

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-17-001  
)  
A Contested Case Hearing Re Final Habitat ) MINUTE ORDER NO. 14 (ORDER  
Conservation Plan and Incidental Take License ) DENYING PETITIONER KEEP THE  
for the Na Pua Makani Wind Energy Project by ) NORTH SHORE COUNTRY’S MOTION  
Applicant Na Pua Makani Power Partners, LLC; ) TO RECUSE SAM GON III FILED ON  
Tax Map Key Nos. (1) 5-6-008:006 and ) JANUARY 24, 2018); CERTIFICATE OF  
(1) 5-6-006:018, Koolauloa District, Island of ) SERVICE  
O’ahu, Hawaii. )  
\_\_\_\_\_ )

**MINUTE ORDER NO. 14  
(ORDER DENYING PETITIONER KEEP THE NORTH SHORE COUNTRY’S  
MOTION TO RECUSE SAM GON III FILED ON JANUARY 24, 2018)**

**I. Introduction**

At the January 12, 2018 hearing on the exceptions to the Hearing Officer’s proposed findings of fact, conclusions of law, and decision and order in the above-titled matter, counsel for Petitioner Keep the North Shore Country (KNSC) requested that Board of Land and Natural Resources (Board) member Sam Gon III (Member Gon) recuse himself from the contested case “due to prior decision making in his capacity on the Endangered Species Recovery Committee on this exact Habitat Conservation Plan.” Tr. 01/12/18 at 7:3-9. Board Chairperson Suzanne Case (Chair Case) asked KNSC to file a motion for recusal and asked that counsel address the applicability of the *Liberty Dialysis of Hawaii, LLC v. Rainbow Dialysis Hawaii, LLC* case to KNSC’s request. Tr. 01/12/18 at 7:10-16. The parties filed the following pleadings relating to KNSC’s request to recuse Member Gon:

- Keep the North Shore Country’s Motion and Memorandum to Recuse Sam Gon III in Response to Minute Order No. 13 (Motion)

- Applicant Na Pua Makani Power Partners, LLC's (NPM) Opposition to Keep the North Shore Country's Motion and Memorandum to Recuse Sam Gon III in Response to Minute Order No. 13, Filed January 24, 2018 (Opposition)
- Keep the North Shore Country's Reply to the Applicant's Opposition to Keep the North Shore Country's Motion to Recuse Sam Gon III (Reply)

Additionally, Member Gon filed a Disclosure of Samuel M. Gon III (written response).

KNSC asserts that Member Gon should recuse himself from participating in this matter because he served on the Endangered Species Recovery Committee (ESRC) when the ESRC reviewed NPM's habitat conservation plan that is the subject of this contested case. KNSC argues that Member Gon's participation on the ESRC provided him specific information about the habitat conservation plan that is not in the contested case record and that Member Gon's participation on the ESRC prejudiced his view on the habitat conservation plan.

## **II. Discussion**

### **A. HRS §§91-9(g) and 91-13 Do Not Require Member Gon's Recusal**

KNSC argues that Member Gon's participation in this contested case violates HRS §§ 91-9(g) and 91-13 because he was a member of the ESRC during the time the ESRC reviewed and recommended approval of the subject habitat conservation plan and reviewed specific information about the habitat conservation plan that is not in the contested case record. Member Gon's participation on the ESRC does not require his recusal nor does it support disqualification.

HRS § 91-9(g) provides, "No matters outside the record shall be considered by the agency in making its decision except as provided herein." Similarly, HRS § 91-9(g) prohibits board members from "consult[ing] any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law."

Nothing in the record shows that Member Gon has not complied or will not comply with HRS §§ 91-9(g) and 91-13. In his written response, Member Gon considered whether his participation on the ESRC warrants his recusal, but concludes it does not.

Member Gon states in his written response:

I understand that my consideration of the [habitat conservation plan] is based on the evidence in the record and the various presentations to the Board considered in light of my experience, training, and background. I am fully capable of considering issues before the Board based upon information presented during the course of public meetings and hearings, without prejudice or bias toward any result or party.

I respectfully submit that my experience, training and background will be of service to the Board of Land and Natural Resources in reaching a fair and appropriate decision on this matter.

Further, Member Gon's written response provides information about his relevant background and knowledge that would be helpful to the Board in its deliberation and decision in this contested case. He is a conservation biologist and a scientist with decades of experience working with endangered species issues locally. He has published peer-reviewed articles on Hawaiian bats and is very knowledgeable on the biology of the Hawaiian bat. And as Applicant points out, Member Gon was appointed to the Board for his expertise and knowledge in native Hawaiian culture and traditional and customary practices.

