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Solar Energy Law



TABLE OF CONTENTS

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Grass Shack Productions
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ARTICLES

- 4 Hot Topics in Hawaii Solar Energy Law
by Douglas A. Codiga
- 17 Disciplinary Counsel's Report (2011 and 2012)
by Janet S. Hunt, Chief Disciplinary Counsel
- 23 Lawyers' Fund for Client Protection of the Hawaii Supreme Court:
Annual Report for 2012
- 26 Marvel in Manoa -- Reflections on Teaching a J Term Class
by Hon. Mark W. Bennett

OF NOTE

- 16 HSBA Happenings
- 19 Notices of Discipline
- 20 Case Notes
- 24 Administrative Suspensions
- 29 Volunteers at the Access to Justice Room
- 29 2013 Hawaii Access to Justice Conference
- 30 Off the Record
- 31 Classifieds

On the cover: *676 (Noa)* by Dale Dolejsi. Born in Seattle, Dolejsi earned his B.F.A. from the University of Washington and M.A. from the Claremont Graduate University. He is currently on the faculty of Island Pacific Academy where he serves as the Chair of the Visual and Performing Arts Department. The painting on the cover was painted from a viewpoint near his home and comes from a recent series of watercolor paintings that juxtaposes influences of Film Noir with the stunning beauty of Hawaii. It is featured at the Andrew Rose Gallery's current exhibition. The gallery is located at 1003 Bishop Street, Suite 120, Honolulu. For more information visit www.andrewrosegallery.com.

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Hot Topics in Hawaii

Solar Energy!

by Douglas A. Codiga

Solar energy – especially photovoltaic, or PV – has emerged as an important source of renewable energy in Hawaii, driven by its relative cost-effectiveness, high levels of public acceptance, and supportive statutory and regulatory law and policy. Although renewable energy production in Hawaii is primarily from wind, geothermal, and biomass, Hawaii has recently experienced rapid and unprecedented growth in solar generation.¹ Hawaii ranks first in the nation with regard to installed solar water heaters and third in the nation for cumulative installed solar PV capacity per capita.² Rooftop distributed solar PV has become one of the state's leading industries, accounting for almost twenty-six percent of all construction expenditures in 2012.³ Solar projects totaling

108.7 megawatts (“MW”) were installed in 2012 – enough to provide electricity to approximately 37,000 homes.⁴ Larger, utility scale solar PV facilities in Hawaii now range in size up to six MW.⁵ And in its 2012 annual survey, the Solar Energy Industries Association ranked Hawaii the seventh-best state in the nation for solar energy, noting that Hawaii gets a greater percentage of electricity from solar than any other state.⁶

Under Hawaii law, “renewable energy” is defined to include “energy generated or produced using . . . [t]he sun[.]”⁷ This broad statutory definition encompasses different types of solar energy devices and technologies. Solar water heating devices, for example, are commonplace rooftop fixtures that produce hot water primarily for residential use. Concentrated solar power, or CSP, uses a parabolic trough to concentrate sunlight onto a tube filled with a working fluid to generate electricity.⁸ Many Hawaii solar energy laws focus on solar PV, which uses silicon panels to convert sunlight directly to electricity. These laws, which have contributed to the recent growth of solar energy, range

from solar rights laws and tax incentives to utility procurement mechanisms mandated by the Public Utilities Commission, such as the Net Energy Metering and Feed-in Tariff programs. Zoning and permitting laws governing larger utility scale solar PV projects have also played an important role.

The rapid growth of solar energy is supported by foundational Hawaii climate and clean energy laws and policies. Following the launch of the Hawaii Clean Energy Initiative (“HCEI”) in January 2008, a landmark agreement (commonly referred to as the Energy Agreement) was signed by the Hawaiian Electric Company, Inc. and the State of Hawaii. As well as including measures to advance solar energy, the Energy Agreement established the goal of “70 percent clean, renewable energy for electricity and transportation by 2030.”⁹ Consistent with this HCEI goal, Act 155, signed into law in 2009, mandates that by 2030 forty percent of net electricity sales by electric utility companies in Hawaii shall be from renewable electrical energy, and energy efficiency measures shall cause the equivalent of a thirty percent reduction in energy use¹⁰ –

thus requiring seventy percent clean energy (i.e., renewable energy and energy efficiency) by 2030 as a matter of law. Accordingly, Part V of Chapter 269, Hawaii Revised Statutes, requires each electric utility to establish Renewable Portfolio Standards (“RPS”)¹¹ of ten percent of its net electricity sales by December 31, 2010; fifteen percent by December 31, 2015; twenty-five percent by 2020; and forty percent by 2030.¹² Solar energy may contribute not only to achievement of these RPS requirements, but also to compliance with Hawaii’s landmark climate change law, Act 234, which requires statewide reduction of greenhouse gas emissions to 1990 levels by the year 2020.¹³

The purpose of this article is to provide a brief overview of selected Hawaii solar energy laws, with a focus on important recent developments and issues, or “hot topics.” A comprehensive discussion of the many detailed aspects of the various laws and policies governing solar energy is beyond the scope of this article. Instead, selected statutes and regulatory proceedings are surveyed in an effort to provide an introductory overview and examination of the current critical issues likely to shape the growth of solar energy in Hawaii in the years to come.

