, directly or indirectly, of the power (i) to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting securities, by contract or otherwise or (ii) to own fifty percent (50%) or more of the voting securities or other interests of the Person. "Person" shall mean an individual, partnership, corporation, limited liability company, trust, unincorporated association, joint stock company, or other entity or association

(b) Assignment Prior to Completion of Construction. Other than assignment to an Affiliate, or to Renewable Hawaii, Inc, a Hawaii corporation, which Tenant may effect without Owner's prior written consent, this Lease may not be assigned or encumbered prior to substantial completion of construction of the Wind Energy Project without the prior written consent of the non-assigning party, which consent may be granted or withheld in the non-assigning party's sole discretion.

(c) Assignment After Completion of Construction. Other than assignment to an Affiliate or to Renewable Hawaii, Inc, a Hawaii corporation, which Tenant may effect without Owner's prior written consent, following substantial completion of construction of the Wind Energy Project, this Lease may not be assigned or encumbered without prior written consent of the non-assigning party, which consent shall not be unreasonably withheld.

(d) Effect of Assignment. No assignment, encumbrance or mortgage shall operate to enlarge the obligations or diminish the rights of the non-assigning party hereto (except as expressly provided below, with respect to the release of the assigning party). No assignment, encumbrance or mortgage of this Lease or the rights of any party hereunder or to the Leased Property, Wind Energy Projects, Transmission Facilities or Improvements, however accomplished, shall be binding on the non-assigning party until twenty (20) days after the non-assigning party has been furnished with written notice thereof and an executed original counterpart of an instrument by which the assignee assumes all rights and obligations under this Lease and/or to the Leased Property, Wind Energy Projects,

Transmission Facilities and Improvements. In the event of a permissible assignment of this Lease by any party hereto that is not for collateral or other security purposes, such party shall be relieved of all obligations under this Lease as to the interest so assigned to the extent that such obligations relate to periods of time following such assignment and are assumed by the party to whom assigned, and liability for obligations relating to the interest so assigned and assumed and relating to the periods of time from and after such assignment shall rest exclusively upon such assignee. Without limiting the generality of the foregoing, any such assignment shall not relieve the assigning party from any obligation that arose or accrued prior to such assignment.

18.2. Collateral Assignment by Tenant. In the event that Tenant grants to any party (a "Security Assignee") a Lien on or security interest in all or any part of or any interest in this Lease, the Leased Property, Wind Energy Projects, Transmission Facilities or Improvements for security purposes, the Security Assignee shall have no obligation or liability under this Lease prior to the time, if ever, that that such Security Assignee succeeds to the rights of the Tenant under the Lease, or to the Wind Energy Projects, Transmission Facilities or Improvements by foreclosure or conveyance in lieu of foreclosure. To prevent termination of this Lease or any partial interest therein, Security Assignee shall have the right, but not the obligation, at any time prior to the termination, to pay any or all amounts due hereunder, and to do any other act or thing required of Tenant as necessary to cure any default and to prevent the termination of the Lease; provided, however, that such Security Assignee shall be entitled to a minimum of ten (10) days to cure a monetary default if Tenant fails to cure within Tenant's cure period, and thirty (30) days to cure a non-monetary default if Tenant fails to cure within Tenant's cure period; provided, further, however, that such period shall be extended for non-monetary defaults as reasonably necessary to effect a cure if and to the extent the same is not susceptible of cure within such thirty (30) day period but Security Assignee commences such cure within such period (or as soon as Security Assignee obtains possession of the Leased Property) and diligently prosecutes the same to completion. In furtherance of the foregoing, as a precondition to exercising any rights or remedies as a result of any alleged default by Tenant, Owner shall give written notice of the alleged default to each Security Assignee concurrently with delivery of such notice to Tenant, specifying in detail the alleged default.

18.3. New Lease. If the Lease is rejected by a trustee or debtor-in-possession in any bankruptcy or insolvency proceeding, and within one hundred twenty (120) days after such rejection or termination Tenant shall have arranged to the reasonable satisfaction of Owner for the payment of all fees or other charges due and payable by Tenant as of the date of such rejection or termination and the cure of any monetary or non-monetary defaults under the Lease, then Owner shall execute and deliver to Tenant a new lease to the Leased Property which (a) shall be for a term equal to the remainder of the term of the Lease before giving effect to such rejection or termination, (b) shall contain the same covenants, agreements, terms, provisions and limitations as this Lease (except for any requirements that have been fulfilled by Tenant prior to rejection or termination of the Lease), (c) shall include that portion of the Lease, Leased Property, Wind Energy Projects or Improvements in which Tenant had an interest on the date of

rejection or termination, and (d) shall enjoy the same priority as this Lease over any Lien or other interest created by Owner; and, until such time as such new lease is executed and delivered, the Tenant may enter, use and enjoy the Leased Property and conduct operations thereon as if this Lease were still in effect.

18.4. Amendments. Owner shall not agree to any material modification or amendment of this Lease and Owner shall not accept a surrender or termination of this Lease, in each such case, without the prior written consent of each Security Assignee. Notwithstanding the foregoing, at Tenant's request, Owner shall amend this Lease to include any provision that may reasonably be requested by an existing or proposed Security Assignee, and shall execute such additional documents as may reasonably be requested by such Security Assignee in connection with financing obtained by Tenant, provided that such amendments or documents do not adversely affect Owner's rights or materially increase Owner's burdens or obligations under this Lease.

Section 19. Default and Termination.

19.1. Tenant's Right to Terminate. Tenant shall have the right to terminate the Lease as to all or any part of the Leased Property at any time, effective upon thirty (30) days' written notice to Owner from Tenant.

19.2. Owner's Right to Terminate For Default. Owner shall have the right to terminate the Lease if (a) a material default in the performance of Tenant's obligations under this Lease shall have occurred and remains uncured, (b) Owner notifies Tenant in writing of the default, which notice sets forth in reasonable detail the facts pertaining to the default, and (c)(i) if the default is a failure to pay undisputed charges or sums due and payable, then if the default shall not have been remedied within forty-five (45) days after Tenant receives notice thereof, or (ii) if the default is other than a payment default described in clause (c)(i), then if the default shall not have been remedied within ninety (90) days after Tenant receives notice thereof, or if it is not reasonably feasible to cure the default within ninety (90) days, if Tenant fails to commence its cure of the default within ninety (90) days and thereafter continuously and diligently pursue it to conclusion as quickly as reasonably possible.

19.3. Owner's Right to Terminate For Abandonment. After commencement of the First Operational Term, Owner shall have the right to terminate the Lease without liability if Tenant abandons the Wind Energy Project. For purposes of this Section 19.3, the following definitions shall apply:

(a) Abandonment by the Tenant shall mean that total Availability is below 70% for a continuous period of three (3) years.

(b) Availability shall mean, for any relevant period, the ratio, expressed as a percentage, of (a) the sum of OK Hours in such period to (b) sum of Total Hours in such period for all installed wind turbine generators.

(c) OK Hours shall mean the total number of hours in a relevant period that a turbine is ready and available for operation and energy production. Hours

during which a turbine is ready and available for operation but is not operated because of curtailment by Maui Electric Company, Limited, or its successor or assigns ("MECO") or because wind speeds are below cut-in speed, above cut-out speeds or above re-starting speeds (in each case as set forth in the applicable technical specifications), shall not be deducted from OK Hours. Hours when a turbine is not available for operation and energy production as a result of any of the following causes and such turbine is otherwise available for operation and energy production, or when such turbine could have been made available for operation and energy production by performing the necessary repairs but for the following causes, shall be deemed "OK Hours" and shall not be discounted at the counters:

- (1) any Force Majeure Event;
- (2) any weather conditions beyond those indicated in the health and safety rules in the applicable operations and maintenance manual;
- (3) excessive errors or failures of the high voltage grid system requiring a shutdown of the Project or similar Project shutdowns;
- (4) wind speeds below cut-in speed, above cut-out speeds or above re-starting speeds, in each case as set forth in the applicable technical specifications;
- (5) cable unbundling in accordance with the applicable technical specifications;
- (6) events or conditions (including then-existing parameters of MECO's grid) outside of the operational specifications of the turbines set forth in the applicable technical specifications and the applicable operation and maintenance manual;
- (7) Changes in law requiring modifications such that the turbines cannot perform at their warranted performance in accordance with applicable laws; and
- (8) Scheduled maintenance (as defined in the applicable operation and maintenance agreement) performed by turbine supplier.

Hours during which a turbine is not available for energy production due to a cause other than those listed above shall not be deemed "OK Hours" unless Tenant is diligently remedying the cause of the turbine unavailability. Hours during which a turbine is available for operation, there has not been a curtailment by MECO, and wind speeds are not below cut-in speed, above cut-out speeds or above re-starting speeds (as set forth in the applicable technical specifications), yet Tenant chooses, at its sole discretion, not to operate such turbine, shall not be deemed "OK Hours".

(d) Total Hours shall mean the total number of hours in a relevant period.

(e) Force Majeure: For the purposes of this Section 19.3, the term "Force Majeure Event" shall mean any cause that is reasonably unforeseeable as of the date of this Agreement and that is beyond the reasonable control, directly or indirectly, of the Party affected and that wholly or partly delays or prevents such Party's performance of its obligations under this Agreement, including: war (whether declared or not) or other armed conflict; terrorism; civil insurrection; declaration of martial law; changes in law; piracy; nuclear or chemical spills or accidents; widespread electrical outages; lightning strikes, earthquakes; fires; tornadoes; blizzards or ice storms; hurricanes; volcanic activity; accidents; chemical or Hazardous Substance contamination existing at the Leased Property (except to the extent disclosed to Tenant by Owner in writing) prior to the delivery of the first turbine or subsequently brought onto the Leased Property by anyone other than the Tenant or its subcontractors, or which prevents access by Tenant, its turbine supplier or their respective subcontractors to the Leased Property; material physical damage to the Project caused by third parties; strikes; lockouts or other labor actions (however, specifically excluding the labor force under the control of the Party experiencing such labor actions). The Parties expressly agree and acknowledge that the list of Force Majeure Events in the foregoing sentence is intended as an inclusive list rather than an exhaustive list. Notwithstanding anything to the contrary, the term Force Majeure Event shall be deemed not to include (a) high or turbulent winds at the Leased Property (unless such winds prevent either Party from performing its obligations hereunder pursuant to the requirements of the applicable operation and maintenance manual, applicable laws and safety regulations), (b) lack of funds or the availability of financing, or (c) any order, injunction, legal proceeding, or other legal or equitable decree seeking to enjoin or materially limit, or enjoining or materially limiting, the construction or operation of the Project. Upon the occurrence of a Force Majeure Event, the party claiming or experiencing such event shall promptly notify the other Party.

19.4. Effect of Termination. Upon termination of the Lease, whether as to the entire Leased Property or a portion thereof, Tenant shall, upon written request by Owner, prepare and place of record in the county in which the Leased Property is located, a release of all of Tenant's right, title and interest in and to the Leased Property, or to that part thereof as to which the Lease has been terminated. Subject to Section 19.6, following termination of the Lease as to all or any part of the Leased Property, Tenant shall peaceably and quietly leave, surrender and return the Leased Property (or applicable portion thereof) to Owner. All further rights and obligations of Owner and Tenant under this Lease will cease and terminate as of the date of any termination with respect or in regard to the Leased Property, or to that part as to which the Lease has been terminated; except for the provisions of Section 19.6 and those obligations that expressly survive the termination of this Lease as set forth in Section 19.5.

19.5. Survival. Any provision of this Lease that expressly or by implication comes into or remains in force following the termination of this Lease shall survive the termination or expiration of this Lease for the period set forth in such provision, or if no period is set forth in such provision, for the period that is coextensive with the applicable statute of limitations. Notwithstanding anything to the contrary in this Lease, any indemnification obligations provided for under this Lease and the provisions of Section 21 shall survive the termination of this Lease.

19.6. Removal of Improvements. Within twenty-four (24) months after termination, surrender, or expiration of this Lease and upon the written request of Owner, Tenant will (a) remove, raze or demolish all WTGs that are above ground and other above-ground Improvements on the Leased Property and, to the extent any above-ground Improvements also extend below ground, Tenant will remove, raze or demolish such Improvements extending up to eighteen inches (18") below ground and (b) grade and restore the surface of the Leased Property to its approximate original condition that existed before Tenant installed any above-ground WTGs or other above-ground Improvements upon the Leased Property, normal wear and tear excepted, all at Tenant's sole cost and expense. Tenant shall obtain all permits prior to commencing the removal, razing or demolition process. The twenty-four (24) month removal period shall be tolled from the period of time Tenant submits to all appropriate Governmental Authorities complete applications for all required permits and diligently pursues such permits until the time Tenant receives such permits necessary to begin work. Failure to remove, raze or demolish any Improvement within said period and restore the surface of the Leased Property as provided above shall be deemed an abandonment of the Improvement to Owner and Owner shall have the right to keep such Improvement or to remove, raze or demolish any property deemed to be abandoned by Tenant and to receive reimbursement from Tenant for the actual and reasonable cost of such removal, razing, or demolition of such Improvement and the restoration of the surface of the Leased Property to the standard set forth above. In such event, Owner shall be entitled to the salvage value of any such Improvements removed.

Section 20. Condemnation.

20.1. Complete Taking. If during the Term there shall be taken for any public or quasi-public use under any statute or by right of eminent domain or by private purchase in lieu thereof, the entire Leased Property or any substantial portion of the Leased Property, which in the sole judgment and discretion of Tenant renders the remaining portion thereof unsuitable for Tenant's use and purposes under this Lease, Tenant shall have the right to terminate this Lease as of the date of such taking. Such termination shall be without prejudice to the rights of either Owner or Tenant to recover compensation from the condemning authority for any Loss caused by such condemnation.

20.2. Partial Taking. If during the Term there shall be taken for any public or quasi-public use under any statute or by right of eminent domain or by private purchase in lieu thereof, a portion of the Leased Property which does not require termination of this Lease as provided in Section 20.1 above, then this Lease shall continue in full effect as to the untaken portion of the Leased Property. In the event of any lesser taking as

described in this Section 20.2, Tenant shall be entitled to the portion of the net award for such taking (whether paid by way of damages, rent or otherwise) allocable to the Improvements placed on the Leased Property by Tenant, or to the relocation of the same.

20.3. Apportionment, Distribution of Award. On any taking, all sums awarded, including damages and interest, will be paid as follows:

(a) any portion of the award by the court on account of any Loss that Tenant may sustain in the removal and relocation of Improvements or damage to the Improvements, to Tenant;

(b) any portion of the award by the court for Tenant's anticipated or lost revenues or profits, to Tenant;

(c) any portion of the award by the court for Owner's anticipated or lost revenues or profits, to Owner;

(d) any portion of the award by the court for the taking of the real property constituting the Leased Property to Owner; provided that the "added value" or "bonus value" in to such property on account of this Lease will be awarded to Tenant; and

(e) All remaining amounts of the award, to Owner, or Tenant consistent with applicable law as if this Lease were not terminated.

Section 21. Miscellaneous.

21.1. Force Majeure. If performance of this Lease or of any obligation hereunder (other than an obligation to pay any amounts described in Schedule III) is prevented or substantially restricted or interfered with by reason of an event of "Force Majeure" (defined below), the affected party shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference. The affected party shall promptly notify the other party in writing of the event of Force Majeure and shall use its reasonable efforts to avoid or remove such causes of nonperformance, and shall continue performance hereunder whenever such causes are removed. The term "**Force Majeure**" means causes beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure, including, but not limited to, acts of God, labor unrest (including, but not limited to, slowdowns, picketing, boycotts or strikes), floods, earthquakes, storms, fires, lightning, explosions, power failures or power surges, vandalism, theft, terrorism, the unauthorized cutting of power, transmission or other lines, wires or cables to a Wind Energy Project, epidemics, wars, revolutions, riots, civil disturbances, sabotage, changes in law or applicable regulations subsequent to the date hereof and actions or inactions by any federal, state or local legislative, executive, administrative judicial agency or body which in any of the foregoing cases, by exercise of due foresight such party could not reasonably have expected to avoid, and which, by the exercise of due diligence, it is unable to overcome.

21.2. Limits on Liability. The liability of Tenant under this Lease shall be limited to five million dollars (US\$5,000,000.00), as adjusted annually according to the CPI index, except for Tenant's obligations under Section 7 (Payments) and Schedule III (Fee Structure) and for Tenant's liability to indemnify for losses due to third-party claims, hazardous materials, and/or removal of the WTGs and other improvements from the Leased Property at Termination, which shall not be limited; and provided that the amount of the limitation set forth in this Section 21.2 shall at the request of either Party be renegotiated by the Parties in the event Tenant exercises its right to extend this Agreement for the Second Operational Term pursuant to Section 6.

21.3. Successors and Assigns. This Lease shall inure to the benefit of and be binding upon Owner and Tenant and their respective heirs, transferees, successors and assigns, and all persons claiming under them.

21.4. Remedies. Subject to Section 19.2, Section 19.3, and Section 21.2, in the event that either Owner or Tenant breaches this Lease, the non-breaching party shall have all rights and remedies available to such non-breaching party at law and in equity.

21.5. Notices. All notices, requests and communications required or permitted by this Lease shall be given in writing by (a) personal delivery (confirmed by courier delivery service), (b) expedited delivery with proof of delivery, (c) facsimile and confirmed with a copy of such notice sent by certified mail, or (d) first class mail, postage prepaid, return receipt requested, certified, addressed as follows:

If to Owner: ULUPALAKUA RANCH, INC.
 HC1, Box 901
 Kula, Hawaii 96790
 Attn: Summer Erdman
 Phone: (808) 878-1202
 Fax: (808) 878-2178

with a copy to: Kiefer & Merchant LLC
 444 Hana Highway Suite 204
 Kahului, Hawaii 96732
 Attn: Rick Kiefer
 Phone: (808) 871-9700
 Fax: (808) 871-6017

If to Tenant: SHELL WINDENERGY, INC.
910 Louisiana Street, Suite 1050
Houston, TX 77002
Attn: Bradley Eaton
Phone: (713) 241-2471
Fax: 713) 241-5541

Except as expressly provided herein, any notice provided for herein shall become effective only upon and at the time of first receipt by the party to whom it is given, unless such notice is mailed by certified mail, return receipt requested, in which case it shall be deemed to be received two (2) business days after the date that it is mailed. Any party may, by proper written notice hereunder to the other party, change the individual address to which such notice shall thereafter be sent; provided, however, such new notice address will not be effective until ten (10) business days after delivery of notice of the new notice address.