HRS § 195D-25 establishes the ESRC with members that include the chairperson of the Board (or the chairperson's designee). The Legislature designed HRS Chapter 195D so that the chairperson could both sit on the ESRC and vote on the recommendation on a habitat conservation plan, and then vote on the habitat conservation plan on the Board. It is illogical that this would result in the recusal of the chairperson if there is a contested case, especially because the statute requires an affirmative vote of not less than two-thirds of the (authorized membership of the) Board to approve a habitat conservation plan. It is clear from the statutory provision that



nothing in the statute or law prevents a member of the Board from also serving as a member of the ESRC and that it is not a conflict to serve on both the ESRC and the Board.

*Liberty Dialysis-Hawaii, LLC v. Rainbow Dialysis, LLC, et al.*, 130 Hawai‘i 95, 306 P.3d 140 (2013) also supports the Board’s finding that Member Gon’s participation on the ESRC does not disqualify him from participating in this contested case. In *Liberty Dialysis*, the Hawai‘i Supreme Court considered whether an administrator’s participation in an initial decision by the State Health Planning and Development Agency (SHPDA) to grant a certificate of need required the administrator’s recusal from the subsequent contested case before the Reconsideration Committee that reviewed the SHPDA decision to grant the certificate of need. The Court ruled that the administrator was not disqualified from participating in the Reconsideration Committee’s deliberation and decision on the certificate of need. Although the case involved the application and interpretation of certain statutes and administrative rules relating to SHPDA proceedings, Reconsideration Committee, and certificates of need, *Liberty Dialysis* makes clear that there is no inherent conflict of interest or violation of due process when one participates in an initial decision and then participates as a member of a board that subsequently reviews the initial decision. In this case, the initial decision (made by the ESRC) is only a recommendation on whether to approve the habitat conservation plan, and the decision on the habitat conservation plan is made by the Board.

**B. Member Gon’s Participation on the ESRC Does Not Establish Bias or Prejudice**

KNSC has not shown that Member Gon’s participation on the ESRC during the ESRC’s review and deliberation on the habitat conservation plan prejudices his views in this contested case. At the January 12, 2018 hearing, Member Gon stated on the record, “The idea of my ability to take in fresh information and provide for an opinion in this particular case is not in


question.” Tr. 01/12/18 at 46:22-24. Member Gon reiterated in his written response that he will consider this matter without prejudice or bias.

The Board recognizes that this matter must be decided on the record of the contested case, and that all members must approach the record with an open mind and set aside any determinations that they previously made. The Board is confident that Member Gon has and will continue to do so in this contested case.

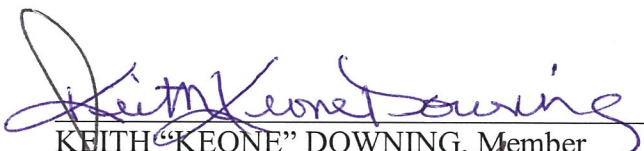
**III. Conclusion**

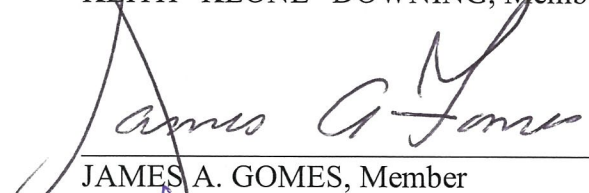
Petitioner Keep the North Shore Country’s Motion to Recuse Sam Gon III is hereby DENIED. This order may be executed in counterparts.

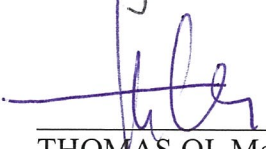
DATED: Honolulu, Hawaii, March 23, 2018.

  
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SUZANNE D. CASE, Chairperson  
Board of Land and Natural Resources and Presiding  
Officer

Recused  
\_\_\_\_\_  
STANLEY H. ROEHRIG, Member

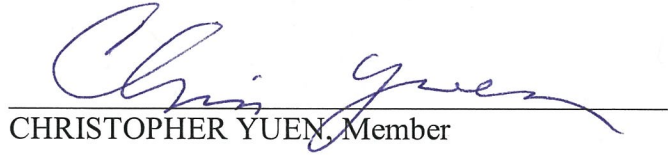
  
\_\_\_\_\_  
KEITH “KEONE” DOWNING, Member

  
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JAMES A. GOMES, Member

  
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THOMAS OI, Member



SAMUEL "OHU" GON III, Member



CHRISTOPHER YUEN, Member

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(1) 5-6-006:018, Koolauloa District, Island of )  
O‘ahu, Hawaii. )  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of Minute Order 14 was duly served upon the following parties, by U.S. Mail, postage prepaid and by email, at the addresses below:

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DATED: Honolulu, Hawai'i, March 23, 2018.



KATHERINE CULLISON

Department of Land and Natural Resources