Right to Install Solar Energy Devices on Homes and Townhouses

Under Hawaii law, the covenants, bylaws, and deed restrictions of an association¹⁴ of owners of single-family homes or townhouses generally cannot bar the installation of solar PV systems and solar water heaters. Section 196-7, Hawaii Revised Statutes, “Placement of solar energy devices” (“section 196-7”), provides that “no person shall be prevented by any covenant, declaration, bylaws, restriction, deed, lease, term, provision, condition, codicil, contract, or similar binding agreement, however worded, from installing a solar energy device on any single-family residential dwelling or townhouse that the person owns.”¹⁵ Any contrary lease or contract provision shall be void and unenforceable.¹⁶

The legal protection afforded by section 196-7 is available only to single-family homes and townhouses, however, and not to multi-story or high-rise condominiums or apartments with multiple units. Under Hawaii law, “townhouse” means “a series of individual houses having architectural unity and a common wall between each unit, provided that each unit extends from the ground to the roof.”¹⁷ Condominium and apartment buildings may lack individual units that extend from the ground to the roof. In addition, the rights afforded by this law are available only to owners and not renters of homes or townhouses. The owner seeking to install the device must ensure that it is in compliance with the association’s rules concerning solar energy devices and register the device with the association within thirty days of installation.

Consistent with the foregoing, section 196-7 also requires associations to adopt rules by December 31, 2006 concerning the placement of solar energy devices. The rules are to facilitate the placement of solar energy devices, and accordingly must not impose conditions or restrictions that render the solar system more than twenty-five percent less efficient or increase the cost of installation, maintenance, and removal of the solar system by more than fifteen percent. Nor may the association assess or charge any fees, or require an encumbrance on title, related to installation of the solar energy for the placement of any solar energy device.¹⁸

The failure of associations to timely adopt such rules, in compliance with the statutory requirement of December 31, 2006, has been identified as a potential barrier to the exercise of the solar rights available under section 196-7. During the 2013 session of Hawaii Legislature, for example, a bill was introduced to amend section 196-7 to require the rejection of a condominium association’s biennial registration application, and loss of its tax exempt status, upon the association’s failure to timely submit the required rules.¹⁹ Reliance upon section 196-7 may also be reduced to the extent association members are reluctant to

seek to enforce the law by litigating against their associations due to time, expense, and similar considerations.

Solar Devices on Project Common Elements

In addition to individual rooftops, homeowners may place solar energy devices on a common element (e.g., building rooftop, parking structures, or grounds) or limited common element (e.g., individual unit lanai area) of the project upon obtaining consent of the association. The association must consent, however, if the unit owner agrees in writing to comply with the association’s design specifications for the installation of the device, engages a duly licensed contractor to install the device, and provides a certificate of insurance naming the association as an additional insured on the homeowner’s insurance policy within fourteen days of the association’s approval of the solar device.²⁰ The owner – and each successive owner – shall be responsible for costs arising from damage to the device or to the common elements, limited common elements, and adjacent units;²¹ shall maintain insurance covering these obligations and name the association as an additional insured;²² and shall remove the solar energy device if necessary to allow the repair, maintenance, or replacement of the common elements or limited common elements.²³ If a material or labor roof warranty exists at the time the common element or limited common element roof area, the homeowner is required to obtain written confirmation that installation of the device will not void the roof warranty, and the owner must provide the association with a copy of the confirmation.²⁴

Like homeowners, the association itself may install solar energy devices in project common areas under Hawaii law. Section 514A-13.4, Hawaii Revised Statutes, provides that, regardless of the declaration of the residential development project, or its bylaws, an association’s board of directors shall have the authority to install or cause the installation of solar energy and wind energy devices on common elements of the

project.²⁵ The association may also lease or license the common elements for the installation of solar energy devices and wind energy devices on the common elements of the project.²⁶ The solar or wind energy device installed on a common element of the project shall not be deemed to impair or diminish the interest of the owners in the common elements, as long as the installation “does not directly affect any non-consenting unit owner.”²⁷ The statute defines the term “directly affect” to mean the installation of the device in a manner which would “specially, personally, and adversely affect an individual apartment owner in a manner not common to the apartment owners as a whole.”²⁸

Solar Tax Incentives

State tax incentives have played a critical role in the growth of renewable energy in Hawaii – including solar energy – since the adoption of the first Hawaii energy tax credit in 1976.²⁹ Pursuant to section 235-12.5, Hawaii Revised Statutes, “Renewable energy technologies; income tax credit” (“section 235-12.5”), individual and corporate taxpayers may claim a tax credit for eligible renewable energy systems installed and placed into service during the taxable year.³⁰ The tax credit is available to solar and wind energy systems.³¹ For solar energy systems, the tax credit may be claimed in the amount equal to thirty-five percent of the actual cost of the system, or the amount of the applicable cap as determined under subsection (b) of section 235-12.5 (“subsection (b)”), whichever is less.³² Under subsection (b), the cap for residential solar PV is \$5,000 per system and the cap for commercial solar PV is \$500,000 per system.³³ The cap for solar water heating devices on single-family residential properties is \$2,250 per system.³⁴

In 2009, the Hawaii Legislature established a refundable tax credit by amending section 235-12.5 to provide that, for solar energy systems, a taxpayer may elect to reduce the eligible credit amount by thirty percent and if this reduced amount exceeds the amount of income tax payment due from the tax-