21.6. Entire Agreement; Amendments. This Lease, the Schedules attached hereto, any Transmission Easement that is in effect as of the date hereof and any addenda to this Lease executed contemporaneously herewith by the parties hereto constitute the entire agreement between Owner and Tenant respecting the subject matter hereof and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties pertaining to the subject matter hereof. Any agreement, understanding or representation respecting the Leased Property, or the Lease, or any other matter referenced herein that is not expressly set forth in this Lease or in a subsequent writing signed by both parties shall be null and void and of no force or effect. This Lease shall not be modified or amended, except in writing signed by both parties and no purported modifications or amendments, including, without limitation, any oral agreement, course of conduct or absence of a response to a unilateral communication, shall be binding on either party.

21.7. Further Assurances. Owner will, whenever reasonably requested by Tenant, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all conveyances, assignments and all other instruments and documents as may be reasonably necessary in order to complete the transactions herein provided and to carry out the terms and provisions of this Lease.

21.8. Governing Law; Venue for Disputes; Attorneys' Fees. This Lease shall be governed by and construed, interpreted and enforced in accordance with the laws of the State of Hawaii. Any litigation concerning or relating to this Lease shall be brought in the United States District Court for the District of Hawaii. In the event of any litigation between the parties, the prevailing party shall be entitled to an award of its attorneys' fees and litigation costs.

21.9. Severability. If, at any time, any provision of this Lease is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions hereof nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall in

any way be affected or impaired thereby and the parties shall promptly negotiate to restore this Lease as near as possible to its original intent and economic effect. If the Lease or its terms are found to be in excess of the longest duration permitted by applicable law, then the provisions of Section 6 which specify the term of duration hereof shall be severed from this Lease, and the term instead shall expire on the latest date permitted by applicable law.

21.10. Tax Credits. Tenant and Owner acknowledge and agree that as between Tenant and Owner, Tenant is to have the benefit of all federal, state and local tax credits associated with the generation of electricity from a "clean" or renewable power source (other than any credits for facilities installed and existing on the Effective date hereof). Except as provided above, if under applicable law the holder of a leasehold interest becomes ineligible for any tax credit, benefit or incentive for alternative energy expenditure established by any local, state or federal government, then, at Tenant's option, Owner and Tenant shall amend this Lease or replace it with a different instrument, so as to convert Tenant's interest in the Leased Property to a substantially equivalent interest that makes Tenant eligible for such tax credit, benefit or incentive; provided, however, that any such change shall not materially reduce Owner's rights or benefits hereunder or increase its burdens and obligations.

21.11. Recording of Agreement. Concurrently with the execution of this Lease, Owner and Tenant shall execute a Memorandum of Lease substantially in the form set forth in Schedule VI, which shall be recorded in the real property records of the county or counties in which the Land is located. No party hereto shall record a copy of this Lease.

21.12. Captions. The captions in this Lease are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Lease or the scope or content of any of its provisions.

21.13. No Partnership. Nothing contained in this Lease shall be construed to create a partnership or joint venture between the parties or their successors in interest and Owner shall not have any ownership in the Wind Energy Projects or any rights to the electricity generated thereby except and to the extent set forth in a written agreement by and between Owner and Tenant.

21.14. Gender and Number. Within this Lease, words of any gender shall be held and construed to include any other gender, and words in the singular number shall be held and construed to include the plural, unless the context otherwise requires.


21.15. Construction. The parties acknowledge that their attorneys have reviewed and revised this Lease and that any rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Lease or any amendments or Schedules hereto.

21.16. Time of the Essence. Time is of the essence with respect to the obligations under this Lease.

21.17. Counterparts. This Lease may be executed by facsimile and in multiple counterparts, no one of which need be executed by all parties hereto, each of which shall constitute an original. Counterparts thus executed shall together constitute one and the same instrument.

IN WITNESS WHEREOF, Owner and Tenant have caused this Lease to be executed and delivered by their duly authorized representatives as of the Effective Date.

ULUPALAKUA RANCH, INC., a Hawaii
corporation,

By: 
Name: Sumner P. Erdman
Title: President

"Owner"

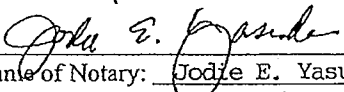
SHELL WINDENERGY, INC., a Delaware
corporation,

By: _____
Name: _____
Title: _____

"Tenant"

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

On this 29th day of June, 2006, before me personally appeared Sumner P. Erdman, to me known, who being by me duly sworn, did say that he is the President of ULUPALUKUA RANCH, INC., a Hawaii corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged the instrument to be the free act and deed of the corporation.


Name of Notary: Jodie E. Yasuda
Notary Public, State of Hawaii
My commission expires: July 8, 2009

STATE OF _____)
) SS.
COUNTY OF _____)

45.

On this ____ day of _____, 2006, before me personally appeared _____, to me known, who being by me duly sworn, did say that _____ is the _____ of SHELL WINDENERGY, INC., a Delaware corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged the instrument to be the free act and deed of the corporation.

Name of Notary: _____
Notary Public, State of _____
My commission expires: _____

21.17. Counterparts. This Lease may be executed by facsimile and in multiple counterparts, no one of which need be executed by all parties hereto, each of which shall constitute an original. Counterparts thus executed shall together constitute one and the same instrument.

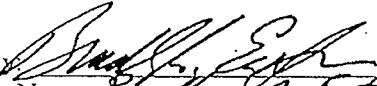
IN WITNESS WHEREOF, Owner and Tenant have caused this Lease to be executed and delivered by their duly authorized representatives as of the Effective Date.

ULUPALAKUA RANCH, INC., a Hawaii corporation,

By: _____
Name: _____
Title: _____

“Owner”

SHELL WINDENERGY, INC., a Delaware corporation,

By:  _____
Name: Stanley B. Lata
Title: Vice President and General Manager, Business Development

“Tenant”

STATE OF HAWAII)
) SS.
COUNTY OF _____)

On this _____ day of _____, 2006, before me personally appeared _____, to me known, who being by me duly sworn, did say that _____ is the _____ of ULUPALUKUA RANCH, INC., a Hawaii corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged the instrument to be the free act and deed of the corporation.

Name of Notary: _____
Notary Public, State of Hawaii
My commission expires: _____

STATE OF Hawaii)
City and) SS.
COUNTY OF Honolulu)

On this 29th day of June, 2006, before me personally appeared Bradley R. Eaton, to me known, who being by me duly sworn, did say that he is the V.P. & G.M., Business Development of SHELL WINDENERGY, INC., a Delaware corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged the instrument to be the free act and deed of the corporation.

Maureen J h
Name of Notary: Maureen J
Notary Public, State of Hawaii
My commission expires: 10-25-09

SCHEDULES

- Schedule I - Leased Property
- Schedule II - Restricted Property
- Schedule III - Fee Structure
- Schedule IV - Transmission Easement
- Schedule V - Liens and Third Party Rights
- Schedule VI - Memorandum of Lease
- Schedule VII - Form Third-Party Waiver and Release of Special Claims and Losses

SCHEDULES

- Schedule I - Leased Property
- Schedule II - Restricted Property
- Schedule III - Fee Structure
- Schedule IV - Transmission Easement
- Schedule V - Liens and Third Party Rights
- Schedule VI - Memorandum of Lease
- Schedule VII - Form Third-Party Waiver and Release of Special Claims and Losses

SCHEDULE I

LEASED PROPERTY

All of that certain parcel of land (being portion(s) of the land(s) described in and covered by Royal Patent Number 7791, Land Commission Award Number 7716, Apana 3 to R. Keelikolani) situate, lying and being at Auwahi, Kahikinui, Island and County of Maui, State of Hawaii, bearing Tax Key designation (2) 1-9-001-006, and containing an area of 5,252.872 acres, more or less.

Being a portion of the premises acquired by that certain Deed dated July 1, 1963, by and between William W. Saunders, Trustee for the Creditors and Stockholder of Ulupalakua Ranch, Limited, a dissolved Hawaii corporation, as Grantor, and ULUPALAKUA RANCH, INC., a Hawaii corporation, as Grantee, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 4544, at Page 289.




SCHEDULE II
RESTRICTED PROPERTY

See attached map.

Preliminary map for excluded areas to
Auwahi Wind Energy Project:



Legend

-  Ulupalakuā Ranch Lands
-  Native Plant Habitat Sensitive Areas
RESTRICTED AREA
-  Archeological Sensitive Areas
RESTRICTED AREA

SCHEDULE III

FEE STRUCTURE

In consideration of the rights granted under this Lease, following the Effective Date, Tenant shall make the following payments to Owner during the Term:

A. Execution Fee. Within thirty (30) days of the Effective Date Tenant shall pay to Owner of the sum of One Hundred Fifty Thousand and No/100 Dollars (\$150,000) (the "Execution Fee").

B. Success Fee: Within sixty (60) days after the Commercial Operation Date of each Wind Energy Project located in whole or in part on the Leased Property, Tenant will pay to Owner a one-time success fee of \$5,000.00 per megawatt of installed capacity of the Wind Energy Project ("Success Fee").

C. Quarterly Fees: During the Term of the Lease, Tenant shall also make additional quarterly payments to Owner within 45 days of the end of each calendar quarter according to the Payment schedule set forth below ("Payment Schedule"). The minimum Quarterly Fee ("Minimum Payment") shall commence on July 1, 2006, and shall increase at a rate of two percent (2%) per year at a compounded rate beginning on the first anniversary of the date of the Commencement of Operational Term. Tenant will pay to Owner, according to the Payment Schedule, a percentage of Gross Revenues (as defined in Section D below), derived from the WTGs located on the Property that are a part of the Wind Energy Project or the specified Minimum Payment, whichever is greater. Each payment made in accordance with this paragraph and the Payment Schedule shall be accompanied by Tenant's summary of the determination of such payments and shall be referred to as a "Royalty Payment" and more than one Royalty Payment shall be collectively referred to herein as "Royalty Payments". Each percentage referenced in this paragraph and Payment Schedule shall be referred to as a "Royalty Rate." If the sum of the Royalty Payments made to Owner in any calendar year (prorated on a daily basis for partial years) is less than the Minimum Payment (prorated on a daily basis for partial years), then Tenant shall within 45 days following the end of the calendar year pay to Owner an amount equal to the amount by which the Minimum Payment exceeds the Royalty Payments made during the calendar year.

PAYMENT SCHEDULE

Quarterly Payment	For the time period between July 1, 2006 and June 30, 2011 or if the Commercial Operation Date occurs prior to July 1, 2011	If the Commercial Operation Date does not occur before July 1, 2011
Royalty Rate	4.75%	4.75%
Minimum Payment	\$1,250 per megawatt of installed capacity per calendar quarter and in no event less than \$5,000 per calendar quarter.	\$1,250 per megawatt of installed capacity per calendar quarter and in no event less than \$6,000 per calendar quarter.

All payments due to Owner under this Lease shall be made by Federal Reserve wire transfer or by direct bank transfer in clearinghouse funds to Owner's bank account so as to provide Owner with full use of the funds on the due date. Written advice of the payment and Tenant's summary of the payment determination in reasonable detail shall be sent by facsimile and by regular mail postage prepaid to Owner on the date of payment. If payments are not made by the due date, at the time of payment Tenant will pay Owner as additional rent interest on the amounts due at the Contract Rate (as defined in Section 11.1) from the end the quarter covered by the payment to the due date, and at the Contract rate plus four percent (4%) from the due date to the actual date of payment. Such interest will be due and payable at the same time as the delinquent payment and unpaid interest, if any, will bear interest at the Contract Rate.

D. Definition of "Gross Revenues. For the purposes of this Lease, "Gross Revenues" means the sum of all revenues accrued or received by Tenant from the sale of electricity generated from Wind Energy Projects on the Property, as measured at the point of delivery or custody transfer defined in any existing or future power purchase contract, but excluding all sales, use or other taxes imposed upon or attributable to such sales of electricity.

The parties acknowledge and agree that Gross Revenues shall not include, without limitation, the following:

- (1) any proceeds from any lump sum payments to cancel or modify any obligation under any energy or electricity or capacity purchase contract related to the Wind Energy Project or payment liquidated or other damages under any energy or electricity or capacity purchase contract related to the Wind Energy Project, provided, however, that curtailment payments or minimum capacity payments shall not be considered as liquidated or other damages for purposes hereof.

(2) any amounts for energy used in the operation of the Wind Energy Project;

(3) any proceeds from any lump sum payment or payments to cancel or modify any obligation under any contract related to the Wind Energy Project (other than energy or electricity or capacity purchase contracts) except to the extent such payment or payments represent in any form compensation for or liquidation of Gross Revenue;

(4) any proceeds received from the sale, lease or other disposition of any Improvements (or any interest therein), or financing of the Improvements or Property;

(5) any rental or lump sum payment received by Tenant in exchange for Tenant's assigning, subleasing, mortgaging or otherwise transferring all or any interest of Tenant in any Transmission Easement or any Improvements thereon, except to the extent that such payment directly or indirectly offsets or reduces payments by the Transferee to Tenant that would be included within the definition of Gross Revenue ; and

(6) proceeds from any governmental subsidies, except to the extent that such proceeds offset or reduce Gross Revenues payable to Tenant.

SCHEDULE IV

TRANSMISSION EASEMENT

See attached Form of Transmission Easement



LAND COURT SYSTEM

REGULAR SYSTEM

Return By: Mail () Pickup () To:

Total Pages:

402623.01

Tax Map Key No.: _____ (2)

GRANT OF TRANSMISSION LINE EASEMENT

This GRANT OF TRANSMISSION LINE EASEMENT ("Grant of Easement") is made and executed to be effective as of _____, 2006 (the "Effective Date") by ULUPALAKUA RANCH, INC., a Hawaii corporation, whose business address is HCl, Box 901, Kula, Hawaii 96790 (together with its successors and assigns hereunder, ("Grantor") in favor and for the benefit of NAME OF GRANTEE, a _____, whose business address is _____ ("Grantee").

RECITALS:

A. Grantor is the owner of the approximately 5,252.87 acres of land (the "Land") situated in County of Maui, identified as Tax Map Key No. 1-9-001-006 (2) and more particularly described in Exhibit A attached to and made a part of this Grant of Easement.

B. Grantor and Grantee have entered into that certain Lease Agreement, dated _____, 2006, wherein Grantor granted Grantee the right to lease the Land and certain wind use and other rights for purposes of wind energy generation and related uses (the "Lease Agreement").

C. Grantor desires to convey to Grantee an easement pursuant to the terms of the Lease Agreement and this Grant of Easement.

NOW, THEREFORE, for and in consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor hereby agrees as follows:

**ARTICLE I
THE EASEMENT**

Section 1.1. Grant of Easement. Grantor hereby grants and conveys to Grantee, subject to the matters set forth herein,

(a) an exclusive perpetual easement in gross upon, through, under, over, across and above that portion of the Land designated in Exhibit B attached to and made a part of this Grant of Easement for the purposes set forth in Section 1.2 below (the "Transmission Easement"), and

(b) an easement in gross for the purposes of ingress, egress and access upon, through, over and across the Land by means of roads and lanes thereon if existing, or otherwise by such route or routes as Grantee may construct or improve from time to time for purposes of access to the Transmission Easement and its ownership and operation thereof (the "Ingress and Egress Easement") (the Transmission Easement and the Ingress and Egress Easement are collectively referred to herein as the "Easement"). The phrase "in gross" with respect to the Easement means that the Easement is an interest that is not tied to any particular use or ownership by Grantee or its successors or assigns of any land that is adjacent to the Land or otherwise.

TO HAVE AND TO HOLD, the same unto the Grantee, its successors and assigns, forever, for the uses and purposes set forth herein.

Section 1.2. Transmission Easement Purpose. The Transmission Easement shall be for the purpose of the development, erection, construction, installation, replacement, repair, relocation, removal, maintenance, operation and use of the following from time to time in connection with Wind Energy Projects, as that term is defined in the Lease Agreement, whether located on the Land or on land owned by Grantor that is adjacent to the Land: (a) a line or lines of poles or towers, together with such wires and cables as from time to time are suspended therefrom, and/or underground wires and cables, for the transmission of electrical energy and/or for communication purposes, and all necessary and proper anchors, support structures, foundations, footings, crossarms and other appliances and fixtures for use in connection with said towers, wires and cables, (b) one or more substations or interconnection or switching facilities from which Grantee may interconnect to a utility transmission system or the transmission system of another purchaser of electrical energy, and (c) roads associated with the foregoing (such towers, wires, cables, substations, facilities and other enumerated items in clauses (a), (b) and (c) are herein collectively called the "Transmission Facilities").

Section 1.3. Use of Easement. The Easement shall be for the use and enjoyment of Grantee and its employees, contractors, subcontractors, agents, licensees, and invitees; provided that, subject to the restrictions set forth elsewhere in this Grant of Easement, Grantor expressly reserves unto itself and its employees, contractors, subcontractors, agents, representatives, licensees and invitees the right to use and enjoy the Land and land owned by Grantor that is

adjacent to the Land for any purpose whatsoever in accordance with the terms of the Lease Agreement.

Section 1.4 Condemnation. Should title or possession of all of the Easement be taken in condemnation proceedings by any government, whether federal, state or local, domestic or foreign (collectively "Governmental Authority(ies)") under the exercise of the right of eminent domain, or should a partial taking render the remaining portion of the Easement unsuitable for Grantee's use, Grantee shall be entitled to any award made for (a) the cost of removal and relocation of any property that Grantee has the right to remove, (b) the loss of or damage to any property that Grantee elects or is required not to remove, (c) the loss of use of any property by Grantee, and (d) Grantee's anticipated or lost revenues or profits. It is agreed that Grantee shall have the right to participate in any settlement discussions related to any eminent domain proceedings concerning the land upon which the Easement is located.

Section 1.5 Grantor's Right to Relocate the Ingress and Egress Easement. Grantor reserves the right to reasonably relocate the route of the Ingress and Egress Easement from time to time at Grantor's expense, so long as such relocation does not materially and adversely affect Grantee's access to the Transmission Facilities. Grantee shall upon request execute such instruments as may be necessary to implement such relocation.

Section 1.6 Subdivision of the Land. If Grantor subdivides the Land and any of the resulting parcels do not include any Transmission Facilities or any portion of the route of the Ingress and Egress Easement, Grantee shall upon request provide a release of such parcels from the terms of this Easement.

Section 1.7 Dedication. Grantor reserves the right to dedicate portions of the Land to Governmental Authorities for public purposes, provided that such dedication shall not interfere with Grantee's rights hereunder. Upon such dedication this Easement shall terminate as to the portions of the Land so dedicated.

