

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 11, 2020

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

OAHU

Consent to Mortgage with Estoppel Certificate, General Lease No. S-6105, Na Pua Makani Power Partners, LLC, Lessee, Kahuku, Koolauloa, Oahu, Tax Map Key: (1) 5-6-008:006.

APPLICANT AND REQUEST:

Na Pua Makani Power Partners, LLC (“NPM”), Lessee, requesting consent to mortgage from KeyBank National Association, Mortgagee, in an amount not to exceed \$109,261,050.

LEGAL REFERENCE:

Sections 171-22, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Kahuku, Koolauloa, Oahu, identified by Tax Map Key: (1) 5-6-008:006, as shown on the map attached as **Exhibit A**.

AREA:

231.927 acres, more or less.

TRUST LAND STATUS:

Acquired after Statehood, i.e. non-ceded.
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No.

CHARACTER OF USE:

Wind resource and other evaluations, wind energy conversion system, transmission and

communication facilities, road and access, and wind.

TERM OF LEASE:

40 years, commencing on September 1, 2017 and expiring on August 31, 2057. Next rental reopening is scheduled for September 1, 2037.

RENTAL:

\$120,000 per annum, or 2.5% of gross revenue, whichever is the greater.

USE OF LOAN PROCEEDS:

The loan funds will be used for the operations and maintenance of the Na Pua Makani Wind project partially located on the leased premises.

Note: The remaining portion of the project is located on the adjacent private property further identified as TMK: (1) 5-6-006:018. See Exhibit A.

APPLICANT REQUIREMENT:

None

REMARKS:

At its meeting on October 14, 2016, under agenda item D-12, the Board authorized the issuance of the subject lease. General Lease No. S-6105, a 40-year lease that commenced on September 1, 2017.

The subject State land is only a portion of NPM's wind farm at the location, in addition to the adjoining private property, further identified as TMK: (1) 5-6-006:018. To finance the operation and maintenance of the entire wind project covering both private and public lands, NPM is in the process of obtaining a loan from private lenders as described above.

NPM has provided staff with copies of the mortgage,¹ preliminary title report, and an estoppel certificate, which are all part of the mortgagee's standard policies. Staff notes the mortgage includes a power of sale in favor of the mortgagee in case of default. Nevertheless, only the leasehold interest would be subject to such power of sale. The State remains the fee owner of the leased premises.

NPM has a habitat conservation plan (HCP) approved by the Board and incidental take license (ITL) approved by the Board and issued by the Division of Forestry and

¹ The title of the document provided is "Accommodation Mortgage of Leasehold and Easement Interests with Power of Sale, Assignment of Leases and Rent, Security Agreement and Fixture Filing".

Wildlife. Appellant Keep the North Shore Country (KNSC) appealed to the circuit court. Judge Crabtree affirmed the Board's decision, and KNSC appealed to the Intermediate Court of Appeals. KNSC requested transfer of the case to the Hawaii Supreme Court and the Supreme Court accepted transfer of the case. KNSC filed a motion for stay of the Board's decision to approve HCP/ITL, and the motion was denied by the Supreme Court. The HCP/ITL are now up on appeal at the Hawaii Supreme Court.

Condition 66 of the subject lease provides:

“b) Lessee shall obtain Board approval of a Habitat Conservation Plan (“HCP”) and secure an Incidental Take License (“ITL”) from the Division of Forestry and Wildlife of the Department of Land and Natural Resources of the State of Hawaii for the Wind Project no later than (i) one (1) year after the date of this Lease, or (ii) March 31, 2018, whichever of (i) or (ii) shall first occur (the “Initial HCP/ITL Deadline”), provided that, if, at the time of the Initial HCP/ITL Deadline, any contested case hearing pertaining to the HCP/ITL has not been concluded or is appealed or is subject to appeal, or if a decision of the Board on the HCP/ITL is subject to any further challenge or court action or such a challenge or court action is then occurring, then the Initial HCP/ITL Deadline shall be extended to a date that is ninety (90) days after the later to occur of (A) the conclusion of the contested case hearing or any appeals thereof; or (B) the deadline by which an appeal must be filed regarding the Board's decision in the contested case;”

Subparagraph c) continues to provide, “If any of the conditions set forth in subparagraphs a), b) or c) of this Section above are not satisfied within the time allowed therefor, then Lessor and Lessee shall each have the right to immediately terminate this Lease by providing written notice of such termination to the other party, provided that Lessor agrees that it must provide such notice to Lessee before Lessee satisfies all of the applicable conditions set forth in such subparagraphs a), b) and c), regardless of whether satisfied within the time allowed therefor as stated in such conditions. If this Lease is properly terminated pursuant to this Section, then this Lease shall be deemed to be null and void ab initio. Notwithstanding the foregoing, the termination of the Lease shall not excuse Lessee from paying rent due to Lessor for the period after the end of the one—year rent waiver set forth above up to the termination date of the Lease.”

In the event the Hawaii Supreme Court were to vacate or otherwise invalidate the HCP/ITL approved by the Board, Lessee would need to stop operating the wind farm at the premises in accordance with any Supreme Court order to do so, or as necessary to comply with applicable State and federal laws. Condition 66 of the lease provides the Board with authority to terminate the lease if Lessee ultimately does not succeed in securing the HCP or ITL, there is a process to follow in order to effectuate the termination that would take

time to complete.