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payer, the excess of the credit amount over payments due shall be refunded to the taxpayer.³⁵ This refundable tax credit is widely considered to be a major factor in the recent growth of the solar industry.³⁶

The solar tax credits have spurred not only growth but also significant controversy involving the State of Hawaii Department of Taxation, the Hawaii Legislature, and solar energy advocates.³⁷ For example, at the time of this writing, legislation pending before the Hawaii Legislature would substantially revamp the nature and amount of the section 235-12.5 solar tax credit, based in part upon concerns expressed by legislators with regard to the cumulative financial impact of the tax credit on the State's budget.³⁸ Legislation adopted during the current or future legislative sessions that substantially amends section 235-12.5 could alter the availability, effectiveness, and impact of the solar tax credit.

As a legal matter, controversy has focused on the interpretation of "system" as that term is used in section 235-

12.5, with allegations that some solar energy companies have promoted improper multiple claims for solar arrays using multiple inverters.³⁹ Partly in response to these allegations, in 2010 and 2011 the Department of Taxation issued Tax Information Releases ("TIRs") seeking to clarify the meaning of the term "system" in section 235-12.5 and the nature and amount of tax credits that may properly be claimed.⁴⁰ In November 2012, following issuance of the TIRs, the Department of Taxation issued Temporary Administrative Rules establishing new guidelines for calculating the tax credit under section 235-12.5. Under these rules, which became effective on January 1, 2013, a taxpayer may claim a credit based upon a system that has a capacity of at least five kilowatts ("kW") for residential systems, and at least 1,000 kW for commercial systems. Multiple, full credits are available for multiple systems, provided that any additional system for which the claim must have the required minimum output capacity. The full credit is also available

for one additional system that does not have the required minimum output capacity.⁴¹ Governor Neil Abercrombie has publicly expressed his support for the rules.⁴² The Sierra Club subsequently filed a lawsuit against the Department of Taxation in the Circuit Court of the First Circuit, State of Hawaii, seeking declaratory judgment on the validity of the rules and injunctive relief preventing implementation or enforcement of the rules, based in part on the argument that the rules are contrary to section 235-12.5 and Hawaii law and policy promoting increased use of solar and other forms of renewable energy.⁴³ The lawsuit remains pending at the time of this writing.

Solar Power Purchase Agreements

Hawaii's solar energy tax incentives, combined with historically low costs for solar PV panels, high electricity prices, and other favorable conditions, have spurred increased use of a variety of private contractual arrangements commonly referred to as solar leases or power purchase agreements ("PPA"). As a pre-

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liminary matter, these types of PPAs for relatively small rooftop solar PV systems may be distinguished from negotiated bilateral power purchase agreements (also referred to as PPAs) between large independent power producers and the local electric utility, which require approval by the Public Utilities Commission.

Broadly speaking, the purpose of a PPA is to establish and allocate legal rights and obligations concerning the installation and operation of a solar PV system that generates electricity for consumption at the premises. The solar PV system is installed, operated, and maintained by the seller of electricity on premises owned or leased by the host entity, typically an owners association, commercial facility, or landowner. The host agrees to purchase electricity from the seller at a rate that is usually below the rate offered by the local electric utility. Often a PPA is accompanied by a separate license or lease governing the seller's access to the premises to install and operate the solar PV system.

Because the seller is not a regulated electric utility, regulatory approval by the Public Utilities Commission is not required.⁴⁴

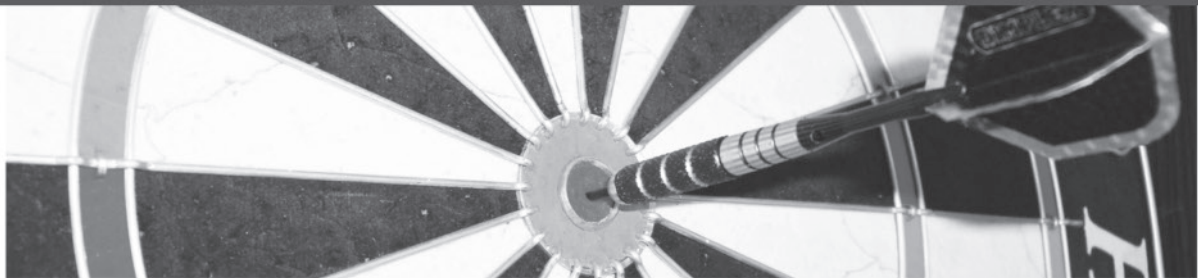
Solar PPAs and site control agreements require careful consideration of a host of potential legal issues. The term of a PPA, often tied to the anticipated life of the solar PV system, is typically twenty years. Renewal options are common. The parties must negotiate key terms and conditions concerning the size of the system, the energy payment rate, the commercial operation date, metering and payment arrangements, the potential sale of the system to the host prior to the end of the term, operation and maintenance provisions, termination and default provisions, and the disposition of the solar PV system and restoration of the rooftop and premises at the end of the term. The accompanying site lease or license must be reviewed not only on its general terms but also for consistency with the PPA. The executed PPA may play a central role in defining the revenue and credit quality of the

project and therefore often serves as a key instrument of project finance.