Section 1.8. Protection of Grantor's Cattle Operations. Grantee acknowledges that Grantor conducts active cattle operations on the Land. Grantee and all of its contractors, agents and employees shall keep closed all gates on the Land that they utilize for any purposes permitted under this Agreement. Neither Grantee nor any of its employees, agents, contractors or invitees shall hunt anywhere on the Land. Discharge of firearms is strictly prohibited.

Section 1.9 Grantee's Acceptance of the Easement "As Is". Grantee accepts the Land and the Easement on a strictly "AS IS, WHERE IS, WITH ALL FAULTS" basis.

ARTICLE II INDEMNITIES, RELEASES AND MANAGEMENT OF POTENTIAL LIABILITIES

Section 2.1 Relevant Definitions. "Claims and Losses" means claims, damages, losses, liabilities, suits causes of action, and expenses, including but not limited to reasonable

attorneys' fees and costs of litigation. "Indemnify" means to indemnify, defend and hold harmless the person or entity entitled to be indemnified to the maximum extent permitted by law, subject to any limitations contained herein; the obligation to defend shall include the full right to settle any claims at no cost or obligation to the party being defended, who shall upon request cooperate reasonably in the defense. "Interference and Electrical Generating Facility Dangers" means the following dangers associated with electrical generating and transmission facilities: audible and electromagnetic fields, electromagnetic noise, electrical interference, radio frequency interference or cell tower interference. "Grantor Party" means any one of Grantor or Grantor's affiliates, successors and assigns and all such parties' stockholders, members, partners, officers, directors, employees, agents, representatives, contractors, licensees, lessees, permittees, family members and invitees, and "Grantor Parties" means two or more of such persons or entities. "Special Claims and Losses" means (i) consequential, incidental, special, punitive, exemplary or indirect damages of any kind or nature, regardless of the form of action, whether in contract, tort or otherwise (including, but not limited to, loss of profits or revenue and losses of rent, business opportunities and the like that may result from a loss of use of the Land or any portion thereof or otherwise), and (ii) Claims and Losses resulting from or attributable to Interference and Electrical Generating Facility Dangers. "Grantee Party" means any one of Grantee or Grantee's affiliates, successors and assigns and all such parties' stockholders, members, partners, officers, directors, employees, agents, representatives, contractors, licensees, permittees and invitees, and "Grantee Parties" means two or more of such persons or entities. "Unrelated Persons" means persons or entities that are not a Grantor Party or a Grantee Party.

Section 2.2 Indemnities Involving Only Grantor Parties and Grantee Parties.

(a) Grantee's Indemnity. Grantee shall Indemnify each Grantor Party from Claims and Losses suffered by the Grantor Party or that a Grantee Party asserts against the Grantor Party and that arise out of or result from a Grantee Party's actions, omissions, use or operations at the Land, including any construction, operation or removal of the Transmission Facilities or improvements on the Land by the Grantee, and specifically excluding any Claims and Losses to the extent caused by any Grantor Party's actions or inactions, and Special Claims and Losses. Notwithstanding the foregoing, any Grantor Claims and Losses for which Grantee is obligated to indemnify any Grantor Party hereunder shall be reduced by any insurance proceeds actually received by such Grantor Party for such Grantor Claims and Losses..

(b) Grantor's Indemnity. Grantor shall Indemnify each Grantee Party from Claims and Losses suffered by the Grantee Party or that a Grantor Party asserts against the Grantee Party and that arise out of or result from a Grantor Party's actions, omissions, uses or operations at the Land, and specifically excluding any Claims and Losses to the extent caused by any Grantee Party's actions or inactions, and Special Claims and Losses. Notwithstanding the foregoing, any Grantee Claims and Losses for which Grantor is obligated to indemnify any Grantee Party hereunder shall be reduced by any insurance proceeds actually received by such Grantee Party for such Grantee Claims and Losses.

Section 2.3 Indemnities Regarding Claims of Unrelated Persons.

(a) Grantee's Indemnity. Grantee shall Indemnify each Grantor Party from Claims and Losses that an Unrelated Person asserts against the Grantor Party and that arises out of or

results from a Grantee Party's actions, omissions, use or operations at the Land, but only to the extent the Claims and Losses arise out of the actions, omissions, use or operations of a Grantee Party. Grantee's obligation to Indemnify against such Claims and Losses specifically includes any Special Claims and Losses that the Unrelated Person may assert.

(b) Grantor's Indemnity. Grantor shall Indemnify each Grantee Party from Claims and Losses that an Unrelated Person asserts against the Grantee Party and that arises out of or results from a Grantor Party's actions, omissions, uses or operations at the Land, but only to the extent the Claims and Losses arise out of or result from the actions, omissions, use or operations of a Grantor Party. Grantor's obligation to Indemnify against Unrelated Person Claims and Losses specifically includes any Special Claims and Losses that the Unrelated Person may assert.

Section 2.4 Release and Agreements Regarding Interference and Electrical Generating Facility Dangers. Grantor hereby releases and discharges each Grantee Party from any Claims and Losses attributable to Interference and Electrical Generating Facility Dangers even if such Claims and Losses are caused by or allegedly caused by Grantee or any Grantee Party's sole, joint or concurrent negligence, strict liability or other legal fault.

Section 2.5 Mitigation of Special Claims and Losses. Grantor and Grantee each agree to use commercially reasonable best efforts to include in all contracts that they enter into during the term of this Easement allowing third parties to enter onto the Land shall contain a mutually agreeable waiver and release of all Special Claims and Losses against the Grantor Parties and Grantee Parties. The initial approved form of such waiver and release is set forth in Schedule VII of the Lease Agreement, and may be modified from time to time by mutual agreement. Grantee shall also throughout the term provide Grantor with Grantee's current recommendations for avoiding or minimizing the risk of injuries or damage resulting from Interference and Electrical Generating Facility Dangers or other risks associated with the operation of Transmission Facilities, which Grantor may use as part of its company safety and risk management programs.

Section 2.6 No Limitation; Survival. The provisions of this Article II do not limit or modify indemnity provisions contained in Section 3.3 (Hazardous Materials) or elsewhere in this Easement. This Article II shall survive the termination of this Easement.

ARTICLE III REPRESENTATIONS, WARRANTIES AND COVENANTS

Section 3.1. Representations and Warranties by Grantor. Grantor hereby represents and warrants to Grantee as follows:

(a) Authority. Grantor is the sole owner and holder of fee simple title to the surface estate of the Land and all appurtenant rights thereto. Grantor has full power, authority, capacity and legal right to enter into, execute and deliver this Grant of Easement, and to assign, warrant, set-over, transfer and convey the Easement pursuant to the terms of this Grant of Easement. Each person signing this Grant of Easement on behalf of Grantor is authorized to do so. This

Grant of Easement constitutes a valid and binding agreement enforceable against Grantor and the Land in accordance with its terms.

(b) Legal Status; Approvals. Grantor (i) is duly organized or formed, validly existing and in good standing under the laws of its state of Hawaii, (ii) is duly qualified to transact business and is in good standing in the state of Hawaii, and (iii) has full power and authority to own the Land and carry on its business as now conducted and proposed to be conducted. Grantor has all necessary approvals, governmental and otherwise, to own the Land and to execute and deliver this Grant of Easement and the execution and delivery of this Grant of Easement by Grantor will not place Grantor in default of any agreements to which Grantor is a party or bound.

(c) No Liens; Warranty. Except as set forth on Exhibit C attached hereto and made a part of this Grant of Easement, as of the Effective Date, there are no liens, encumbrances, leases, mortgages, deeds of trust, security interests, licenses or other exceptions made or suffered by Grantor (collectively, "Liens") encumbering or affecting all or any portion of the Easement. Grantor hereby warrants and agrees to defend title to the Easement unto Grantee against every person whomsoever claiming or to claim the same or any part thereof, by, through, or under Grantor but not otherwise.

(d) No Third Party Rights. Except as set forth in Exhibit C, there are no currently existing options, rights of refusal, sales contracts, or other such rights in favor of any third parties relating to the Easement or any interest therein that could materially interfere with the development, construction, installation, maintenance or operation by Grantee of Transmission Facilities on the Easement or that could materially and adversely affect Grantee's use of the Easement.

(e) Hazardous Materials. To the best of Grantor's knowledge, there are no Hazardous Materials (as defined in Section 3.3(b) below) located on the Easement in any amount which would require reporting under applicable environmental laws, and the Easement has not been used for the generation, treatment, storage or disposal of hazardous materials and there are no underground storage tanks located on the Easement.

(f) No Litigation. Grantor is not a party to any, and to the best of Grantor's knowledge, there are no pending or threatened, legal, administrative, arbitral or other proceedings, claims, actions or governmental or regulatory investigations of any kind or nature whatsoever against Grantor (i) challenging the validity or propriety of this Grant of Easement, the documents executed in connection herewith, and/or transactions contemplated in this Grant of Easement and/or such documents or (ii) which could reasonably be expected to have a material adverse effect on the ownership, operation or value of the Easement or any part thereof or interest therein.

(g) Non Foreign Grantor. Grantor is not a "foreign person" within the meaning of Section 1445(f)(3) of the Internal Revenue Code of 1986, as amended, and the related Treasury Department regulations, including temporary regulations.

Section 3.2. Covenants of Grantor. Grantor covenants and agrees as follows:

(a) Maintenance of Land. Grantor shall operate and maintain the Land so as not to, and so as to cause third parties not to, interfere with Grantee's use of the Easement; provided that it shall be Grantee's sole responsibility to install or construct such fencing or improvements Grantee deems necessary for the purpose of preventing interference with Grantee's uses of the Easement. Without limiting the generality of the foregoing, Grantor shall not violate any federal, state or local law, ordinance or regulation relating to the generation, manufacture, production, use, storage, release or threatened release, discharge, disposal, transportation or presence of any substance, material or waste which is now or hereafter classified as hazardous or toxic, or which is regulated under current or future federal, state or local laws or regulations, on or under the Easement.

(b) No Interference. Grantor agrees that Grantor will not, and will cause the other Grantor Parties (as defined in Section 2.1) not to, construct or install any structure or other improvement on the Transmission Easement. Further, Grantor shall not and shall cause the other Grantor Parties not to take any action that could (i) in any way interfere with or impair the transmission of electric, electromagnetic or other forms of energy across the Transmission Easement, (ii) interfere with or impair Grantee's access to the Transmission Easement, or (iii) otherwise interfere with Grantee's intended use of the Easement. Grantor shall not take any action or grant any third party any rights in the Easement that could materially interfere with the development, construction, installation, maintenance or operation of any Transmission Facilities on the Easement or that could materially and adversely affect Grantee's use of the Easement. In no event shall Grantor grant any rights to any third party to develop, construct, install or maintain or operate any Transmission Facilities on or around the Easement without Grantee's prior written consent, which consent may be withheld in Grantee's sole discretion.

(c) Liens. Grantor shall not, without the prior written consent of Grantee, create or permit to be created, any Liens with respect to the Land or any part thereof, provided that Grantor may with Grantee's consent, which consent shall not be unreasonably withheld, grant or create Liens, including, but not limited to, Liens (i) for utility and other purposes on the Land, and (ii) in the form of mortgages securing loans made to Grantor. In the event that on a date subsequent to the date hereof Grantee consents to a Lien, the holder of such Lien must concurrently execute and deliver to Grantee a Subordination and Non-Disturbance Agreement in a form reasonably acceptable to Grantee that provides that the holder of such Lien shall (1) subordinate such Lien to Grantee's interest under this Easement, (2) agree not to disturb Grantee's possession or rights under this Easement or terminate this Easement, so long as Grantor is not entitled to terminate this Easement under the provisions hereof, (3) provide notice to Grantee and its lenders of defaults under the Lien documents, and (4) comply with such other requirements as may be reasonably required by Grantee or its lenders to protect the interests of Grantee or its lenders. Grantor and Grantee agree that any Liens granted in violation of this Section 3.2(c) shall be deemed void *ab initio*.

(d) Requirements of Governmental Authorities. Subject to the terms of the Lease Agreement, Grantor shall reasonably cooperate with Grantee, at no cost, obligation or liability to Grantor, in connection with (i) Grantee's negotiation and execution of access or transmission easements with owners of properties adjacent to or in the vicinity of the Easement, (ii) obtaining

and complying with any land use or environmental permits and approvals, building permits, environmental impact reviews or any other approvals required for the financing, construction, installation, relocation, replacement, maintenance, operation or removal of any Transmission Facilities upon the Transmission Easement, including, without limitation, execution of applications for such approvals, and (iii) providing affidavits or documents from Grantor customarily required by title companies. In connection with any application by Grantee for a governmental use permit, approval, authorization or other consent, or any governmental review of any previously issued permit for the installation, continued operation, modification or replacement of Transmission Facilities on the Easement, subject to the terms of the Lease Agreement, Grantor agrees to support and not oppose, in any way, whether directly or indirectly, any such application or approval, at any administrative, judicial or legislative level.

(e) Cooperation with Litigation. Grantor shall promptly (i) inform Grantee of any disagreements, disputes, threatened litigation or pending litigation between Grantor and any other party that may materially impact Grantee's use of the Easement, (ii) promptly give Grantee copies of any notices, correspondence or other written or digital communication received by Grantor in connection with any such disagreement, dispute, threatened litigation or pending litigation, and (iii) vigorously defend against any such disagreement, dispute, threatened litigation or pending litigation, if the same will have, or could reasonably be expected to have, a material adverse effect on Grantee's use of the Easement.

(f) Noise/Interference. Grantor acknowledges and agrees that incident to the uses of the Grantee of the Transmission Easement shall be the continuous creation of audible and electromagnetic noise and possible electrical interference, radio frequency interference or cell tower interference related to the maintenance, operation and use of the Transmission Facilities, and as further set forth in Article II, Grantor hereby waives, on behalf of Grantor and, to the extent allowed by law, the Grantor Parties, the right to make any claims for Claims and Losses (as defined in Section 2.1) as a result thereof; provided, however, that this Section 3.2(f) shall not preclude Grantor from bringing a claim for indemnity against Grantee against claims brought by third parties against Grantor.

(g) Insurance. Grantor has procured, and shall procure and maintain until such time as Grantee abandons the Easement, at Grantor's sole cost and expense, a policy or policies of insurance in amounts not less than a combined single limit of \$1,000,000 per occurrence and \$2,000,000 in the aggregate, insuring against any and all liability to the extent obtainable for injury or death of a person or persons or damage to property occasioned by or arising out of or in connection with Grantor's occupation and use of the Easement. Grantee shall be named as an additional insured on such policy or policies but only to the extent the Claims and Losses arise out of the acts, omissions, use or operations of a Grantor Party. Such policy or policies shall not be cancelable without at least thirty (30) days' prior written notice to Grantee, and Grantor shall provide copies of certificates evidencing such coverage from time to time upon Grantee's request.

Section 3.3 Covenants of Grantee. Grantee covenants and agrees as follows:

(a) Liens. Grantee shall keep Grantor's interest in the Land free and clear of all Liens and claims of Liens for labor and services performed on, and materials, supplies or equipment furnished to, the Land in connection with Grantee's use of the Land; *provided, however,* that if (a) such a Lien does arise on Grantor's interest in the Land, (b) Grantee has a right to contest such Lien and (c) Grantee, within one hundred twenty (120) days after it receives notice of the filing of such Lien, either bonds around such Lien or establishes appropriate reserves therefor, or, otherwise, removes such Lien from the Land pursuant to applicable law, then Grantee shall not be deemed to have breached this Section 3.3(a).

(b) Hazardous Materials.

i. Restriction on Use of Hazardous Materials. The Grantee shall not cause or permit any substance, material or waste which is now or hereafter classified as hazardous or toxic, or which is regulated under current or future federal, state or local laws or regulation (collectively "Hazardous Materials") to be processed, used, generated, stored in or about, disposed of about or upon, or transported to or from, the Land except (1) as necessary to the construction and operation of the Wind Energy Projects, or (2) commonly used consumer products containing components that may be classified as hazardous (e.g., cleaning supplies) as long as such materials are used for their intended purposes in the ordinary course of business operations on the Land and are not stockpiled in large quantities, or (3) the Grantor has approved the use of specific Hazardous Material in advance, and (4) in each case the processing, use, generation, storage, disposal or transporting is strictly in accordance with Environmental Laws (as defined below). The Grantee and Persons (as defined in the Lease Agreement) claiming through the Grantee shall comply with all Environmental Laws applicable to the use and occupancy of the Land, shall procure and maintain all necessary environmental permits or licenses required for operations on the Land and file with all Governmental Authorities any reports, business plans, notices and other disclosures required to be made under applicable Environmental Laws. The Grantee shall provide the Grantor with copies of all such permits, reports, business plans, notice and disclosures, when obtained or filed. The Grantee shall cause all waste that is or may be a Hazardous Material to be stored offsite in accordance with Environmental Laws and provide the Grantor, upon request, with a copy of all hazardous waste manifests. Notwithstanding the foregoing, (i) the obligation of Grantee shall in no case apply to any Hazardous Materials released or discharged by any tenant occupying the Land prior to Grantee, Grantor or their agents, employees or contractors (collectively, "Grantor's Environmental Condition") and (ii) Grantor shall be responsible, at its cost, for such compliance with respect to any Grantor's Environmental Condition.