Staff recommends the Board require the estoppel certificate to specifically reference Condition 66 of the lease as noted above and the fact that legal appeals regarding the HCP/ITL are not yet final. Counsel for NPM provided a draft mortgage and estoppel certificate to the department. A preliminary review of the documents revealed the language in the estoppel certificate is not acceptable to the State. Today's request is not asking the Board to approve the form of estoppel certificate proposed by Lessee. Rather, staff will request the Department of the Attorney General to review and approve, if appropriate, any documents pertaining to the approval, if granted today. Staff is including a recommendation below that the Chairperson be authorized to execute the estoppel certificate only after revisions to the document are made to the satisfaction of the Department and the Department of the Attorney General and the estoppel certificate is consistent with the best interests of the State.

The Lessee is compliant with all the terms and conditions of the lease with regards to rent, insurance, improvement bond, and performance bond requirements.

Staff did not solicit comment for this request as there is no change in existing use.

RECOMMENDATION: That the Board

- A. Consent to the mortgage of General Lease No. S-6105 between Na Pua Makani Power Partners, LLC, Mortgagor, and KeyBank National Association, Mortgagee, subject to the following:
 1. The loan proceeds shall be used for the purposes as stated in "Use of Loan Proceeds" above. The Lessee shall maintain records of loan expenditures which may be inspected by the Department;
 2. The standard terms and conditions of the most current consent to mortgage form, as may be amended from time to time;
 3. Review and approval by the Department of the Attorney General; and
 4. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
- B. Authorize the execution of an Estoppel Certificate subject to the following:
 1. The Chairperson is authorized to execute the estoppel certificate only after revisions are made to that document to the satisfaction of the Department and the Department of the Attorney General the estoppel certificate is consistent with the best interests of the State;

2. The estoppel certificate shall expressly reference condition 66 of the lease as noted above;
3. Review and approval by the Department of the Attorney General; and
4. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,

Barry Cheung

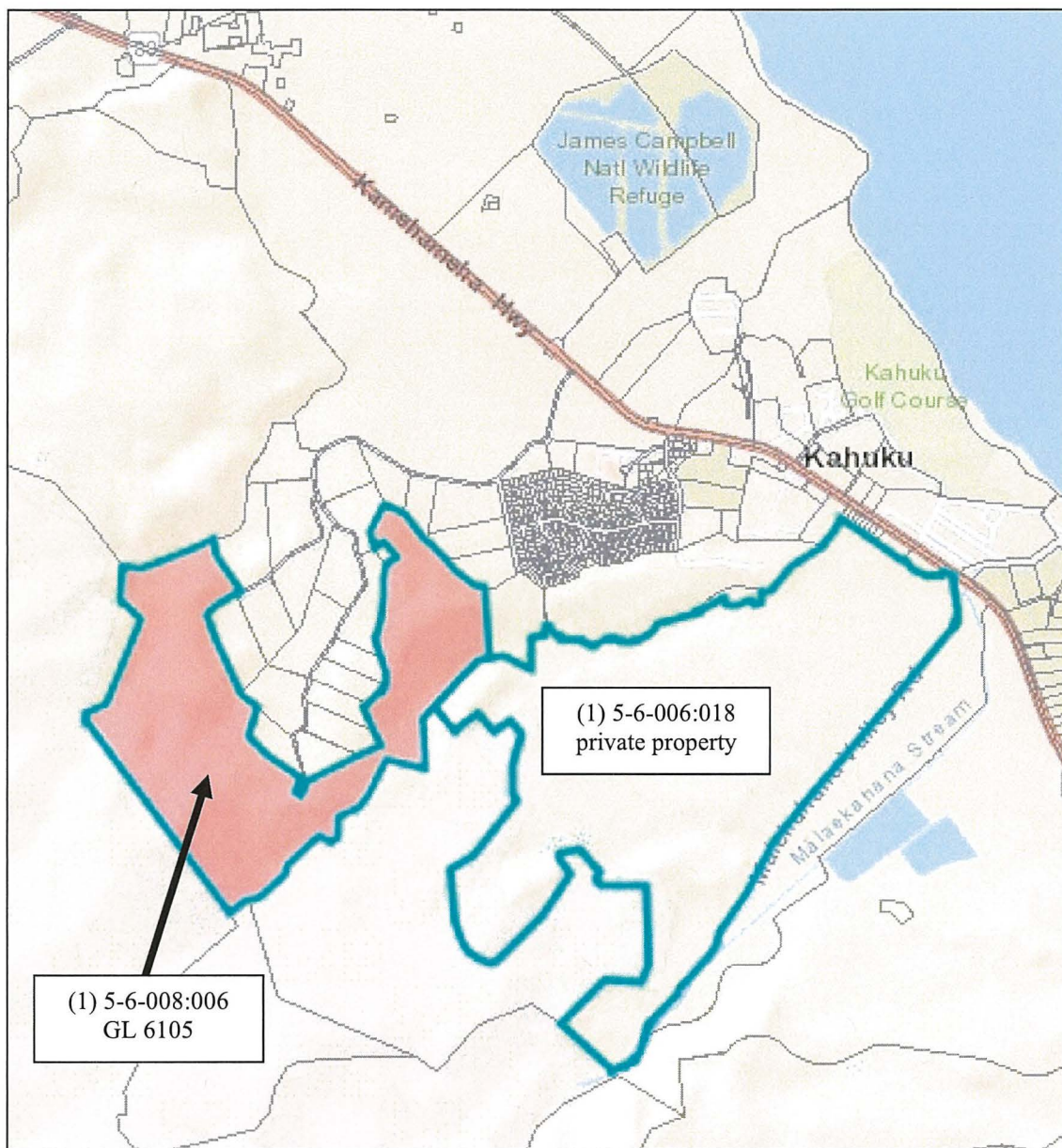
Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

Suzanne D. Case

Suzanne D. Case, Chairperson

RT



TMK (1) 5-6-008:006

EXHIBIT A