In addition, knowledge of regulatory law governing the interconnection of PPA solar PV systems to electric grid, and the procurement by the utility of renewable energy, is helpful in evaluating solar PPA legal issues. Although the PPA seller's electricity is delivered to the host, the solar PV system will likely be interconnected to the electric utility's system. As discussed below, tariff rules adopted by order of the Public Utilities Commission likely govern the interconnection requirements and procedures. The contractual arrangement between the solar PPA project and the electric utility may be through a standard interconnection agreement or through a utility procurement mechanism for solar PV, such as the Net Energy Metering and Feed-in Tariff programs.

Net Energy Metering and Feed-in Tariff Programs

Part VI of Chapter 269, Hawaii Revised Statutes, "Net Energy



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Metering” (“NEM law”), became effective June 25, 2001. Under the NEM law, an “[e]ligible customer-generator” is a residential or commercial utility customer that owns and operates a solar, wind, biomass, or hydroelectric facility intended to offset all or a part of the customer’s own electrical requirements.⁴⁵ Net energy metering (“NEM”) is defined as “measuring the difference between the electricity supplied through the electric grid and the electricity generated by an eligible customer-generator and fed back into the electric grid over a monthly billing period.” Essentially, customer-generators are billed only on the net kilowatt-hours of electricity they use (hence use of the term “net metering”). Net energy metering shall be accomplished using “a single meter capable of registering the flow of electrons in two directions” (a reason the NEM program is often referred to as involving the electric meter “running backwards”).⁴⁶ Under the NEM law, the eligible customer-generator shall have a capacity of not more than fifty kW, although the Public Utilities Commission may increase that amount.⁴⁷

The Hawaii Feed-in Tariff (“FIT”) program, which is among the first in the United States, is open to wind and hydropower but is almost exclusively utilized by solar PV projects. On October 24, 2008, four days after the Energy Agreement was signed, the Public Utilities Commission issued its order opening the FIT docket.⁴⁸ After a public hearing in April 2009 that drew national media attention,⁴⁹ the Commission issued its Decision and Order on September 25, 2009 establishing the Hawaii FIT program.⁵⁰ The program



features a set of standardized, published purchased power rates, including terms and conditions, which the utility is required to pay to renewable energy providers for electricity provided to the grid.⁵¹ The program authorizes smaller Tier 1 and Tier 2 projects and larger Tier 3 projects of up to five MW on Oahu. Essentially a type of standard offer contract, feed-in tariffs provide certainty to renewable energy developers and investors, thereby stimulating development and utility acquisition of solar, wind, and other types of renewable energy.⁵² It is widely acknowledged that FIT programs have “stimulated more renewable technology than any other policy mechanism”⁵³ and a January 2012 status report indicates the Hawaii FIT program has thus far resulted in the installation of solar PV projects totaling approximately 8 MW of capacity.⁵⁴ On December 21, 2012, the Commission

filed an order initiating a formal reexamination of Tier 1 and Tier 2 of the FIT program (“FIT reexamination”).⁵⁵

Although the NEM and FIT programs have been successfully implemented thus far, important issues of law and policy remain. A critical issue for both is program capacity, which may be determined by the Public Utilities Commission by reference to electric system reliability issues, as previously discussed. Increased participation in the NEM program may be constrained by program capacity limits established by the NEM law and Commission orders. The pending FIT reexamination may also result in constraints on increased participation based upon the program capacity. There are also energy payment rates issues. For the FIT program, whether the energy payment rate is sufficient to

“move the market,” i.e., stimulate investment and development activity, remains a paramount issue in the success of the program. Under the NEM law, customer-generators receive credit for excess generation at the electric utility’s retail rate, which has prompted some scrutiny and concern. In the FIT program, a dispute over the application of rules governing program access and priority, or “queuing,” has resulted in a formal legal appeal by a FIT project developer to the Hawaii Intermediate Court of Appeals.⁵⁶ And solar projects seeking to proceed under both of these utility renewable energy procurement programs must contend with technically complex issues concerning grid reliability, curtailment, and the interconnection of variable renewable generation to the existing electric systems operated by the electric utilities.

Tariff Rule 14H and Electric System Reliability

Although Hawaii climate and clean energy law and policy calls for Hawaii to transition from imported fossil fuels to renewables, the pace of this transition may be affected by the ability of existing electric systems to integrate variable generation from solar, wind, and other renewable resources. Electric system reliability has been defined as the “electricity service level or the degree of performance of the [utility] system defined by accepted standards and other public criteria.”⁵⁷ Electric power supplied by solar and wind resources may be relatively variable and unpredictable (due to changing natural conditions, such as cloud cover or wind speeds) compared to electric power supplied by fossil fuel power plants. Electric system operators may generally view non-variable fossil fuel power plants as better able to facilitate electric system reliability relative to variable resources such as solar energy.

The basic issue of electric system reliability and the integration of variable solar energy generation is partly addressed through highly technical tariff rules governing the interconnection of solar facilities to the utility electric systems. For example, the interconnection of relatively small solar PV systems to the distribution level circuits of the Hawaiian Electric Companies⁵⁸ is governed by the Tariff Rule No. 14H for each utility (“Rule 14H”). Rule 14H establishes the detailed technical requirements and procedures for interconnecting solar PV and other renewable energy facilities to the utilities’ electric systems. Depending on the size of the solar PV system and the capacity of the particular distribution level circuit to accept additional variable generation while maintaining electric system reliability, a costly and time-consuming interconnection requirements study (“IRS”) may be required. In many instances, the requirement to conduct an IRS may render the project infeasible.