"Environmental Laws" means and includes all federal, state or local laws, statutes, ordinances, rules, regulations and other requirements of any Governmental Authority, now or hereafter in effect, relating to environmental conditions, industrial hygiene or Hazardous Materials on, within, under or about the Land, including, but not limited to, the Federal Water Pollution Control Act, 33 U.S.C. Section 1251, et seq., the Comprehensive Environmental Response,

Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq. the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Clean Water Act, 33 U.S.C. Section 1251, et seq., the Clean Air Act, 42 U.S.C. Section 7401 et seq., the Toxic Substances Control Act, 15 U.S.C. Sections 2601 through 2629, the Safe Drinking Water Act, 42 U.S.C. Sections 300f through 300j, the Occupational Safety and Health Act, 29 U.S.C. Section 651, et seq., the Oil Pollution Act, 33 U.S.C. Section 2701, et seq., the Emergency Planning and Community Right to Know Act, 42 U.S.C. Section I 1001, et seq., the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the Federal Insecticide, Fungicide and Rodenticide Act, 15 U.S.C. Section 136, et seq., the Medical Waste Tracking Act, 42 U.S.C. Section 6992, and Hawaii laws regarding Management and Disposal of Infectious Waste, Hawaii Revised Statutes Section 321-21, Solid Waste, Hawaii Revised Statutes Chapter 340E, the provisions of Chapter 128D, Section 328-21, Chapter 340A, Chapter 340E, and Chapters 342B through P of the Hawaii Revised Statutes, as amended, or any judicial or administrative interpretation of such laws, rules or regulations, and any similar federal, state or local law, statute, ordinance, rule, regulation or requirement.

ii. Notification. The Grantee shall give prompt notice to the Grantor if the Grantee becomes aware of (1) the occurrence of any accidental or intentional release, spilling, leaking, emitting, discharging, escaping, leaching, migrating, dumping or disposal into the air, land, surface water, or ground water of a Hazardous Material in quantities in excess of reportable quantities established pursuant to any applicable law or regulation (an "Environmental Event") on the Land or on adjoining property that threatens to affect the Land, or (2) any claims made or, to Grantee's knowledge, threatened, by any third party against the Grantee, Grantor or the Land seeking damages, contribution, cost recovery, compensation, injunctive relief, specific performance, or other relief resulting from any actual or alleged release or discharge or from the existence or alleged existence of any Hazardous Materials on, within or under the Land (an "Environmental Claim"), or (3) any investigation or regulatory action is taken or threatened, or order issued in connection with or resulting from, the occupancy or use of the Land (an "Action"). The Grantee shall not enter into any settlement agreement, consent decree or other compromise with respect to any Environmental Claim in any way relating to the Land without first notifying the Grantor and affording the Grantor the opportunity to participate in any such investigation or Action. The notice shall describe the event giving rise to the notice and be accompanied by copies of any requests for information, claims, complaints, citations, summons, reports, notices, warning or other communications in the possession of or reasonably available to, the Grantee relating to the matter disclosed in the notice. The Grantor's receipt of notice shall not be deemed to create any obligation on the part of Grantor to respond in any manner. The Grantor shall have the right, but not the obligation, (1) to participate in all oral or written communications with Governmental Authorities concerning

environmental conditions on or about the Land, (2) to join and participate in, and control, if the Grantor so elects, any Action initiated in respect of any Environmental Claim against the Grantee and persons claiming through the Grantee, and (3) to negotiate, defend, approve and appeal any such Action.

iii. Remediation. The Grantee shall promptly undertake and diligently complete, at its sole cost and expense, without abatement of Rent all corrective and remedial measures necessary to restore the Land and any other land or ground water affected by an Environmental Event caused by Grantee to the condition existing immediately prior to the Environmental Event; provided, however, that the Grantee shall have no obligation to remediate the Land to the extent an Environmental Event results from a Grantor's Environmental Condition. Unless an emergency situation exists that requires immediate action, the Grantee shall obtain the Grantor's prior approval of all contemplated investigative, corrective or remedial measures, including, without limitation, the selection of an environmental consultant or contractor, the determination of the scope of work and sampling activities to be performed and the form and substance of all draft reports prepared by any consultant (before such reports are finalized). The Grantee shall promptly provide the Grantor with the results of any test, investigation or inquiry made by the Grantee relating to Hazardous Materials on or about the Land. The presence of Hazardous Materials on the Land shall not be deemed an occurrence of destruction subject to the provisions of the Lease Agreement respecting destruction.

iv. Indemnity. The Grantee shall indemnify, defend and hold harmless the Grantor against all Environmental Claims arising, in whole or in part, during or relating to the use or occupancy of the Land by the Grantee or any person claiming through the Grantee and against all costs and expenses incurred in defending any such Environmental Claim and in connection with any cleanup, remedial, removal or restorative work on or about the Land required to restore the Land as provided in the Lease Agreement. This indemnity shall expressly not extend to any Environmental Claims with respect to Grantor's Environmental Claims or arising out of acts or omissions from and after the expiration of the term of this Easement unless the basis for such Environmental Claims occurred during the term of this Easement. Grantor shall indemnify, defend and hold harmless the Grantee against all Environmental Claims arising, in whole or in part, with respect to Grantor's Environmental Conditions or any other actions or conditions caused by Grantor and against all costs and expenses incurred in defending any such Environmental Claim and in connection with any cleanup, remedial, removal or restorative work on or about the Land required to remedy Grantor's Environmental Conditions.

v. Survival. Grantor's and Grantee's obligations under this Section shall survive the termination or expiration of this Easement.

(c) Grantee's Insurance. Grantee shall procure and maintain during the term of this Easement, at its sole cost and expense, a policy or policies of liability insurance with coverage

amounts not less than a combined single limit of \$5,000,000 per occurrence and \$10,000,000 in the aggregate, insuring against any and all liability to the extent obtainable for injury or death of a person or persons or damage to property occasioned by or arising out of or in connection with the occupation and use of the Land pursuant to this Easement. Grantor shall be named as an additional insured on such policy or policies, but only to the extent the Claims and Losses arise out of the actions, omissions, use or operations of a Grantee Party. Such policy or policies shall not be cancelable without at least thirty (30) days' prior written notice to Grantor, and Grantee shall provide copies of certificates evidencing such coverage from time to time upon Grantor's request. Notwithstanding anything to the contrary herein, Grantee may obtain such insurance from its, or its affiliate's, captive insurance company, provided such captive insurance company is licensed to do business in the State of Hawaii and has a rating of AA or equivalent by AM Best.

(d) Termination and Surrender. This Easement shall remain in effect so long as the Lease Agreement remains in effect, and upon termination of the Lease Agreement all Transmission Facilities shall be removed by Grantee in accordance with Section 19.6 of the Lease Agreement, PROVIDED HOWEVER that if this Easement is granted or assigned to Maui Electric Company, Limited or its successor or assigns this Easement shall be perpetual and Grantee shall have no obligation hereunder to remove the Transmission Facilities upon termination of the Lease Agreement.

ARTICLE IV MISCELLANEOUS

Section 4.1. Notices. All notices, requests and communications under this Grant of Easement shall be given in writing by (a) personal delivery (confirmed by the courier delivery service), (b) expedited delivery with proof of delivery, (c) facsimile and confirmed with a copy of such notice sent by mail, or (d) first class registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to Grantor:

ULUPALUKUA RANCH, INC.
HC 1, Box 901
Kula, Hawaii 96790
Attn: Summer Erdman
Phone: (808) 878-1202
Fax: (808) 878-2178

With a copy to:

Kiefer & Merchant LLC
444 Hana Highway Suite 204
Kahului, Hawaii 96732
Phone: (808) 871-9700

Fax: (808) 871-6017

If to Grantee:

SHELL WINDENERGY, INC.
910 Louisiana Street, Suite 1050
Houston, TX 77002
Attn: Bradley Eaton
Phone: (713) 241-2471
Fax: (713) 241-5541

Except as expressly provided herein, any notice provided for herein shall become effective only upon and at the time of first receipt by the party to whom it is given, unless such notice is mailed by certified mail, return receipt requested, in which case it shall be deemed to be received two (2) business days after the date that it is mailed. Any party may, by proper written notice hereunder to the other party, change the individual address to which such notice shall thereafter be sent; provided, however, such new notice address will not be effective until ten (10) business days after delivery of notice of the new notice address.

Section 4.2. Assignment. Subject to Section 3.2(c), this Grant of Easement and the rights of any party to this Grant of Easement may be assigned, encumbered or mortgaged, in whole or in part, without the prior written consent of the non-assigning party but no such assignment, encumbrance or mortgage shall operate to enlarge the obligations or diminish the rights of the non-assigning party hereto (except as expressly provided below, with respect to the release of the assigning party). Notwithstanding the foregoing, no assignment, encumbrance or mortgage of this Grant of Easement or the rights of any party hereunder or to the Easement, however accomplished, shall be binding on the non-assigning party until twenty (20) days after the non-assigning party has been furnished with written notice thereof and an executed original counterpart of the instrument establishing such persons' rights under this Grant of Easement; provided, however, that an assignment of this Grant of Easement to any utility or power provider or to any party that Grantee grants a Lien on or security interest in all of or any interest in this Grant of Easement for security purposes, shall be deemed binding on the non-assigning party upon recordation of such assignment in the Bureau of Conveyances of the State of Hawaii. In the event of an assignment of this Grant of Easement by any party hereto that is not for collateral or other security purposes, such party shall be relieved of all obligations under this Grant of Easement as to the interest so assigned to the extent that such obligations relate to periods of time following such assignment and are assumed by the party to whom assigned, and liability for obligations relating to the interest so assigned and assumed and relating to the periods of time from and after such assignment shall rest exclusively upon such assignee. Without limiting the generality of the foregoing, any such assignment shall not relieve the assigning party from any obligation that arose or accrued prior to such assignment.

Section 4.3. Successors and Assigns. The Easement shall run with the Land and be binding on Grantor and on all subsequent owners of the Land. This Grant of Easement shall inure to the benefit of and be binding upon Grantor and Grantee, and their respective heirs, transferees, successors and assigns, and all persons claiming under them.

Section 4.4. Entire Agreement; Amendments. The Lease Agreement and this Grant of Easement, including all of the Exhibits attached hereto, constitutes the entire agreement between Grantor and Grantee respecting the Easement and supersedes all prior agreements, understandings, negotiations and discussions, whether or oral or written, of the parties pertaining to the Easement. Any agreement, understanding or representation respecting the Easement or any other matter referenced herein that is not expressly set forth in this Grant of Easement or in a subsequent writing signed by both parties shall be null and void and of no force or effect. This Grant of Easement shall not be modified or amended, except in writing signed by both parties and no purported modifications or amendments, including, without limitation, any oral agreement, course of conduct or absence of a response to a unilateral communication, shall be binding on either party.

Section 4.5. Further Assurances. Grantor will, whenever reasonably requested by Grantee, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, all conveyances, assignments and all other instruments and documents as may be reasonably necessary in order to complete the transactions herein provided and to carry out the terms and provisions of this Grant of Easement.

Section 4.6. Governing Law. This Grant of Easement shall be governed by and construed, interpreted and enforced in accordance with the laws of the State of Hawaii. Any litigation concerning or relating to this Grant of Easement shall be brought in the United States District Court in the State of Hawaii. In the event of any litigation between the parties, the prevailing party shall be entitled to an award of its attorneys' fees and litigation costs.

Section 4.7. Severability. If, at any time, any provision of this Grant of Easement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions hereof nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall in any way be affected or impaired thereby and the parties shall promptly negotiate to restore this Grant of Easement as near as possible to its original intent and economic effect.

Section 4.8. Captions. The captions in this Grant of Easement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Grant of Easement or the scope or content of any of its provisions.

Section 4.9. Gender and Number. Within this Grant of Easement, words of any gender shall be held and construed to include any other gender, and words in the singular number shall be held and construed to include the plural, unless the context otherwise requires.

Section 4.10. Counterparts. This Grant of Easement may be executed in multiple counterparts, no one of which need be executed by all parties hereto, each of which shall constitute an original. Counterparts thus executed shall together constitute one and the same instrument.

[SIGNATURE PAGE FOLLOWS]



IN WITNESS WHEREOF, the parties hereto have duly executed these presents on the day and year first above mentioned.

ULUPALAKUA RANCH, INC., a Hawaii corporation

By: _____

Name:

Its:

"Grantor"

NAME OF GRANTEE

By: _____

Name:

Its:

"Grantee"

STATE OF HAWAII)
) SS:
COUNTY OF _____)

On this ____ day of _____, 200__, before me personally appeared _____, to me known, who being by me duly sworn, did say that _____ is the _____ of ULUPALUKUA RANCH, INC., a Hawaii corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged the instrument to be the free act and deed of the corporation.

Name of Notary:
Notary Public, State of Hawaii
My commission expires:

STATE OF _____)
) SS:
COUNTY OF _____)

On this ____ day of _____, before me personally appeared _____ to me, who being by me duly sworn, did say that _____ is the _____ of NAME OF GRANTEE, a _____ [entity], and acknowledged that _____ executed the foregoing instrument as the free act and deed of said [entity]

Name of Notary:
Notary Public, State of _____
My commission expires:

EXHIBIT A
LEGAL DESCRIPTION OF THE LAND

EXHIBIT B

LEGAL DESCRIPTION OF TRANSMISSION EASEMENT



EXHIBIT C
THIRD PARTY RIGHTS



SCHEDULE V

LIENS AND THIRD PARTY RIGHTS

1. Reservation in favor of the State of Hawaii of all mineral and metallic mines.
2. The effects, if any, of Declaration of Land Patent dated January 24, 1992, made by Milton Lee Kepa, recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 92-129826.
3. The effects, if any, of Declaration of Land Patent dated December 3, 1992, made by James Akahi aka Akahi Nui, recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 92-197268.
4. Location of the seaward boundary in accordance with the laws of the State of Hawaii and shoreline setback line in accordance with County regulation and/or ordinance and the effect, if any, upon the area of the land described herein.
5. Government Road, trails and survey triangulation stations, as shown on survey map prepared by R. M. Towill corporation, and upon the tax maps.
6. Claims arising out of customary and traditional rights and practices, including without limitation those exercised for subsistence, cultural, religious, access or gathering purposes, as provided for in the Hawaii Constitution or the Hawaii Revised Statutes.

SCHEDULE VI

MEMORANDUM OF LEASE

See attached Short Form Memorandum of Lease Agreement

LAND COURT SYSTEM

REGULAR SYSTEM

Return By: Mail () Pickup () To:

Janeen Olds
Kobayashi Sugita & Goda
999 Bishop Street, Suite 2600
Honolulu, Hawaii 96813

Total Pages:

402552.02

Tax Map Key: 1-9-001-006 (2)

SHORT FORM MEMORANDUM OF LEASE AGREEMENT

This SHORT FORM MEMORANDUM OF LEASE AGREEMENT made this _____ day of _____, 2006, by and between ULUPALAKUA RANCH, INC., a Hawaii corporation, whose business address is HC1, Box 901, Kula, Hawaii 96790, hereinafter called the "Owner", and SHELL WINDENERGY, INC., a Delaware corporation, whose business address is One Shell Plaza, 910 Louisiana Street, Houston, Texas 77002, hereinafter referred to as the "Tenant",

WITNESSETH THAT:

WHEREAS, the Owner and Tenant did enter into that certain unrecorded Lease Agreement dated _____, 2006 (the "Lease"), demising the right to lease the property described in Exhibit A, attached hereto and incorporated herein by this reference (the "Land"), together with (i) the right (subject to compliance with all applicable laws and permitting requirements) to install, maintain and operate on the Land wind-powered, electricity-generating turbines and similar, related and incidental equipment used in using wind power for purposes of generating electricity; (ii) any wind use and air use rights on or pertaining to the Land, subject to applicable laws, which Owner may hold (the "Wind Use Rights"); and (iii) all other rights, interests, privileges and appurtenances pertaining to the Land, including any easements and other rights as may be necessary for ingress, egress and maintenance of the Land and any and all right, title and interest of Owner in and to adjacent roads, streets, alleys or rights-of-way subject to the exceptions listed in Lease (such items in clause (iii) collectively, the "Other Appurtenances", and the Land, the Wind Use Rights and the Other Appurtenances herein collectively called the "Leased Property"); and

WHEREAS, the Owner and Tenant desire to record a Short Form Memorandum of Lease Agreement thereof.

NOW, THEREFORE, in consideration of the premises and the provisions hereof, the parties hereto agree as follows:

1. Subject to and in accordance with the terms of the Lease, Owner does hereby lease unto the Tenant, its successors and permitted assigns, the Leased Property, for a term (the "Option Term") commencing on _____, 2006 (the "Effective Date"), and continuing until the earlier of (a) the date on which Tenant commences generating and selling electricity with at least 15 MW of installed nameplate rating generation capacity at the Leased Property ("Commencement of Operational Term"), or (b) the fifth anniversary of the Effective Date. If Commencement of Commercial Operations does not occur by the fifth anniversary of the Effective Date, Tenant shall have a single option to extend the Option Term for up to five (5) more years. If Tenant validly exercises the option, the Option Term shall continue until (a) the earlier of the Commencement of Commercial Operations or (b) the tenth anniversary of the Effective Date. If Commencement of Commercial Operations does not occur by the last day of the Option Term, the Lease shall terminate.

If Commencement of Commercial Operations occurs within the Option Term, this Lease shall continue in effect for twenty-five (25) years from the Commencement of Commercial Operations (such period being called the "First Operational Term"). Tenant shall have the option to extend this Lease for an additional twenty five (25) years from the end of the First Operational Term (the "Second Operational Term") if Tenant validly exercises the option.

2. The rental for the Leased Property is more fully set forth in the Lease. This Short Form Memorandum of Lease Agreement is subject to all of the covenants, conditions and terms set forth in the Lease, which are hereby adopted herein and made a part hereof by this reference, to the same full extent as if all of the covenants, conditions and terms thereof were copied in full herein. In the event of any conflict between the provisions of this Short Form Memorandum of Lease Agreement and the provisions of the Lease, the provisions of the Lease shall control.

3. This Short Form Memorandum of Lease Agreement may be executed in counterparts, each of which shall be deemed an original regardless of the date of its execution and delivery. All of such counterparts together shall constitute one and the same document, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts. For all purposes, including, without limitation, recordation, filing and delivery of this document, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, Owner and Tenant hereto have duly executed these presents on the day and year first above mentioned.

ULUPALAKUA RANCH, INC., a Hawaii
corporation

By: _____

Name:

Title:

“Owner”

SEELL WINDENERGY, INC., a Delaware
corporation

By: _____

Name:

Title:

“Tenant”

STATE OF HAWAII)
) SS.
COUNTY OF _____)

On this ____ day of _____, 2006, before me personally appeared _____, to me known, who being by me duly sworn, did say that _____ is the _____ of ULUPALUKUA RANCH, INC., a Hawaii corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged the instrument to be the free act and deed of the corporation.

Name of Notary: _____
Notary Public, State of Hawaii
My commission expires: _____

STATE OF _____)
) SS.
COUNTY OF _____)

On this ____ day of _____, 2006, before me personally appeared _____, to me known, who being by me duly sworn, did say that _____ is the _____ of SHELL WINDENERGY, INC., a Delaware corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged the instrument to be the free act and deed of the corporation.

Name of Notary: _____
Notary Public, State of _____
My commission expires: _____

TMK: 1-9-001-006 (2)
(Title Guaranty)

EXHIBIT A

All of that certain parcel of land (being portion(s) of the land(s) described in and covered by Royal Patent Number 7791, Land Commission Award Number 7716, Apana 3 to R. Keelikolani) situate, lying and being at Auwahi, Kahikinui, Island and County of Maui, State of Hawaii, bearing Tax Key designation (2) 1-9-001-006, and containing an area of 5,252.872 acres, more or less.

Being a portion of the premises acquired by that certain Deed dated July 1, 1963, by and between William W. Saunders, Trustee for the Creditors and Stockholder of Ulupalakua Ranch, Limited, a dissolved Hawaii corporation, as Grantor, and **ULUPALAKUA RANCH, INC.**, a Hawaii corporation, as Grantee, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 4544, at Page 289.

SCHEDULE VII

**Form Waiver and Release of Special Claims and Losses
(See Section 15.5)**

[To be completed by the parties after execution of Lease Agreement]

ULUPALAKUA RANCH – WAIVER AND RELEASE



USER NAME: _____ PHONE: _____ DATE: _____
ADDRESS: _____ E-MAIL: _____

Read each section of this Waiver and Release carefully and thoroughly before signing. Choosing to sign this Waiver and Release has important legal consequences, and you should not sign this Waiver and Release if you are not fully aware of and willing to be bound by its terms.

USER WAIVES AND RELEASES ULUPALAKUA RANCH, INC. FROM CERTAIN CLAIMS AND LIABILITY:
Ulupalakua Ranch, Inc. ("Ranch") is a working cattle ranch with dangers associated with livestock, unimproved roads, and rugged land (collectively "Ranching Dangers"). Portions of the Ranch are also being used for a wind farm with associated electrical generating and transmitting facilities. Risks associated with the wind farm and its associated electrical generating and transmitting facilities include, but are not limited to: audible and electromagnetic fields, electromagnetic noise, electrical interference, radio frequency interference or cell tower interference (collectively "Interference and Electrical Generating Facility Dangers"). User understands, acknowledges, and accepts that access to the Ranch has certain risks, including Ranching Dangers, Interference and Electrical Generating Facility Dangers, and other dangers which may exist. User voluntarily assumes the risk that User's access may result in injury or death of User or damage to User's vehicle or property. User fully and forever discharges and releases to the fullest extent permitted by law Ulupalakua Ranch, Inc. and its officers, directors, shareholders, employees, agents, and insurers ("Released Parties") from any claims and losses resulting from or attributable to Ranching Dangers, Interference and Electrical Generating Facility Dangers, or any other cause, whether known or unknown, including but not limited to claims for general, consequential, incidental, special, punitive, exemplary or indirect damages of any kind or nature, regardless of the form of action, whether in contract, tort or otherwise (including but not limited to, loss of use of the Ranch or any portion thereof).

THIS IS A BINDING CONTRACT THAT IS IN EFFECT NOW AND SHALL REMAIN IN EFFECT IN THE FUTURE:
User expressly agrees that this document is a binding agreement, pursuant to which User freely gives up certain rights and makes certain binding promises. This agreement shall continue at full force and effect at all times and shall be binding on User's heirs, executors, personal representatives, administrators, estate, spouse, marital estate, and assigns. In case any one or more of the provisions contained in this agreement shall be held void or unenforceable for any reason, the enforceability of the remaining provisions contained herein shall not be impaired thereby.

I HAVE CAREFULLY AND THOROUGHLY READ THIS WAIVER AND RELEASE AND FREELY AND FULLY AGREE TO BE BOUND BY ITS TERMS.

USER'S SIGNATURE: _____

ASSIGNMENT OF LEASE

THE STATE OF TEXAS §

§ KNOW ALL MEN BY THESE PRESENTS:

COUNTY OF HARRIS §

This Assignment of Lease Agreement ("Assignment Agreement") executed on the 21st day of October, 2008, but effective on October 21, 2008 by and between Shell WindEnergy Inc., a Delaware corporation, whose business address is One Shell Plaza, 910 Louisiana Street, Houston, Texas 77002 ("Assignor" or "SWE") and Auwahi Wind Energy LLC, a Delaware Limited Liability corporation, with offices at 910 Louisiana Street, Houston, Texas 77002, ("Assignee").

RECITALS:

WHEREAS, Assignor entered into that certain unrecorded Lease effective June 29, 2006 with Ulupalakua Ranch, Inc. (the "Lease"), of which a Short Form Memorandum of Lease was recorded in the Bureau of Conveyances of the State of Hawaii in Document 2006-122528, leasing to Assignor, for the purposes stated in said Lease, the real property described in Exhibit "A," attached hereto and incorporated herein by this reference; and

WHEREAS, pursuant to Section 18.1 of said Lease, Assignor, as Tenant retained the right to assign the Lease to its affiliate; and

WHEREAS, Assignor formed a wholly owned subsidiary on April 22, 2008 named Auwahi Wind Energy LLC, which satisfies the requirements of an "affiliate" under the Lease; and

WHEREAS, Assignor desires to assign all of Assignor's right, title and interest and obligations in and to the Lease; and

WHEREAS, Auwahi Wind Energy LLC, as Assignee hereunder, desires to assume all rights and responsibilities of the Lease and to fully perform Assignor's duties and obligations with respect to the Lease which first arise after the Effective Date of this Agreement.

EXHIBIT 8

AGREEMENT:

NOW, THEREFORE, for **TEN DOLLARS (\$10.00)** and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby covenant and agree as follows and take the following actions:

1. Assignor does hereby assign, transfer and set over and deliver unto Assignee all of Assignor's right, title and interest, in and to the Lease, including without limitation, the leasehold estate therein described, together with all interests thereto appertaining, and together with also with the personal property, if any, as set forth in said Lease.

AND all of the estate, right, title and interest of the Assignor, as Tenant under the Lease, in and to the real property thereby demised and all buildings, improvements, rights, easements, privileges and appurtenances thereunto belonging or appertaining or used, occupied, and enjoyed in connection with said lease and the real property demised by said Lease.

2. Assignee does hereby promise, covenant and agree to and with the Assignor that the Assignee will, effective as of and from the date of execution and delivery of this Assignment Agreement and during the remainder of the term of the Lease, pay the rents thereby reserved as and when the same become due and payable pursuant to the provisions of said Lease, and will also faithfully observe and perform all of the covenants and conditions contained in said Lease which from and after the date hereof are or ought to be observed and performed by the Assignor as Tenant therein named, and will at all times hereafter indemnify and save harmless the Assignor from and against the nonpayment of said rents and the nonobservance or nonperformance of said covenants and conditions and each of them.

3. This Assignment shall be binding upon and inure to the benefit of the Assignor and Assignee and their respective successors and permitted assigns.

4. Except as expressly set forth herein, the terms of the Lease shall remain in full force and effect, unaltered by this Assignment Agreement.

5. This Assignment Agreement shall be construed in accordance with the laws of the State of Texas.

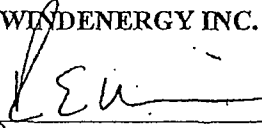
6. This Assignment Agreement may be executed in any number of counterparts, each of which shall constitute an original, and all such counterparts shall together constitute one instrument binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the parties hereto have executed this Assignment Agreement to be effective as of the date set forth above.

ASSIGNOR:

SHELL WINDENERGY INC.

By: 

Name: RICHARD E. WILLIAMS

Title: PRESIDENT

ASSIGNEE:

AUWAHI WINDENERGY LLC

By: 

Name: MIKE OROSCO

Title: VICE PRESIDENT - DEVELOPMENT

THE STATE OF Texas §
§
COUNTY OF Harris §

The foregoing instrument was acknowledged before me on this 21st day of October, 2008 by Richard E. Williams, the President of Shell WindEnergy Inc., a Delaware corporation, on behalf of said entity.

Witness my hand and official seal.

Derada D. White

Notary Public in and for the State of Texas

DERADA D. WHITE

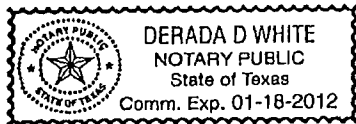
Printed Name of Notary

My Commission Expires: 01-18-2012

THE STATE OF Texas §
§
COUNTY OF Harris §

The foregoing instrument was acknowledged before me on this 21st day of October, 2008, by Mike Orosco, the V.P. - Development of Auwahi Wind Energy LLC, a Delaware corporation, on behalf of said entity.

Witness my hand and official seal.



Derada D. White

Notary Public in and for the State of Texas

DERADA D. WHITE

Printed Name of Notary

My Commission Expires: 01-18-2012

TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
Attorneys at Law, A Law Corporation

RONALD I. HELLER 2721-0
700 Bishop Street, 15th Floor
Honolulu, HI 96813-4187
Telephone: (808) 523-6000
Facsimile: (808) 523-6001
rheller@torkildson.com

Attorney for KAHEAWA WIND POWER, LLC

2011 DEC -1 AM 10:43
TAX APPEAL COURT
STATE OF HAWAII
FILED

TAX APPEAL COURT
OF THE STATE OF HAWAII

In The Matter Of The Tax Appeal Of
KAHEAWA WIND POWER, LLC,
Taxpayer-Appellant.

CASE NO. 1 TX 10-1-1246
and consolidated cases

STIPULATION OF FACTS; JOINT
EXHIBITS J-1 THROUGH J-17

Trial date: April 9, 2012

STIPULATION OF FACTS

Taxpayer-Appellant KAHEAWA WIND POWER, LLC ("Kaheawa") and Appellee COUNTY OF MAUI (the "County"), hereby stipulate and agree that the facts set forth below shall be, and are hereby, conclusively established for purposes of this consolidated action. By signing this Stipulation, neither party necessarily admits that any particular fact is relevant to the issues in this case – each party reserves the right to argue that specific facts stated in this Stipulation are irrelevant to the issues in this case.

Kaheawa and the County further stipulate that Joint Exhibits J-1 through J- 17 attached hereto shall be, and are hereby, admitted into evidence in this action. By signing this Stipulation, neither party necessarily admits that any particular Joint Exhibit is relevant to the issues in this

DEC 1 10 43 AM '11

LAND/TAX APPEAL COURT
RECEIVED
70

case – each party reserves the right to argue that specific Joint Exhibits, although admitted into evidence by agreement, are irrelevant to the issues in this consolidated action.

This Stipulation is made solely for purposes of the present action, and does not constitute an admission of any fact for any other purpose or with respect to any third party.

Unless specific dates or time frames are set forth in particular statements below, or are obvious and apparent from the context, the statements should be considered to apply generally to the time periods that are relevant in this case.

This Stipulation is not intended to set forth all of the facts that may be relevant in this case. Nothing in this Stipulation shall preclude either party from offering any additional evidence, except that evidence offered for the sole purpose of contradicting a stipulated fact shall not be allowed.

This Stipulation may be amended only by a further stipulation signed by both parties or their respective counsel.

Stipulated Facts

1. This consolidated action is a real property tax appeal, filed by Kaheawa with respect to the parcel of land identified as Tax Map Key 4-8-001-001-6001 (the “Subject Property”). The present consolidated action involves tax years 2007 through 2011.

2. The Subject Property is located in the West Maui mountain area, roughly three miles mauka from Maalaea harbor. The Subject Property is leased from the State of Hawaii. Kaheawa acquired a leasehold interest in the Subject Property by executing General Lease No. S-5731 dated January 19, 2005 (the “Lease”). A true copy of the Lease, as amended, is attached as Joint Exhibit J-1.

3. The Taxpayer-Appellant, Kaheawa, is engaged in the business of producing electrical power from wind energy. There are currently 20 wind turbines located on the Subject Property, each capable of independently generating approximately 1.5 megawatts of electricity. This is a commercial power-generating business; the electricity is sold to Maui Electric

Company, Limited (on an "as-available" basis) and ultimately used by businesses and/or consumers.

4. Joint Exhibit J-2 is a photograph showing a portion of the Subject Property, with some of the towers and turbines. The photograph is an accurate representation of the subject matter.

5. On or about May 17, 2010, the County issued an "AMENDED NOTICE OF PROPERTY ASSESSMENT" for each of the 2007, 2008 and 2009 tax years. True copies of these notices are attached as Joint Exhibits J-3, J-4, and J-5, respectively.

6. On or about March 15, 2010, the County issued a "NOTICE OF PROPERTY ASSESSMENT" for the 2010 tax year. A true copy of that notice is attached as Joint Exhibit J-6.

7. On or about March 15, 2011, the County issued a "NOTICE OF PROPERTY ASSESSMENT" for the 2011 tax year. A true copy of that notice is attached as Joint Exhibit J-7.

8. The County is treating the turbines and the towers on which the turbines are mounted as real property included in "building" value for real property tax assessment purposes. Kaheawa asserts that the turbines and the associated towers are equipment and machinery, moveable and not real property.

9. The turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Kaheawa does not dispute that the poured concrete slabs are affixed to the land,¹ and thus are real property, included within "building" value for real property tax purposes.

10. The turbines and the towers are bolted in place. They can be unbolted and removed without any harm to either the equipment or the land.

¹ "Affixed" meaning that the slabs could not be removed without significant damage to the slabs themselves and/or the surrounding land.

11. Joint Exhibits J-8 and J-9, respectively, are photographs of a tower section being lowered into place so that it can be bolted to the foundation, and the assembly of towers by stacking one section on top of another. Each photograph is an accurate representation of the subject matter.

12. Joint Exhibits J-10 and J-11 are photographs of a turbine being lifted into place so that it can be bolted to the tower. Each photograph is an accurate representation of the subject matter.

13. The turbines and towers were purchased as commercially available hardware.²

14. Joint Exhibit J-12 is a photograph showing tower sections on the ship that brought them to Maui. The photograph is an accurate representation of the subject matter.

15. Joint Exhibit J-13 is a set of photographs showing tower sections being transferred from the ship that brought them to Maui onto a truck for transportation to the Subject Property. Each photograph is an accurate representation of the subject matter.

16. Joint Exhibit J-14 is a set of photographs showing a turbine blade being loaded onto a truck for transportation to the Subject Property. Each photograph is an accurate representation of the subject matter.

17. Joint Exhibit J-15 is a set of photographs showing how sections of the turbine are bolted together. Each photograph is an accurate representation of the subject matter.

18. Joint Exhibit J-16 is a pair of photographs showing how a turbine blade assembly was lifted into place and attached to the turbine. Each photograph is an accurate representation of the subject matter.

19. For building permit purposes, Kaheawa had to submit plans and drawings for the concrete foundation slabs. Kaheawa did not have to obtain a building permit, or submit plans and drawings, for the turbines and the towers.

² As with many products, "Some assembly required."

20. The towers came with an instruction booklet from the manufacturer, as opposed to a set of blueprints for construction drawn by an architect. Joint Exhibit J-17 is a copy of the instruction booklet.

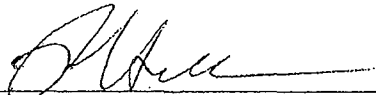
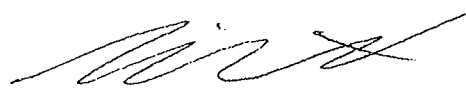
21. When the turbines and towers were purchased and placed in service, Kaheawa claimed a Capital Goods Excise Tax Credit for Hawaii state income tax purposes. Under HRS §235-110.7, the Capital Goods Excise Tax Credit only applies to "tangible personal property" that meets certain requirements. Thus, in order to get the credit, the property involved must be "tangible personal property." HRS §235-110.7(e) says that:

"Tangible personal property" does not include tangible personal property which is an integral part of a building or structure ...

22. The Department of Taxation of the State of Hawaii allowed the Capital Goods Excise Tax Credit claimed by Kaheawa.

23. Kaheawa's Lease specifically requires the removal of the turbines and towers at the end of the Lease term, subject to a right of the Lessor to elect to take ownership. See Lease, Exhibit J- 1 at paragraph 11, page 8.

DATED: Honolulu, Hawaii, 12/1, 2011.

	 RONALD I. HELLER Attorney for Taxpayer-Appellant KAHEAWA WIND POWER, LLC,
	 RICHARD ROST Attorney for Appellee COUNTY OF MAUI

1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

2 STATE OF HAWAII Electronically Filed
3 Intermediate Court of Appeals
4 CAAP-12-0000728
5 In the Matter of the) 24-SEP-2012
6 Tax Appeal of) TX. NO. 10-1-1246
7 KAHEAWA WIND POWER, LLC.) 03:43 PM
8)
9)
10)
11)
12)

8 TRANSCRIPT OF PROCEEDINGS

9 had before the HONORABLE GARY WON BAE CHANG, Judge
10 Presiding, on Monday, February 13, 2012;
11 1) Taxpayer-Appellant's Motion for Partial Summary
12 Judgment; 2) Appellee County of Maui's Motion for
13 Summary Judgment.

13 APPEARANCES:

14 RONALD I. HELLER, ESQ. For Kaheawa Wind Power
15 RICHARD B. ROST, ESQ. For County of Maui
16

22 REPORTED BY:

23 MILANI BALLESTEROS, RMR, CRR, CSR #407
24 Official Court Reporter
25 Circuit Court of the First Circuit
State of Hawaii

OFFICIAL COURT REPORTER
STATE OF HAWAII

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 MONDAY, FEBRUARY 13, 2012 9:03 A.M.

2 --ooOoo--

3 THE CLERK: On the motions calendar, calling
4 tax appeal case numbers -- consolidated case
5 numbers -- I'm sorry -- 10-1-1246, 10-1247 through
6 10-1249, and 11-0035. There are two motions on the
7 calendar this morning. The first is the
8 Taxpayer-Appellant's Motion for Partial Summary
9 Judgment and Appellee County of Maui's Motion for
10 Summary Judgment.

11 Counsels, please state your appearances.

12 MR. ROST: Good morning, Your Honor, Deputy
13 Corporation Counsel Richard B. Rost for Appellee,
14 County of Maui.

15 MR. HELLER: Good morning, Your Honor,
16 Ronald Heller for the Taxpayer, Kaheawa Wind Power,
17 LLC.

18 THE COURT: Okay. Good morning. Please
19 have a seat.

20 We're here for cross motions for summary
21 judgment on the question of whether these turbines
22 and towers are real property or personal property.
23 So I take -- I've reviewed the memoranda that are
24 submitted, so if either of you wish to submit further
25 argument to summarize what's been submitted, that's

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 because we've been going well over an hour.

2 MR. HELLER: I don't have anything further,
3 unless the Court has more questions.

4 MR. ROST: Nothing further, Your Honor.

5 THE COURT: Okay. Have a seat.

6 Counsel, I want to thank you for bringing
7 this extremely interesting question. You can tell by
8 the Court's questions that I'm struggling with this
9 because it's certainly not anything that's
10 mechanical, it is certainly not anything that is
11 without difficulty in terms of applying it to the
12 situation we have here, but I think we start off and
13 end with the particular ordinance in question,
14 3.48.005, and then we look at all of the different
15 interpretations that can be given to this relatively
16 short provision defining property and real property.

17 So I think for the Court what it boils down
18 to is value, because we are talking about real
19 property assessment for tax purposes. And real
20 property taxes are assessed upon the value, so I
21 think we cannot turn a blind eye to the question or
22 the implications of how we will interpret this
23 ordinance with an eye toward value. And as I
24 indicated during the course of my questions, the
25 Court was particularly intrigued by the Taxpayer's

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 argument that the turbines and the towers really add
2 no inherent value to the land. It is something that
3 is virtually completely removable and would have no
4 value to someone other than another wind farmer.