Rule 14H has been the focus of extensive regulatory proceedings since 2010.⁵⁹ Most recently, potential modifications to Rule 14H, and similar efforts

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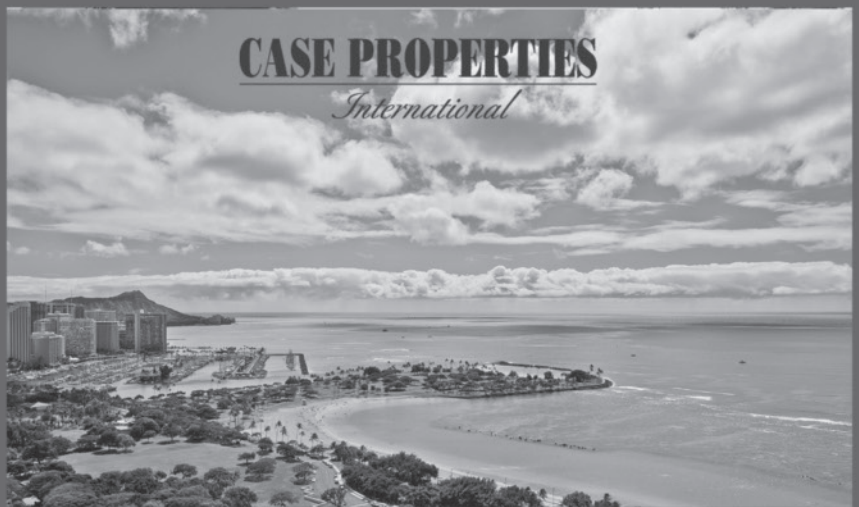
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to streamline the interconnection of solar and other renewable generation to distribution circuits, were a major focus of a Reliability Standards Working Group (“RSWG”) convened by the Public Utilities Commission in 2011.⁶⁰ The recently-concluded RSWG process involved over two dozen stakeholder participants and generated a 747-page final report, which includes specific recommendations on a utility interconnection and other related topics. These recommendations, which are based in part on experience with the successful integration of increasing amounts of solar PV, are expected to be the subject of further regulatory proceedings focused on modifying and improving Rule 14H to allow increased interconnection of distributed solar generation without affecting electric system reliability.⁶¹

Utility Scale Solar Energy Projects

Larger, utility scale solar energy projects – mounted not on rooftops but on the ground in large, open areas and interconnected to the utility’s electric system at the sub-transmission or transmission level, rather than at the distribution level – confront the same electric system reliability challenges and concerns. Utility scale solar PV projects sell electricity to the utility pursuant to a bilateral power purchase agreement approved by the Public Utilities Commission in a regulatory proceeding (“PPA”). The PPA may contain provisions allowing the utility to “curtail,” or not accept, electricity generated by the utility scale project that the utility is unable to utilize based upon technical reasons related to maintaining electric system reliability. If the PPA’s curtailment provisions do not establish a limit or maximum amount of unpaid curtailment, developers of utility scale projects may experience difficulty in obtaining financing due to this uncertainty. In addition to IRS process concerns, technical and policy solutions to addressing the curtailment issue were a major focus of the RSWG process and are expected to be the subject of further regulatory proceedings and action by the Public Utilities Commission.⁶²

Although the curtailment issue may present challenges, Hawaii zoning law has been amended to facilitate the development of utility scale solar PV projects on certain agricultural lands. Section 205-2, Hawaii Revised Statutes, establishes four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation.⁶³ Agricultural districts shall include “solar energy facilities,” provided that such facilities shall be allowed only on land with soil classified by the Land Study Bureau’s detailed land classification as overall (master) productivity rating class B, C, D, or E, and solar facilities placed within land with soil classified as overall productivity rating class B or C shall not occupy more than ten percent of the acreage of the parcel, or twenty acres of land, whichever is lesser.⁶⁴ Similarly, section 205-4.5 identifies as a permissible use within the agricultural district solar energy facilities that do not occupy “more than ten percent of the acreage of the parcel, or twenty acres of land, whichever is lesser; provided that this use shall not be permitted on [Class A lands].”⁶⁵ Although statutory authority to install utility scale solar PV projects on agricultural lands has facilitated development efforts, potential future access to Class A lands for these types of projects (and to Class B and C lands in excess of the ten percent or twenty acres limitation) remains a critical issue, especially to the extent relatively large amounts of land are required for solar PV systems capable of meaningfully contributing toward the achievement of future RPS requirements in conformance with Hawaii climate and clean energy objectives.