5 But I did draw some analogy to a pineapple
6 processing plant. Not that I am aware of how the
7 County of Maui treats pineapple processing plants or
8 the equipment in pineapple processing plants, but I'm
9 visually trying to imagine what happened with Dole
10 Pineapple Cannery and how it was transformed from a
11 pineapple processing plant into a commercial business
12 property, non-pineapple producing, of shops and other
13 business entities, eateries, et cetera. And I am
14 thinking that all of the guts of that pineapple
15 processing plant were all removable and you had a
16 buyer coming along that saw a -- or had a vision of a
17 commercial enterprise other than fruit processing,
18 and did implement that change. And so I'm sure that
19 that particular buyer was not interested in paying a
20 lot for whatever equipment that was in the cannery
21 buildings, but really wanted the structure of the
22 building and the land itself, location, et cetera,
23 everything else that goes into value, and that's what
24 the buyer paid for and that would be what represented
25 the fair market value.

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 So I think that the impact on certain
2 equipment and machinery upon the value of the land is
3 extremely significant, so I give great weight to the
4 arguments that you have to interpret the subject
5 ordinance in a fashion with an eye toward how it
6 affects value, and I think that is the cornerstone of
7 this Court's thinking on these competing motions.
8 And when we look at the particular phrase relating to
9 machinery and equipment, I think that machinery and
10 equipment has to be necessary to the utility of such
11 land, and I am persuaded that when we talk about
12 utility of such land, we are talking about the
13 general inherent utility of the land and what it can
14 be used for, whether it's a pineapple cannery or a
15 commercial business or commercial space leasing
16 business. I think we have to look at the general
17 utility of the land rather than the specific chosen
18 use of the taxpayer, and to that extent, the Court
19 finds the Taxpayer's argument more persuasive on the
20 question of whether or not the towers and turbines
21 are real property for real property assess -- tax
22 assessment purposes.

23 It is a very close question and I want to
24 say that the skill of counsel both for the County and
25 for the Taxpayer made this an extremely challenging

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 motion or pair of motions. And doing the Court's
2 best at reading the provision in question and
3 considering the related provisions, the exemption in
4 particular, the Court is left with the conclusion
5 that the turbines and towers do not constitute real
6 property for the purposes of real property tax
7 assessment. So for these and any other good cause
8 shown in the record, the Court will respectfully
9 grant the Taxpayer Appellant's motion for partial
10 summary judgment and respectfully deny the Appellee
11 County's motion for summary judgment.

12 Mr. Heller, the Court's going to ask you to
13 prepare both orders, separate orders, and simple
14 orders are -- will suffice.

15 Now, on the Taxpayer's motion for partial
16 summary judgment, with this ruling, are there any
17 further issues outstanding?

18 MR. HELLER: Yes, there are, Your Honor.
19 There are some issues regarding the exact numbers and
20 there's also an issue regarding retroactivity of the
21 assessments for certain tax years.

22 THE COURT: Okay. For clarity purposes, I'm
23 going to ask that on the Taxpayer's -- the order
24 disposing of the Taxpayer's motion, if you would
25 kindly identify the remaining issues so that there is

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 some record, without confusion, of what is remaining
2 in the case.

3 MR. HELLER: I will do that, Your Honor.

4 THE COURT: Okay. Based on the Court's
5 ruling for the Taxpayer, any further argument or
6 comment to be made for the record?

7 MR. HELLER: Not from me, Your Honor.

8 THE COURT: Okay. For the County?

9 MR. ROST: We disagree, Your Honor, but
10 that's all.

11 THE COURT: Okay. Well, I can understand
12 the nature of the disagreement.

13 And, Mr. Rost, I hope you -- and I want the
14 record to be specific that your performance today
15 only made my decision more difficult because you
16 argued extremely effectively and this is, I think, a
17 close legal question. It is a question that
18 obviously the County Council can clarify, if the
19 Court is in error, with an amendment to the
20 ordinance, and of course there's also the avenue of
21 appeal. But you did a fine job today, and it is not
22 for anything wanting in your preparation or argument
23 today that caused this result. I think it is the
24 inherent nature of an interesting fact pattern and
25 the language of the ordinance that this Court did its

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 best to interpret.

2 MR. ROST: Thank you, Your Honor. I
3 appreciate the Court's thoughtful ruling.

4 THE COURT: All right. Okay. So thank you.
5 Court stands in recess.

6 (Proceedings concluded at 10:30 a.m.)

7 --ooOoo--

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PERMISSION TO COPY DENIED, HRS 606.13, ETC.

1 STATE OF HAWAII)
)
 2)
)
 3 CITY & COUNTY OF HONOLULU)
)
 4 _____)

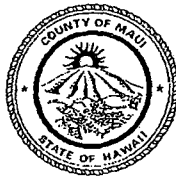
5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

I, MILANI BALLESTEROS, a Certified Shorthand Reporter in the State of Hawai'i, do hereby certify that the foregoing pages 1 - 61, inclusive, comprise a full, true, and correct transcript of the proceedings had on Monday, February 13, 2012 in connection with the above-entitled cause.

DATED: September 24, 2012

/s/ Milani Ballesteros
 MILANI BALLESTEROS, RMR, CRR,
 CSR #407
 Official Court Reporter

ALAN M. ARAKAWA
Mayor



DANILO F. AGSALOG
Director of Finance

MARK R. WALKER
Deputy Director of Finance

COUNTY OF MAUI
DEPARTMENT OF FINANCE
REAL PROPERTY TAX DIVISION

70 E. KAAHUMANU AVENUE, SUITE A-16, KAHULUI, MAUI, HAWAII 96732-2196
Assessment: (808) 270-7297 | Billing and Collection: (808) 270-7697 | Fax: (808) 270-7884
www.mauipropertytax.com

February 25, 2015

Auwahi Wind Energy, LLC
Attn: Vito Galati/Christopher T. Goodin
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

To Whom It May Concern:

Your Appeal Application for Tax Map Key # 1-9-001-006-0000 has been returned to you and will not be presented to the Board of Review for the following reason(s):

1. XX **Not filed by April 09, 2014.** "Any taxpayer seeking to appeal an assessment before the board shall file a notice of appeal with the board at the offices of the division during the period beginning March 15 and ending April 9 of the preceding the tax year...All other appeals shall be deemed untimely and shall not be accepted by the board. Untimely appeals received by the board shall be returned to the sender with notification that the appeal was untimely filed and not accepted by the board. (Section 5-203-17, Rules of Procedure and Forms for the Board of Review). (Maui County Code 3.48.595).
2. **Filing fee of \$75.00 not included.** At the time of filing, "any appeal received without the required fee shall not be filed or accepted by the board, but shall be returned with notification..."
(Section 5-203-17, Rules of Procedure and Forms for the Board of Review).
3. **Incomplete appeal form.** At the time of filing, "any notice of appeal without the information required shall be deemed incomplete and such notice of appeal shall not be accepted by the board, but shall be returned with notification that the notice of appeal was incomplete."
(Section 5-203-18, Rules and Procedure and Forms for the Board of Review).

Your appeal does NOT have the following information:

- Tax Map Key number
- Taxpayer's opinion of the value of the property
- Statement of the grounds for the appeal

Enclosed is a complete copy of the documents filed with the Board of Review.

Real Property Tax Division
Board of Review

EXHIBIT B

ORDINANCES AND RULES REGARDING THE TIMELY FILING OF APPEALS

Maui County Code
Article XI. Appeals

3.48.595 Generally

In the case of a real property tax appeal, a taxpayer shall first appeal to the County board of review, pursuant to section 232-16, Hawaii Revised Statutes. Appeals to the County board of review shall be on grounds as provided in sections 3.48.605A, 3.48.605B, 3.48.605C and or 3.48.605D. Appeals to the County board of review shall be filed on or before April 9 preceding the tax year. Where such an appeal is based upon grounds that the assessed value of the real property for tax purposes is excessive, the valuation claimed by the taxpayer in the appeal shall be admissible in evidence in any subsequent condemnation action involving the property, as an admission that the fair market value of the real property, as of the date of assessment, is no more than the value arrived at when the assessed value from which the taxpayer appeals is adjusted to one hundred percent fair market value, provided that such evidence shall not in any way affect the right of the taxpayer to any severance damages to which the taxpayer may be entitled. Any taxpayer aggrieved by a County board of review final decision may file an appeal for judicial review to the tax appeal court pursuant to sections 91-12 and 91-14 Hawaii Revised Statutes.

Title MC-5
Department of Finance
Subtitle 2
Real Property Tax Division
Chapter 203
Rules and Procedures and Forms for the Board of Review
Subchapter 3

§5-203-17 Filing of appeals. (a) Any taxpayer seeking to appeal an assessment before the board shall file a notice of appeal with the board at the offices of the division during the period beginning March 15 and ending April 9 of the preceding tax year.

(b) An appeal shall be considered timely made if the appeal is filed by personal delivery, private delivery service, or U.S. Postal Service with a postmark date during the period for filing appeals and the notice of appeal is properly addressed to the board. All other appeals shall be deemed untimely and shall not be accepted by the board. Untimely appeals received by the board shall be returned to the sender with notification that the appeal was untimely filed and not accepted by the board.

(c) The appellant shall include the fee required by ordinance for each appeal at the time of filing. Any appeal received without the required fee shall not be filed or accepted by the board, but shall be returned with notification that the required fee was not paid.

(d) An original and one copy of the notice of appeal, including any supporting documents attached to the application form, shall be submitted. [Eff 12/5/02; an and cino 3/30/08; am and comp 6/5/10] (auth: HRS Chapter 246A; Charter §13-2(15); MCC §§3.48.655, 3.48.660, 3.48.680) (Imp: MCC §§3.48.655, 3.48.660)

RECEIVED
CORPORATION COUNSEL

2016 FEB 24 PM 2: 36

KATHLEEN HANAWAHI

2016 FEB 22 AM 11: 03

TAX APPEAL COURT
STATE OF HAWAII
FILED

CADES SCHUTTE
A Limited Liability Law Partnership

VITO GALATI 2611-0
CHRISTOPHER T. GOODIN 8562-0
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4216
Telephone: (808) 521-9200

Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

IN THE TAX APPEAL COURT

STATE OF HAWAI'I

In the Matter of the Appeal

of

AUWAHI WIND ENERGY LLC,

CASE NO. 1.T.X. 16-1-0275

APPELLANT AUWAHI WIND ENERGY
LLC's NOTICE OF APPEAL TO THE TAX
APPEAL COURT FROM BOARD OF
REVIEW; EXHIBITS A & B; CERTIFICATE
OF SERVICE

**APPELLANT AUWAHI WIND ENERGY LLC's NOTICE OF APPEAL TO THE
TAX APPEAL COURT FROM BOARD OF REVIEW**

Pursuant to Hawai'i Revised Statutes ("HRS") § 232-17 and Rule 2 of the Rules of the Tax Appeal Court of the State of Hawai'i, Taxpayer-Appellant Auwahi Wind Energy LLC ("Auwahi") submits this notice of appeal and states as follows:

BACKGROUND

1. Auwahi has a business address of 488 8th Avenue, San Diego, California 92101. Auwahi appeals from the Findings of Fact, Conclusions of Law, and Decision and Order dated January 29, 2016 (the "FOF/COL"), by the County of Maui Board of Review (the "Board of Review"). A true and correct copy of the FOF/COL is attached hereto as Exhibit A. Attached hereto as Exhibit B is a true and correct copy of the assessment information for the property from the County of Maui, Real Property Tax Division.

2. This case concerns real property taxes for tax year 2015.

3. The property is located at 20100 Pi'ilani Highway, Hana, Hawaii and identified by Tax Map Key No. (2) 1-9-001-006 (the "**Property**"). The Property is leased by Auwahi from Ulupalakua Ranch, Inc. Under the lease, Auwahi is required to pay certain real property taxes for the Property and the term of the Lease is greater than fifteen years.

4. The County of Maui (the "**County**") has incorrectly classified wind turbines and towers ("**Turbines**") located at the Property as "real property." The County assessed the land value at \$531,500 and the building value at \$86,881,300, for a total assessed value of \$87,412,800. *See* Ex. B at 1. Of the \$86,881,300 building value, \$86,361,700 is attributable to the Turbines. *See id.* at 2.

5. The County's assessment included a determination that the Turbines qualify as "real property."

6. Based on the County's classification of the Turbines as "real property" and given that the County's 2015 tax rate for buildings on agricultural zoned land is \$5.75 per \$1,000 of net taxable assessed valuation,¹ the amount of real property taxes in controversy for tax year 2015 based on the Turbines is no less than \$496,579.78 ($\$86,361,700 \div \$1,000 = \$86,361.70$; $\$86,361.70 \times \$5.75 = \$496,579.78$).

7. Just like the County, in its Decision and Order, the Board of Review determined that the land value was \$531,500 and the building value was \$86,881,300, for a total assessed value of \$87,412,800.

8. Auwahi's position is that the Turbines are not properly classified as "real property" and that the building value should therefore be reduced by \$86,361,700. With that

¹ *See* Maui County Council Resolution No. 15-52, *available at*

reduction, the building value would be \$519,600, for a total assessed value of not more than \$1,051,100.

9. To date, the amount of court costs paid by Auwahi total \$100.00.

**THE TURBINES ARE NOT “REAL PROPERTY” UNDER THE
HAWAI‘I CONSTITUTION**

10. The assessment is invalid under the Hawai‘i Constitution.

11. Article III, Section 3 of the Hawai‘i Constitution grants the County authority to tax “real property” and matters specifically delegated by the legislature.

12. All remaining taxing authority is reserved to the State.

13. Auwahi’s turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Auwahi’s Turbines can be unbolted and removed without any harm to either the equipment or the land.

14. Auwahi’s Turbines are not necessary to the utility of the land.

15. The Turbines can only be used for the particular business of a wind farm.

16. The Turbines are devoted entirely to the business conducted on the Property.

17. The Turbines are not integrated with and of permanent utility to the land regardless of future use.

18. If the land were devoted to any use other than the electricity-generation business, the Turbines would simply get in the way.

19. The Turbines would have no significant value to someone other than another wind farmer.

20. If some other business were to use the Turbines, the cost to operate and maintain them would be much too high to make economic sense.

21. Because wind conditions can vary, sometimes unpredictably, the Turbines cannot guaranty a steady flow of electrical power.

22. At times, due to either lack of wind or wind in excess of the Turbines' maximum capacity, the Turbines have to be shut down.

23. If someone wanted to use the Turbines as a source of electrical power to be used on the Property itself, the Turbines would not be a reliable source of continuous and steady power.

24. Auwahi's Turbines were not intended to be permanent additions to the land.

25. The Turbines were installed with a view of serving a business purpose, not with a view of permanence.

26. The very nature of the Turbines' function requires that they be movable for purposes of the electricity-generation business in the event that the wind or other conditions changed in the area.

27. Auwahi expects to repair, modify, or possibly upgrade the Turbines for its business.

28. The reason the Turbines are bolted to concrete foundations is to stabilize the Turbines for use in the wind-farm business.

29. The Turbines were not built on-site from construction blueprints.

30. Instead, they were purchased as commercially available hardware with some assembly required.

31. The turbines came with an instruction booklet from the manufacturer.

32. Auwahi did not have to obtain a building permit from, or submit plans and drawings to, the County for the Turbines.

33. Under Auwahi's lease for the Property, Auwahi may remove the Turbines at any time.

34. Upon termination of the lease, Auwahi must remove the Turbines from the premises.

35. Any uncertainty as to whether the Turbines qualify as "real property" must be resolved in favor of Auwahi.

36. Concluding that the Turbines are personal property, and not real property, promotes uniformity and consistency in the tax laws, given that the state and federal taxing authorities have already so concluded.

37. Accordingly, the Turbines are not "real property" under the Hawai'i Constitution. *See Kaheawa Wind Power, LLC v. County of Maui*, 135 Hawai'i 202, 210, 347 P.3d 632, 640 (App. 2014) (concluding that wind turbines did not qualify as "real property" under a prior version of the Maui County Code and relying on *Zangerle v. Republic Steel Corp.*, 60 N.E. 2d 170 (1945), as the case that "most appropriately guides [the] decision in this case"), *cert. rejected*, 2015 WL 745424 (Haw. Feb. 19, 2015); *Zangerle*, 60 N.E.2d 170 (interpreting the meaning of the word "improvements" in the Ohio Constitution for real property tax purposes).

38. Because the Turbines are not "real property" and the assessment imposes taxes on the Turbines as "real property," it follows that the assessment is illegal under the Hawai'i Constitution.

39. The Maui County Code was amended in 2013 to include within the definition of "real property" the following: "Any and all wind energy conversion property that is used to convert wind energy to a form of usable energy, including, but not limited to, a wind charger,

windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines, and substation, and other such components.” MCC § 3.48.005.

40. Because the Turbines do not qualify as “real property” under the Hawai‘i Constitution, the Maui County Code’s definition is invalid and unconstitutional insofar as it purports to classify the Turbines as “real property.”

41. Based on the County’s erroneous classification of the Turbines:

a. The total assessment value exceeds more than twenty percent of the total market value of the “real property.” The County assessed the total value of the Property at \$87,412,800, made up of a land value of \$531,500 and a building value of \$86,881,300. Of the building value, \$86,361,700 is attributable to the Turbines. When the Turbines’ value is removed from the equation, the correct total assessment value of the “real property” is not more than \$1,051,100 for the 2015 tax year. *See* MCC § 3.48.605(A); HRS § 232-3(1).

b. The assessment creates a lack of uniformity or inequality, brought about by inability of the methods used or error in the application of the methods to the property involved. *See* MCC § 3.48.605(B); HRS § 232-3(2).

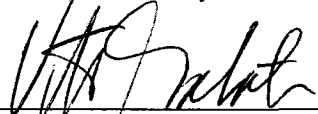
c. The assessment is illegal based at least on the Constitution of the State of Hawai‘i. *See* MCC § 3.48.605(D); HRS § 232-3(4).

WHEREFORE, Auwahi respectfully requests that the Court enter judgment:

- A. Determining that the real property assessment value for the Property for tax year 2015 is reduced to not more than \$1,051,100.
- B. Ordering that the County's 2015 real property tax assessments be amended such that the assessment value for the Property for tax year 2015 is not more than \$1,051,100.
- C. Ordering a refund of any and all amounts paid on, or with respect to, the challenged portion of the assessment for tax year 2015, together with interest as provided by law.
- D. Determining that MCC § 3.48.005 is invalid and unconstitutional insofar as it classifies the Turbines as "real property."
- E. Granting all other and further relief as the Court deems just and proper.

DATED: Honolulu, Hawai'i, February 22, 2016.