Similar to zoning matters, permitting and environmental review for larger solar PV projects may be aided by Hawaii renewable energy laws. For example, in 2008 the Hawaii Legislature adopted Chapter 201N, Hawaii Revised Statutes, “Renewable Energy Facility Siting Process” (“Chapter 201N”). The Legislature found that “coordinating the process for required permits” is in the State’s interest in order to reduce Hawaii’s over-dependence on imported

fossil fuels and meet Hawaii's energy self-sufficiency goals.⁶⁶ Under Chapter 201N, the Energy Resources Coordinator ("coordinator")⁶⁷ shall develop a permit plan application format and procedure, receive the permit plan application from an applicant, and identify all state and county permits necessary for approval of the renewable energy facility.⁶⁸ The coordinator shall further assist the permit plan application process by "coordinating the permitting process," giving technical assistance, overseeing the creation of the permit plan, and facilitating "timely review and permitting" of the facility.⁶⁹ The coordinator shall also coordinate public meetings and work with federal, state, and county agencies and the applicant to determine the terms and conditions of the permit plan and permits.⁷⁰ The permit plan is to be designed to ensure that all permits identified in the plan are processed and either denied or approved no later than twelve months after the date the project permit plan is accepted.⁷¹

Chapter 201N also addresses the potentially contentious issue of environmental review of large solar PV and other renewable energy projects under Chapter 343, Hawaii Revised Statutes ("Chapter 343"). The coordinator may hold a pre-application conference with a prospective applicant "without regard to final acceptance of the final environmental impact statement,"⁷² and the permit plan shall include an agreement regarding the timeline and coordination for potential environmental impact statements ("EIS") and permit concurrence, review, and issuance.⁷³ Chapter 343 shall apply to any permit plan application for a renewable energy facility, however, and the coordinator shall not accept a permit plan application prior to acceptance of an EIS for the facility.⁷⁴ An agency may review and commence processing applications for permits prior to acceptance of a permit plan by the coordinator, provided that action to grant or deny a permit shall not be taken until after final acceptance of an EIS.⁷⁵ Chapter 201N also provides that leases and easements for renewable energy projects in agricul-



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Dona L. Hanaïke, J.D.
STRUCTURED SETTLEMENT CONSULTANT
1188 Bishop St., Suite 2106
Honolulu, Hawaii 96813

DLHanaïke@RinglerAssociates.com
(808) 521-7666





NOTICE TO ATTORNEYS INTERESTED IN PROVIDING LEGAL SERVICES TO THE STATE OF HAWAII

Licensed attorneys who wish to provide legal services to the State for the fiscal year commencing July 1, 2013, are invited to submit a Statement of Qualifications and Expression of Interest to the Attorney General pursuant to Hawaii Revised Statutes §103D-304, as the need arises.

A new statement must be signed and submitted pursuant to this Notice, even if you submitted a statement in the past. **Attorneys from the same firm must submit separate statements.** Please submit your statement(s) to: Department of the Attorney General, 425 Queen Street, Honolulu, Hawaii 96813, Attention: David T. Moore, Administrative Services Manager.

In the past, we have contracted for legal services in the following areas. Attorneys may list other areas of practice **but are limited to no more than three areas.**

<ul style="list-style-type: none"> Administrative Law Administrative Hearings Officer Antitrust Appellate Practice Aviation Bankruptcy/Receiverships Business Law (including Contracts Law, Contracts Negotiation, and Corporate Law) Cable Television Charities Regulation and Enforcement Civil Litigation Civil Rights Collections Complex Civil Litigation Constitutional Law Consumer Law Employee Benefits ERISA Employment Law Energy Law Environmental Law Estates and Trusts Federal Legislation Financial Institutions/Banking Health Law (including Hospital Management, and Mental Health) Immigration Law Information and Computer Technology Law Insurance 	<ul style="list-style-type: none"> Intellectual Property International Trade Labor Law Law Enforcement (including Criminal Appeals and Criminal Prosecutions) Litigation Plaintiff's Qui Tam Probate Law, including Guardianships Public Benefits Law (including ADA, § 504, Special Education, Public Assistance) Public Financing (including Bond Counsel, Investment Banking, and Financing Leases) Public Utilities Real Property (including Financing, Development, Subdivisions, Land Use) Securities Law (Securities/Class Action) Taxation (including Enforcement and Collection of Hawaii Taxes, and Prosecution and Defense of State Tax Appeals) Telecommunications Time Share Tort Law (including Products, Design, or Construction Liability, and Professional Malpractice) Transportation Law Water Law Workers' Compensation
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Statement forms are available at <http://ag.hawaii.gov/wp-content/uploads/2012/11/SDAG-Application-FY13-14.pdf> or may be requested by telephone at (808) 586-1500.

Your completed statements must be postmarked or received by the Hawaii State Department of the Attorney General by Friday, June 7, 2013, to be eligible for consideration for the entire fiscal year commencing July 1, 2013, and ending June 30, 2014.