CADES SCHUTTE
A Limited Liability Law Partnership



VITO GALATI
CHRISTOPHER T. GOODIN
Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

BEFORE THE BOARD OF REVIEW

COUNTY OF MAUI

STATE OF HAWAII

In the Matter of the
Appeal of
AUWAHI WIND ENERGY LLC

TMK NO. (2) 1-9-001-006-0000
Address 20100 PIILANI HWY., HANA HI
96713

Appeal of the Director of the Department of
Finance, Real Property Assessment Division
for year 2015

APPEAL NO. 016621

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER;
CERTIFICATE OF SERVICE

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Appellant AUWAHI WIND ENERGY LLC, (hereinafter "Appellant"), being the owner of real property located at 20100 PIILANI HWY., HANA, Hawaii, and described for real property tax purposes as Tax Map Key No. (2) 1-9-001-006-0000 ("Property") timely filed an appeal, pursuant to §3.48.595, Maui County Code ("MCC") and §5-203-17, Rules of Practice and Procedure of the Board of Appeals ("Rules") of the real property tax assessment issued by the Director of the Department of Finance ("Director") by the Real Property Assessment Division, for the 2015 assessment year(s).

The appeal came on for hearing before the Board of Review (the "Board") on November 18, 2015. Appellant did not appear at the hearing. Senior Real Property Technical Officer Marcy Martin and Deputy Corporation Counsel Brian Bilberry appeared on behalf of the Department of Finance, Real Property Assessment Division.

After hearing testimony presented by or on behalf of the Director, and review and consideration of the exhibits and other submittals by the parties, and after due deliberation, the Board hereby enters the following Findings of Fact, Conclusions of Law, and Decision and Order.

EXHIBIT A

FINDINGS OF FACT

1. To the extent that any finding of fact is more properly characterized as a conclusion of law, the Board adopts it as such.
2. Appellant is the owner of a parcel of property located at 20100 PIILANI HWY HANA, Hawaii, also designated as Tax Map Key No. (2) 1-9-001-006-0000.
3. The assessment year being appealed is 2015.
4. Appellant alleges:
 - a. That the assessment of the Property exceeds by more than twenty (20) percent the assessment of market value used by the Director. Appellant stated that the total valuation for the Property is \$1,051,100.
 - b. Lack of uniformity or inequality, brought about by the inability of the methods used or error in the application of the methods to the Property.
 - c. Illegality, or any ground arising under the Constitution or laws of the United States or the laws of the State or the ordinances of the County in addition to the illegality of the methods used.
5. Appellant submitted a written statement, arguing the following:
 - a. The Hawaii Constitution generally only allows the County to tax "real property."
 - b. The County of Maui has incorrectly classified wind turbines and towers located on the Property as "real property" in contravention of the Hawaii Constitution.
 - c. The term "real property" is not defined in the Hawaii Constitution.
 - d. The Hawaii Intermediate Court of Appeals has excluded wind towers and turbines from being "real property."
 - e. The Department's tax assessment violates the Hawaii Constitution.
 - f. The value attributed to the wind turbines, being \$86,361,700, should be removed from the total assessed value of the real property for the 2015-2016 tax year.
6. Appellant provided information related to the Intermediate Court of Appeals review of prior years' assessment appeals.
7. The Department and its legal representative provided information related to an amendment of Chapter 3.48, Maui County Code ("Real Property Tax"), which took effect for tax years beginning after January 1, 2014, which is relevant to the instant Appeal. The amendment to Section 3.48.005 added "any and all wind energy conversion property that is used to convert

wind energy to a form of usable energy, including, but not limited to, a wind charger, windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines, and substation, and other such components" to the definition of "Property" or "Real property."

CONCLUSIONS OF LAW

1. To the extent that any conclusion of law is more properly characterized as a finding of fact, the Board adopts it as such.
2. The Applicant timely filed its appeal, pursuant to §5-203-17, Board Rules.
3. Pursuant to §3.48.065, MCC, the assessment made by the Director is prima facie correct.
4. Notice of the hearing of the appeal was provided by the Director pursuant to §5-203-20.
5. The Board may not hear the Appellant's objections involving the Constitution or laws of the United States, pursuant to §3.48.655(C), MCC, and any such objections or claims have not been considered or determined herein.
6. Pursuant to §3.48.605, the Appellant has not shown that there was a lack of uniformity or inequality, brought about by the inability of the methods used or error in the application of the methods to the Property, and further that the Appellant is not entitled to a reduction in the value as assessed by the Department.
7. The Appellant did not meet its burden of proof, being a preponderance of the evidence, pursuant to §5-203-23(f), Board Rules.

DECISION AND ORDER

1. Upon consideration of all of the facts before the Board, oral argument, and all submissions, Board hereby denies the appeal.

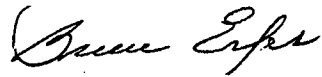
2. For the tax year 2015, the Land Classification is AGRICULTURE and Value of the Property is:

	VALUE	EXEMPTION	NET TAXABLE
Building	\$86,881,300	\$ 0	\$86,881,300
Land	\$531,500	\$ 0	\$531,500
Total	\$87,412,800	\$ 0	\$87,412,800

3. Any party may appeal this decision and order to the State of Hawaii, Tax Appeal Court, within 30 days after the filing of the Decision and Order, pursuant to §232-17, Hawaii Revised Statutes.

DATED: Wailuku, Maui, Hawaii, January 29, 2016.

BOARD OF REVIEW
COUNTY OF MAUI



By: Bruce Erfer
Chairman, Board of Review
County of Maui

BEFORE THE BOARD OF REVIEW

COUNTY OF MAUI

STATE OF HAWAII

In the Matter of the
Appeal of
AUWAHI WIND ENERGY LLC

TMK NO. (2) 1-9-001-006-0000
Address 20100 PIILANI HWY., HANA HI
96713

Appeal of the Director of the Department of
Finance, Real Property Assessment Division
for year 2015

APPEAL NO. 016621
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was duly served upon the following party by U.S. mail, postage prepaid, as follows:

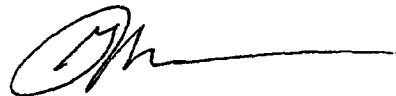
Name: AUWAHI WIND ENERGY LLC
Address: 101 ASH ST HQ07
SAN DIEGO CA 92101

Appellant: AUWAHI WIND ENERGY LLC

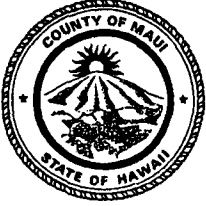
DATED: Wailuku, Maui, Hawaii, January 29, 2016.

DEPARTMENT OF FINANCE
REAL PROPERTY ASSESSMENT DIVISION
COUNTY OF MAUI

Gery Madriaga



for: Danilo F. Agsalóg
Director of Finance
County of Maui



COUNTY OF MAUI
 REAL PROPERTY ASSESSMENT DIVISION
 70 E. KAAHUMANU AVENUE, SUITE A16
 KAHULUI, HI 96732
 TELEPHONE: (808)270-7297

TB538HI

AMENDED NOTICE OF PROPERTY ASSESSMENT

Date: 01/29/2016

TMK/PARCEL ID	YEAR	OWNER	CLASS VAL OVR	LAND AREA	TYPE	CASE NUM
1-9-001-006-0000	2015	ULUPALAKUA RANCH INC	5	5,151.87	B	016621

ORIGINAL	VALUATION	EXEMPTION	NET TAXABLE	TAX RATES	TAXES
BLDG	86,881,300.00	0.00	86,881,300.00	5.75	499,567.48
LAND	531,500.00	0.00	531,500.00	5.75	3,056.13
TOTAL			87,412,800.00		502,623.61
AMENDED					
BLDG	86,881,300.00	0.00	86,881,300.00	5.75	499,567.48
LAND	531,500.00	0.00	531,500.00	5.75	3,056.13
TOTAL			87,412,800.00		502,623.61

PENALTY	0.00
OTHER	0.00
NET CHANGE	0.00
DEPOSIT	0.00

REASON: Board of Review

Board of Review Decision MCC 3.48.630 If you do not agree with the stipulated assessment or the Board of Review's decision you may appeal to the State of Hawaii Tax Appeal Court. The appeal deadline to Tax Appeal Court is 30 days from the date of this notice. Please contact the State of Hawaii, Tax Appeal Court, for the appropriate forms.

NOTES: BOR DECISION

ULUPALAKUA RANCH INC
 HC 1 BOX 901
 KULA HI 96790

ADMINISTRATOR

01/29/2016

Auth ID: RGF

COUNTY OF MAUI *Hawaii*

REAL PROPERTY
TAX DIVISION

[Recent Sales in Neighborhood](#)
[Recent Sales in Area](#)

[Previous Parcel](#)

[Next Parcel](#)

[Return to Main Search Page](#)

[Maui Home](#)

Owner and Parcel Information

Owner Name	ULUPALAKUA RANCH INC Fee Owner AUWAHI WIND ENERGY LLC Leasee Show All Owners and Addresses	Today's Date	April 6, 2015
Mailing Address	HC 1 BOX 901 KULA HI 96790	Parcel Number	190010060000
Location Address	20100 PIILANI HWY	Parcel Map	Show Parcel Map
Neighborhood Code	1242-5	Land Area	5252.872 Acres
Legal Information		Parcel Note	Ag Dedication
Generate Owner List By Radius			

Assessment Information

[Show Historical Assessments](#)

Year	Tax Class	Market Land Value	Agricultural Land Value	Assessed Land Value	Building Value	Total Assessed Value	Total Exemption Value	Total Net Taxable Value
2015	AGRICULTURAL	\$ 3,586,300	\$ 531,500	\$ 531,500	\$ 86,881,300	\$ 87,412,800	\$ 0	\$ 87,412,800
2015	CONSERVATION	\$ 75,800	\$ 600	\$ 600	\$ 0	\$ 600	\$ 0	\$ 600

Agricultural Assessment Information

Acres	Description	Assessed Value
101	PASTUR E 20YR	\$ 606
4105.893	PASTUR E 20YR	\$ 24,635
82.107	PRIMARY SITE	\$ 410,500
963.872	WASTE LAND	\$ 96,400

This parcel has land in agricultural usage and therefore agricultural usage assessments have been made.

Current Tax Bill Information

[2015 Tax Payments](#)

[Show Historical Taxes](#)

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
No Tax Information available on this parcel.									

Commercial Improvement Information

Building Number	Building Type	Structure	Year Built	Eff Year Built	% Complete	Building Square Footage	Sketch	Value
1	SEMPRA OFFICE/WAREHOUSE	WAREHS STEEL W2	2012		75 %	3,840	Sketch Building 1	\$ 519,600
Section	Floor #	Area	Perimeter	Usage	Wall Height	Exterior Wall	Construction	
01	01	1920	176	WAREHOUSE	10	5	METAL WAREHOUSE	
02	01	1920	176	WAREHOUSE	14	5	METAL WAREHOUSE	
02	E1	300	48	OFF ENCL WAREHSE	14	NONE	NONE	
01	E1	1920	128	OFF ENCL WAREHSE	10	NONE	NONE	
02	E2	714	0	OFF ENCL WAREHSE	14	NONE	NONE	

Accessory Information

Building Number	Description	Dimensions/Units	Year Built	Percent Complete	Value
1	WIND POWER TURBINE	0x0 3,000 / 8	2012	100 %	\$ 86,361,700

Sales Information

Sale Date	Price	Instrument #	Instrument Type	Valid Sale or Other Reason	Document Type	Record Date	Land Court #	Land Court Cert
02/09/2012	\$ 0	A44490529	Easements		Grant of easement	03/07/2012		

EXHIBIT B

11/28/2009	\$ 0	09-197252	Easements	Conservation easement	12/29/2009
10/21/2008	\$ 1,290	09-85901	Lease	Assignment lease, sub lease etc.	06/04/2009
06/29/2006	\$ 0	06-122528	Lease	Lease	07/03/2006

Permit Information

Date	Permit Number	Reason	Permit Amount
10/15/2012	B20121255	New commercial bldg	\$ 1,300,000
08/16/2012	B20120943	Other see notes	\$ 108,000
08/16/2012	B20120942	Other see notes	\$ 108,000
08/16/2012	B20120941	Other see notes	\$ 108,000
08/16/2012	B20120940	Other see notes	\$ 108,000
08/16/2012	B20120939	Other see notes	\$ 108,000
08/16/2012	B20120938	Other see notes	\$ 108,000
08/16/2012	B20120937	Other see notes	\$ 108,000
08/16/2012	B20120936	Other see notes	\$ 108,000
03/28/2012	B20120315	Other see notes	\$ 100,000
03/28/2012	B20120314	Other see notes	\$ 100,000
08/31/2006	B20061939	Other see notes	\$ 35,000

[Recent Sales in Neighborhood](#)
[Recent Sales in Area](#)

[Previous Parcel](#)

[Next Parcel](#)

[Return to Main Search Page](#)

[Maui Home](#)

The Maui County Tax Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. Website Updated: April 4, 2015

© 2010 by the Maui County Tax Assessor's Office | Website design by qpublic.net

IN THE TAX APPEAL COURT

STATE OF HAWAI'I

In the Matter of the Tax Appeal

of

AUWAHI WIND ENERGY LLC,

CASE NO. _____

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing document was
duly served on the person below by U.S. Mail:

PATRICK WONG, ESQ.
Corporation Counsel
Deputy Corporation Counsel
200 S. High Street
Kalana O Maui Building, 3d Floor
Wailuku, Hawai'i 96793

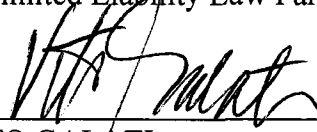
REAL PROPERTY TAX ADMINISTRATOR
County of Maui, Real Property Tax Division
70 E. Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

REAL PROPERTY TAX ASSESSOR
County of Maui, Real Property Tax Division
70 E. Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

DIRECTOR OF TAXATION
State of Hawai'i, Department of Taxation
830 Punchbowl Street, Room 221
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, February 22, 2016.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Vito Galati", is written over a horizontal line.

VITO GALATI
CHRISTOPHER T. GOODIN
Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

RECEIVED
CORPORATION COUNSEL

2016 FEB 24 PM 2: 36

KATHLEEN HANAWAHI

2016 FEB 22 AM 11: 03

TAX APPEAL COURT
STATE OF HAWAII
FILED

CADES SCHUTTE
A Limited Liability Law Partnership

VITO GALATI 2611-0
CHRISTOPHER T. GOODIN 8562-0
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4216
Telephone: (808) 521-9200

Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

IN THE TAX APPEAL COURT

STATE OF HAWAI'I

In the Matter of the Appeal

of

AUWAHI WIND ENERGY LLC,

CASE NO. 1.T.X. 16-1-0275

APPELLANT AUWAHI WIND ENERGY
LLC's NOTICE OF APPEAL TO THE TAX
APPEAL COURT FROM BOARD OF
REVIEW; EXHIBITS A & B; CERTIFICATE
OF SERVICE

**APPELLANT AUWAHI WIND ENERGY LLC's NOTICE OF APPEAL TO THE
TAX APPEAL COURT FROM BOARD OF REVIEW**

Pursuant to Hawai'i Revised Statutes ("HRS") § 232-17 and Rule 2 of the Rules of the Tax Appeal Court of the State of Hawai'i, Taxpayer-Appellant Auwahi Wind Energy LLC ("Auwahi") submits this notice of appeal and states as follows:

BACKGROUND

1. Auwahi has a business address of 488 8th Avenue, San Diego, California 92101. Auwahi appeals from the Findings of Fact, Conclusions of Law, and Decision and Order dated January 29, 2016 (the "FOF/COL"), by the County of Maui Board of Review (the "Board of Review"). A true and correct copy of the FOF/COL is attached hereto as Exhibit A. Attached hereto as Exhibit B is a true and correct copy of the assessment information for the property from the County of Maui, Real Property Tax Division.

2. This case concerns real property taxes for tax year 2015.

3. The property is located at 20100 Pi'ilani Highway, Hana, Hawaii and identified by Tax Map Key No. (2) 1-9-001-006 (the "**Property**"). The Property is leased by Auwahi from Ulupalakua Ranch, Inc. Under the lease, Auwahi is required to pay certain real property taxes for the Property and the term of the Lease is greater than fifteen years.

4. The County of Maui (the "**County**") has incorrectly classified wind turbines and towers ("**Turbines**") located at the Property as "real property." The County assessed the land value at \$531,500 and the building value at \$86,881,300, for a total assessed value of \$87,412,800. *See* Ex. B at 1. Of the \$86,881,300 building value, \$86,361,700 is attributable to the Turbines. *See id.* at 2.

5. The County's assessment included a determination that the Turbines qualify as "real property."

6. Based on the County's classification of the Turbines as "real property" and given that the County's 2015 tax rate for buildings on agricultural zoned land is \$5.75 per \$1,000 of net taxable assessed valuation,¹ the amount of real property taxes in controversy for tax year 2015 based on the Turbines is no less than \$496,579.78 ($\$86,361,700 \div \$1,000 = \$86,361.70$; $\$86,361.70 \times \$5.75 = \$496,579.78$).

7. Just like the County, in its Decision and Order, the Board of Review determined that the land value was \$531,500 and the building value was \$86,881,300, for a total assessed value of \$87,412,800.

8. Auwahi's position is that the Turbines are not properly classified as "real property" and that the building value should therefore be reduced by \$86,361,700. With that

¹ *See* Maui County Council Resolution No. 15-52, *available at*

reduction, the building value would be \$519,600, for a total assessed value of not more than \$1,051,100.

9. To date, the amount of court costs paid by Auwahi total \$100.00.

**THE TURBINES ARE NOT “REAL PROPERTY” UNDER THE
HAWAI‘I CONSTITUTION**

10. The assessment is invalid under the Hawai‘i Constitution.

11. Article III, Section 3 of the Hawai‘i Constitution grants the County authority to tax “real property” and matters specifically delegated by the legislature.

12. All remaining taxing authority is reserved to the State.

13. Auwahi’s turbines are mounted on towers, which are bolted onto poured concrete foundation slabs. Auwahi’s Turbines can be unbolted and removed without any harm to either the equipment or the land.

14. Auwahi’s Turbines are not necessary to the utility of the land.

15. The Turbines can only be used for the particular business of a wind farm.

16. The Turbines are devoted entirely to the business conducted on the Property.

17. The Turbines are not integrated with and of permanent utility to the land regardless of future use.

18. If the land were devoted to any use other than the electricity-generation business, the Turbines would simply get in the way.

19. The Turbines would have no significant value to someone other than another wind farmer.

20. If some other business were to use the Turbines, the cost to operate and maintain them would be much too high to make economic sense.

21. Because wind conditions can vary, sometimes unpredictably, the Turbines cannot guaranty a steady flow of electrical power.

22. At times, due to either lack of wind or wind in excess of the Turbines' maximum capacity, the Turbines have to be shut down.

23. If someone wanted to use the Turbines as a source of electrical power to be used on the Property itself, the Turbines would not be a reliable source of continuous and steady power.

24. Auwahi's Turbines were not intended to be permanent additions to the land.

25. The Turbines were installed with a view of serving a business purpose, not with a view of permanence.

26. The very nature of the Turbines' function requires that they be movable for purposes of the electricity-generation business in the event that the wind or other conditions changed in the area.

27. Auwahi expects to repair, modify, or possibly upgrade the Turbines for its business.

28. The reason the Turbines are bolted to concrete foundations is to stabilize the Turbines for use in the wind-farm business.

29. The Turbines were not built on-site from construction blueprints.

30. Instead, they were purchased as commercially available hardware with some assembly required.

31. The turbines came with an instruction booklet from the manufacturer.

32. Auwahi did not have to obtain a building permit from, or submit plans and drawings to, the County for the Turbines.

33. Under Auwahi's lease for the Property, Auwahi may remove the Turbines at any time.

34. Upon termination of the lease, Auwahi must remove the Turbines from the premises.

35. Any uncertainty as to whether the Turbines qualify as "real property" must be resolved in favor of Auwahi.

36. Concluding that the Turbines are personal property, and not real property, promotes uniformity and consistency in the tax laws, given that the state and federal taxing authorities have already so concluded.

37. Accordingly, the Turbines are not "real property" under the Hawai'i Constitution. *See Kaheawa Wind Power, LLC v. County of Maui*, 135 Hawai'i 202, 210, 347 P.3d 632, 640 (App. 2014) (concluding that wind turbines did not qualify as "real property" under a prior version of the Maui County Code and relying on *Zangerle v. Republic Steel Corp.*, 60 N.E. 2d 170 (1945), as the case that "most appropriately guides [the] decision in this case"), *cert. rejected*, 2015 WL 745424 (Haw. Feb. 19, 2015); *Zangerle*, 60 N.E.2d 170 (interpreting the meaning of the word "improvements" in the Ohio Constitution for real property tax purposes).

38. Because the Turbines are not "real property" and the assessment imposes taxes on the Turbines as "real property," it follows that the assessment is illegal under the Hawai'i Constitution.

39. The Maui County Code was amended in 2013 to include within the definition of "real property" the following: "Any and all wind energy conversion property that is used to convert wind energy to a form of usable energy, including, but not limited to, a wind charger,

windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines, and substation, and other such components.” MCC § 3.48.005.

40. Because the Turbines do not qualify as “real property” under the Hawai‘i Constitution, the Maui County Code’s definition is invalid and unconstitutional insofar as it purports to classify the Turbines as “real property.”

41. Based on the County’s erroneous classification of the Turbines:

a. The total assessment value exceeds more than twenty percent of the total market value of the “real property.” The County assessed the total value of the Property at \$87,412,800, made up of a land value of \$531,500 and a building value of \$86,881,300. Of the building value, \$86,361,700 is attributable to the Turbines. When the Turbines’ value is removed from the equation, the correct total assessment value of the “real property” is not more than \$1,051,100 for the 2015 tax year. *See* MCC § 3.48.605(A); HRS § 232-3(1).

b. The assessment creates a lack of uniformity or inequality, brought about by inability of the methods used or error in the application of the methods to the property involved. *See* MCC § 3.48.605(B); HRS § 232-3(2).

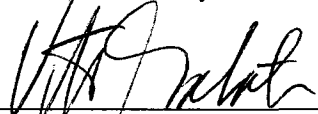
c. The assessment is illegal based at least on the Constitution of the State of Hawai‘i. *See* MCC § 3.48.605(D); HRS § 232-3(4).

WHEREFORE, Auwahi respectfully requests that the Court enter judgment:

- A. Determining that the real property assessment value for the Property for tax year 2015 is reduced to not more than \$1,051,100.
- B. Ordering that the County's 2015 real property tax assessments be amended such that the assessment value for the Property for tax year 2015 is not more than \$1,051,100.
- C. Ordering a refund of any and all amounts paid on, or with respect to, the challenged portion of the assessment for tax year 2015, together with interest as provided by law.
- D. Determining that MCC § 3.48.005 is invalid and unconstitutional insofar as it classifies the Turbines as "real property."
- E. Granting all other and further relief as the Court deems just and proper.

DATED: Honolulu, Hawai'i, February 22, 2016.

CADES SCHUTTE
A Limited Liability Law Partnership



VITO GALATI
CHRISTOPHER T. GOODIN
Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC

BEFORE THE BOARD OF REVIEW

COUNTY OF MAUI

STATE OF HAWAII

In the Matter of the
Appeal of
AUWAHI WIND ENERGY LLC

TMK NO. (2) 1-9-001-006-0000
Address 20100 PIILANI HWY., HANA HI
96713

Appeal of the Director of the Department of
Finance, Real Property Assessment Division
for year 2015

APPEAL NO. 016621

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER;
CERTIFICATE OF SERVICE

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Appellant AUWAHI WIND ENERGY LLC, (hereinafter "Appellant"), being the owner of real property located at 20100 PIILANI HWY., HANA, Hawaii, and described for real property tax purposes as Tax Map Key No. (2) 1-9-001-006-0000 ("Property") timely filed an appeal, pursuant to §3.48.595, Maui County Code ("MCC") and §5-203-17, Rules of Practice and Procedure of the Board of Appeals ("Rules") of the real property tax assessment issued by the Director of the Department of Finance ("Director") by the Real Property Assessment Division, for the 2015 assessment year(s).

The appeal came on for hearing before the Board of Review (the "Board") on November 18, 2015. Appellant did not appear at the hearing. Senior Real Property Technical Officer Marcy Martin and Deputy Corporation Counsel Brian Bilberry appeared on behalf of the Department of Finance, Real Property Assessment Division.

After hearing testimony presented by or on behalf of the Director, and review and consideration of the exhibits and other submittals by the parties, and after due deliberation, the Board hereby enters the following Findings of Fact, Conclusions of Law, and Decision and Order.

EXHIBIT A

FINDINGS OF FACT

1. To the extent that any finding of fact is more properly characterized as a conclusion of law, the Board adopts it as such.
2. Appellant is the owner of a parcel of property located at 20100 PIILANI HWY HANA, Hawaii, also designated as Tax Map Key No. (2) 1-9-001-006-0000.
3. The assessment year being appealed is 2015.
4. Appellant alleges:
 - a. That the assessment of the Property exceeds by more than twenty (20) percent the assessment of market value used by the Director. Appellant stated that the total valuation for the Property is \$1,051,100.
 - b. Lack of uniformity or inequality, brought about by the inability of the methods used or error in the application of the methods to the Property.
 - c. Illegality, or any ground arising under the Constitution or laws of the United States or the laws of the State or the ordinances of the County in addition to the illegality of the methods used.
5. Appellant submitted a written statement, arguing the following:
 - a. The Hawaii Constitution generally only allows the County to tax "real property."
 - b. The County of Maui has incorrectly classified wind turbines and towers located on the Property as "real property" in contravention of the Hawaii Constitution.
 - c. The term "real property" is not defined in the Hawaii Constitution.
 - d. The Hawaii Intermediate Court of Appeals has excluded wind towers and turbines from being "real property."
 - e. The Department's tax assessment violates the Hawaii Constitution.
 - f. The value attributed to the wind turbines, being \$86,361,700, should be removed from the total assessed value of the real property for the 2015-2016 tax year.
6. Appellant provided information related to the Intermediate Court of Appeals review of prior years' assessment appeals.
7. The Department and its legal representative provided information related to an amendment of Chapter 3.48, Maui County Code ("Real Property Tax"), which took effect for tax years beginning after January 1, 2014, which is relevant to the instant Appeal. The amendment to Section 3.48.005 added "any and all wind energy conversion property that is used to convert

wind energy to a form of usable energy, including, but not limited to, a wind charger, windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines, and substation, and other such components" to the definition of "Property" or "Real property."

CONCLUSIONS OF LAW

1. To the extent that any conclusion of law is more properly characterized as a finding of fact, the Board adopts it as such.
2. The Applicant timely filed its appeal, pursuant to §5-203-17, Board Rules.
3. Pursuant to §3.48.065, MCC, the assessment made by the Director is prima facie correct.
4. Notice of the hearing of the appeal was provided by the Director pursuant to §5-203-20.
5. The Board may not hear the Appellant's objections involving the Constitution or laws of the United States, pursuant to §3.48.655(C), MCC, and any such objections or claims have not been considered or determined herein.
6. Pursuant to §3.48.605, the Appellant has not shown that there was a lack of uniformity or inequality, brought about by the inability of the methods used or error in the application of the methods to the Property, and further that the Appellant is not entitled to a reduction in the value as assessed by the Department.
7. The Appellant did not meet its burden of proof, being a preponderance of the evidence, pursuant to §5-203-23(f), Board Rules.

DECISION AND ORDER

1. Upon consideration of all of the facts before the Board, oral argument, and all submissions, Board hereby denies the appeal.

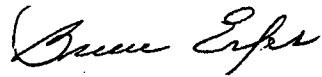
2. For the tax year 2015, the Land Classification is AGRICULTURE and Value of the Property is:

	VALUE	EXEMPTION	NET TAXABLE
Building	\$86,881,300	\$ 0	\$86,881,300
Land	\$531,500	\$ 0	\$531,500
Total	\$87,412,800	\$ 0	\$87,412,800

3. Any party may appeal this decision and order to the State of Hawaii, Tax Appeal Court, within 30 days after the filing of the Decision and Order, pursuant to §232-17, Hawaii Revised Statutes.

DATED: Wailuku, Maui, Hawaii, January 29, 2016.

BOARD OF REVIEW
COUNTY OF MAUI



By: Bruce Erfer
Chairman, Board of Review
County of Maui

BEFORE THE BOARD OF REVIEW

COUNTY OF MAUI

STATE OF HAWAII

In the Matter of the
Appeal of
AUWAHI WIND ENERGY LLC

TMK NO. (2) 1-9-001-006-0000
Address 20100 PIILANI HWY., HANA HI
96713

Appeal of the Director of the Department of
Finance, Real Property Assessment Division
for year 2015

APPEAL NO. 016621
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was duly served upon the following party by U.S. mail, postage prepaid, as follows:

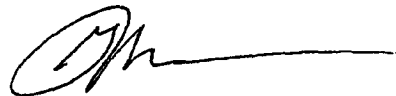
Name: AUWAHI WIND ENERGY LLC
Address: 101 ASH ST HQ07
SAN DIEGO CA 92101

Appellant: AUWAHI WIND ENERGY LLC

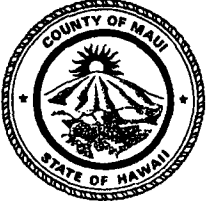
DATED: Wailuku, Maui, Hawaii, January 29, 2016.

DEPARTMENT OF FINANCE
REAL PROPERTY ASSESSMENT DIVISION
COUNTY OF MAUI

Gery Madriaga



for: Danilo F. Agsalóg
Director of Finance
County of Maui



COUNTY OF MAUI
 REAL PROPERTY ASSESSMENT DIVISION
 70 E. KAAHUMANU AVENUE, SUITE A16
 KAHULUI, HI 96732
 TELEPHONE: (808)270-7297

TB538HI

AMENDED NOTICE OF PROPERTY ASSESSMENT

Date: 01/29/2016

TMK/PARCEL ID	YEAR	OWNER	CLASS VAL OVR	LAND AREA	TYPE	CASE NUM
1-9-001-006-0000	2015	ULUPALAKUA RANCH INC	5	5,151.87	B	016621

ORIGINAL	VALUATION	EXEMPTION	NET TAXABLE	TAX RATES	TAXES
BLDG	86,881,300.00	0.00	86,881,300.00	5.75	499,567.48
LAND	531,500.00	0.00	531,500.00	5.75	3,056.13
TOTAL			87,412,800.00		502,623.61
AMENDED					
BLDG	86,881,300.00	0.00	86,881,300.00	5.75	499,567.48
LAND	531,500.00	0.00	531,500.00	5.75	3,056.13
TOTAL			87,412,800.00		502,623.61

PENALTY	0.00
OTHER	0.00
NET CHANGE	0.00
DEPOSIT	0.00

REASON: Board of Review

Board of Review Decision MCC 3.48.630 If you do not agree with the stipulated assessment or the Board of Review's decision you may appeal to the State of Hawaii Tax Appeal Court. The appeal deadline to Tax Appeal Court is 30 days from the date of this notice. Please contact the State of Hawaii, Tax Appeal Court, for the appropriate forms.

NOTES: BOR DECISION

ULUPALAKUA RANCH INC
 HC 1 BOX 901
 KULA HI 96790

ADMINISTRATOR

01/29/2016

Auth ID: RGF

COUNTY OF MAUI *Hawaii*

REAL PROPERTY
TAX DIVISION

[Recent Sales in Neighborhood](#)
[Recent Sales in Area](#)

[Previous Parcel](#)

[Next Parcel](#)

[Return to Main Search Page](#)

[Maui Home](#)

Owner and Parcel Information

Owner Name	ULUPALAKUA RANCH INC Fee Owner AUWAHI WIND ENERGY LLC Leasee Show All Owners and Addresses	Today's Date	April 6, 2015
Mailing Address	HC 1 BOX 901 KULA HI 96790	Parcel Number	190010060000
Location Address	20100 PIILANI HWY	Parcel Map	Show Parcel Map
Neighborhood Code	1242-5	Land Area	5252.872 Acres
Legal Information		Parcel Note	Ag Dedication
Generate Owner List By Radius			

Assessment Information

[Show Historical Assessments](#)

Year	Tax Class	Market Land Value	Agricultural Land Value	Assessed Land Value	Building Value	Total Assessed Value	Total Exemption Value	Total Net Taxable Value
2015	AGRICULTURAL	\$ 3,586,300	\$ 531,500	\$ 531,500	\$ 86,881,300	\$ 87,412,800	\$ 0	\$ 87,412,800
2015	CONSERVATION	\$ 75,800	\$ 600	\$ 600	\$ 0	\$ 600	\$ 0	\$ 600

Agricultural Assessment Information

Acres	Description	Assessed Value
101	PASTUR E 20YR	\$ 606
4105.893	PASTUR E 20YR	\$ 24,635
82.107	PRIMARY SITE	\$ 410,500
963.872	WASTE LAND	\$ 96,400

This parcel has land in agricultural usage and therefore agricultural usage assessments have been made.

Current Tax Bill Information

[2015 Tax Payments](#)

[Show Historical Taxes](#)

Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
No Tax Information available on this parcel.									

Commercial Improvement Information

Building Number	Building Type	Structure	Year Built	Eff Year Built	% Complete	Building Square Footage	Sketch	Value
1	SEMPRA OFFICE/WAREHOUSE	WAREHS STEEL W2	2012		75 %	3,840	Sketch Building 1	\$ 519,600
Section	Floor #	Area	Perimeter	Usage	Wall Height	Exterior Wall	Construction	
01	01	1920	176	WAREHOUSE	10	5	METAL WAREHOUSE	
02	01	1920	176	WAREHOUSE	14	5	METAL WAREHOUSE	
02	E1	300	48	OFF ENCL WAREHSE	14	NONE	NONE	
01	E1	1920	128	OFF ENCL WAREHSE	10	NONE	NONE	
02	E2	714	0	OFF ENCL WAREHSE	14	NONE	NONE	

Accessory Information

Building Number	Description	Dimensions/Units	Year Built	Percent Complete	Value
1	WIND POWER TURBINE	0x0 3,000 / 8	2012	100 %	\$ 86,361,700

Sales Information

Sale Date	Price	Instrument #	Instrument Type	Valid Sale or Other Reason	Document Type	Record Date	Land Court #	Land Court Cert
02/09/2012	\$ 0	A44490529	Easements		Grant of easement	03/07/2012		

EXHIBIT B

11/28/2009	\$ 0	09-197252	Easements	Conservation easement	12/29/2009
10/21/2008	\$ 1,290	09-85901	Lease	Assignment lease, sub lease etc.	06/04/2009
06/29/2006	\$ 0	06-122528	Lease	Lease	07/03/2006

Permit Information

Date	Permit Number	Reason	Permit Amount
10/15/2012	B20121255	New commercial bldg	\$ 1,300,000
08/16/2012	B20120943	Other see notes	\$ 108,000
08/16/2012	B20120942	Other see notes	\$ 108,000
08/16/2012	B20120941	Other see notes	\$ 108,000
08/16/2012	B20120940	Other see notes	\$ 108,000
08/16/2012	B20120939	Other see notes	\$ 108,000
08/16/2012	B20120938	Other see notes	\$ 108,000
08/16/2012	B20120937	Other see notes	\$ 108,000
08/16/2012	B20120936	Other see notes	\$ 108,000
03/28/2012	B20120315	Other see notes	\$ 100,000
03/28/2012	B20120314	Other see notes	\$ 100,000
08/31/2006	B20061939	Other see notes	\$ 35,000

[Recent Sales in Neighborhood](#)
[Recent Sales in Area](#)

[Previous Parcel](#)

[Next Parcel](#)

[Return to Main Search Page](#)

[Maui Home](#)

The Maui County Tax Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. Website Updated: April 4, 2015

© 2010 by the Maui County Tax Assessor's Office | Website design by qpublic.net

IN THE TAX APPEAL COURT

STATE OF HAWAI'I

In the Matter of the Tax Appeal

of

AUWAHI WIND ENERGY LLC,

CASE NO. _____

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing document was
duly served on the person below by U.S. Mail:

PATRICK WONG, ESQ.
Corporation Counsel
Deputy Corporation Counsel
200 S. High Street
Kalana O Maui Building, 3d Floor
Wailuku, Hawai'i 96793

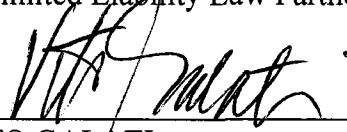
REAL PROPERTY TAX ADMINISTRATOR
County of Maui, Real Property Tax Division
70 E. Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

REAL PROPERTY TAX ASSESSOR
County of Maui, Real Property Tax Division
70 E. Kaahumanu Avenue, Suite A16
Kahului, Hawai'i 96732

DIRECTOR OF TAXATION
State of Hawai'i, Department of Taxation
830 Punchbowl Street, Room 221
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, February 22, 2016.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Vito Galati", is written over a horizontal line.

VITO GALATI
CHRISTOPHER T. GOODIN
Attorneys for Taxpayer-Appellant
AUWAHI WIND ENERGY LLC