A statement received after June 7, 2013, will be considered a "late submittal" for the balance of the fiscal year as follows:

<p><u>A late submittal received between:</u></p> <p>June 8, 2013 - September 6, 2013</p> <p>September 7, 2013 - December 6, 2013</p> <p>December 7, 2013 - March 7, 2014</p>	<p><u>Will be considered beginning:</u></p> <p>October 1, 2013</p> <p>January 1, 2014</p> <p>April 1, 2014</p>
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tural or conservation state land use districts are permitted even if the leased land or easement area has not been subdivided.⁷⁶

Solar Water Heating Mandate

Finally, although solar water heating has been an established and reliable source of solar energy in Hawaii for decades – well before the current boom in solar PV – a recent hot topic involves the variance provision under a Hawaii statute requiring new single family homes to be constructed with a solar water heating device. Under section 196-6.5, Hawaii Revised Statutes (“section 196-6.5”), “Solar water heating system required for new single-family residential construction,” after January 1, 2010, no building permit shall be issued for a new single-family dwelling that does not include a solar water heater system, unless the coordinator approves a variance.⁷⁷ Under the statute, a variance application shall only be accepted if submitted by an architect or mechanical engineer who attests that installation is impracticable due to poor solar resource, cost-prohibitive based upon a life cycle cost-benefit, unnecessary because a solar PV or wind energy system is used for heating water, or a natural gas-powered instantaneous water heater (that provides hot water on demand, only as needed) is installed.⁷⁸

In adopting this solar water heating mandate, the Hawaii Legislature found that a conventional electric water tank accounts for thirty to forty-five percent of a home’s electric bill and that savings from the installation of a solar water heating device could result in the system being paid off in eight to ten years without a state tax incentive.⁷⁹ Despite this, during the period of January 2010 when the law took effect through February 2013 a total of 1,420 variances have been sought, virtually all of which have been for the installation of gas-powered instantaneous water heaters.⁸⁰ Prior and potentially ongoing issues surrounding the section 196-6.5 variance procedures, and enforcement of the solar water heating mandate in general, illustrate the types of challenges confronting

development and implementation of key Hawaii laws governing both solar water heating and solar PV.

Current and future legal challenges in solar energy law may be anticipated insofar as the shift to non-fossil fuel energy entails far-reaching changes in the production and use of new forms of energy. Such challenges, however, must be continually assessed in light of the potential economic and environmental opportunities associated with clean energy. The recent rapid increase in solar energy illustrates the potential of solar energy law and policy, properly understood and applied, to continue to play an important role in shaping Hawaii’s transition to a clean energy economy.

¹ State of Hawaii Department of Economic Development and Tourism, “Hawaii Energy Facts and Figures, January 2013” (“DBEDT Facts and Figures”) at 2, 9, available at http://energy.hawaii.gov/wp-content/uploads/2011/10/EnergyFactsFigures_Jan2013.pdf.

² *Id.*

³ *Id.* at 9.

⁴ Solar Energy Industries Association, “Solar Market Insight Report 2012 Year in Review” (2012) (“SEIA Report”), available at <http://www.seia.org/research-resources/us-solar-market-insight-2012-year-review>.

⁵ DBEDT Facts and Figures at 9.

⁶ See SEIA Report, “State by State,” available at <http://www.seia.org/news/multimedia/shareable-graphics>.

⁷ Haw. Rev. Stat. § 269-91.

⁸ Sopogy, Inc. (“Sopogy”), a Hawaii CSP company, explains that CSP technology uses a parabolic trough to concentrate solar heat into thermal energy at an efficiency of approximately fifty percent and allows for storing, shifting, and firming the energy generated. Sopogy offers CSP technology only for commercial and non-residential applications. See Sopogy, “FAQ,” available at <http://sopogy.com/company/index.php?id=16#10>.

⁹ *Id.* at 18, available at <http://hawaii.gov/dbedt/info/energy/agreement/signed2008oct20.pdf>.

¹⁰ 2009 Haw. Sess. Laws, Act 155 §§ 3, 11; see also Hawaii Powered: Hawaii Clean Energy Initiative (Energy efficiency measures implemented over the next two decades can save 4,300 gigawatt hours of electricity, equivalent to approximately thirty percent of the demand forecasted for 2030), available at http://www.hawaiicleanenergyinitiative.org/wg_efficiency.html.

¹¹ See Haw. Rev. Stat. ch. 269, Part V, *et seq.*

¹² Haw. Rev. Stat. § 269-92(a).

¹³ 2007 Haw. Sess. Laws, Act 234 §1(a); H.B. 226, 24th Leg. (Haw. 2007); Haw. Rev. Stat. § 342B-72(a).

¹⁴ Under Haw. Rev. Stat. §196-7, “Private entity” means “any association of homeowners, community association, condominium association, cooperative, or any other non-governmental entity with covenants, bylaws, and administrative provisions with which the homeowner’s compliance is required.”

¹⁵ Haw. Rev. Stat. § 196-7(a). Similarly, it is worth noting that bylaws, covenants, deed restrictions and similar legal agreements shall not, under Hawaii law, prevent the installation of a clothesline on any single-family residential dwelling or townhouse that a person owns, and any contrary lease or other contract provision shall be void and unenforceable. Haw. Rev. Stat. § 196-8.5. The term “clothesline” is defined as “a rope, cord, wire, or similar device on which laundry is hung to dry.” An association may, however, adopt rules that reasonably restrict the placement and use of clotheslines provided that the restrictions do not prohibit the use of clotheslines altogether. In addition, the association may not assess any fees or charges concerning placement of the clothesline. *Id.*

¹⁶ Haw. Rev. Stat. § 196-7(a).

¹⁷ Haw. Rev. Stat. §§ 514A-89 (emphasis added); 514B-140; see also Haw. Rev. Stat. § 502C-1 (Family Child Care Homes law defining “Townhouse” to not include any apartments or units located in a building of more than three stories).

¹⁸ Haw. Rev. Stat. § 196-7(b).

¹⁹ See H.B. 1406, 27th Leg. (Haw. 2013); see also Statement of Richard C. Lim, Director, State of Hawaii Department of Business, Economic Development, and Tourism before the House Committee on Energy & Environmental Protection (Feb. 12, 2013) (noting in support of H.B. 1406 that “[b]ased on the number of phone calls to our office, and our conversations with frustrated and even exasperated home or townhouse owners who wish to install solar devices, it appears that private entities have not adopted rules[.]”).

²⁰ Haw. Rev. Stat. § 196-7(c)(3).

²¹ Haw. Rev. Stat. § 196-7(d)(1).

²² *Id.*

²³ Haw. Rev. Stat. § 196-7(d)(2).

²⁴ Haw. Rev. Stat. § 196-7(e).

²⁵ Haw. Rev. Stat. § 514A-13.4(c)(1).

²⁶ *Id.*

²⁷ Haw. Rev. Stat. § 514A-13.4(c)(2).

²⁸ *Id.*; see also Haw. Rev. Stat. § 514B-140(c) (same language).

²⁹ 1976 Haw. Sess. Laws, Act 189 (Haw. 1976) (establishing state income tax credit for individual and corporate taxpayers who install devices that “make[] use of solar energy for heating, cooling, or reducing the use of other types of energy dependent on fossil fuel for its generation.”).

- 30 Haw. Rev. Stat. § 235-12.5(a).
- 31 Haw. Rev. Stat. § 235-12.5(a)(1), (2); *see also* Haw. Rev. Stat. § 235-12.5(c) (definition of “Solar or wind energy system”).
- 32 Haw. Rev. Stat. § 235-12.5(a)(1).
- 33 Haw. Rev. Stat. § 235-12.5(b)(2)(A), (C).
- 34 Haw. Rev. Stat. § 235-12.5(b)(1)(A).
- 35 Haw. Rev. Stat. § 235-12.5(g); *see also* 2009 Haw. Sess. Laws, Act 154 § 1, S.B. 464, 25th Leg. (Haw. 2009).
- 36 *See, e.g.*, S. Cocke, “Report Says Solar Tax Credits Have Been Good For the State,” *Civil Beat* (Apr. 20, 2012) (citing report commissioned by Blue Planet Foundation indicating net fiscal benefit to state from solar tax credits) *available at* <http://www.civilbeat.com/articles/2012/04/20/15612-report-says-solar-tax-credits-have-been-good-for-the-state/>.
- 37 *See, e.g.*, S. Cocke, “Solar Tax Controversy Expected To Heat Up 2013 Legislative Session,” *Civil Beat* (Jan. 11, 2013) (citing report commissioned by Blue Planet Foundation indicating net fiscal benefit to state from solar tax credits), *available at* <http://www.civilbeat.com/articles/2013/01/11/18069-solar-tax-controversy-expected-to-heat-up-2013-legislative-session/>.
- 38 *See, e.g.*, H.B. 623, 27th Leg. (Haw. 2013).
- 39 *See, e.g.*, S. Cocke, “Hawaii Tax Department Poised to Crack Down on Solar Tax Credits,” *Civil Beat* (Nov. 8, 2012) (New guidance to limit solar companies claiming multiple credits on solar arrays utilizing multiple inverters), *available at* <http://www.civilbeat.com/articles/2012/11/08/17597-hawaii-tax-department-poised-to-crack-down-on-solar-tax-credits/>.
- 40 *See* State of Hawaii Department of Taxation, “Tax Information Release No. 2010-02” (May 3, 2010), “Tax Information Release No. 2010-03” (May 21, 2010); “Tax Information Release No. 2010-10” (Oct. 13, 2010), *available at* http://www6.hawaii.gov/tax/a3_1tir.htm.
- 41 *See* State of Hawaii Department of Taxation, “Adoption of Temporary Rules of the Department of Taxation Relating to the Renewable Energy Technologies” (Nov. 5, 2012), *available at* http://www6.hawaii.gov/tax/har_temp/STANDARD_version_RETIT C.pdf.
- 42 *See, e.g.*, Star Advertiser, “Citing spiraling costs Abercrombie slashes PV credits” (Nov. 9, 2012), *available at* <http://www.kitv.com/news/hawaii/Citing-spiraling-costs-Abercrombie-slashes-PV-credits/-/8905354/17353952/-/tjcyj5pz/-/index.html>.
- 43 *See* *Sierra Club v. State of Hawaii*, Department of Taxation, Civ. No. 12-1-3119 (Plaintiff’s Complaint filed Dec. 11, 2012) at 10 (the Temporary Administrative Rules contravene the Legislature’s purpose in enacting section 235-12.5 to “increase investment in and installation of residential and commercial renewable energy projects, including photovoltaic projects.”).
- 44 *See* Haw. Rev. Stat. § 269-1 (“Public utility” shall not include any person who “(i) Owns, controls, operates, or manages a renewable energy system that is located on a customer’s property; and (ii) Provides, sells, or transmits the power generated from that renewable energy system to an electric utility or to the customer on whose property the renewable energy system is located[.]”).
- 45 Haw. Rev. Stat. § 269-101.
- 46 *Id.*
- 47 Haw. Rev. Stat. § 269-101.5. In 2008, the Commission increased the maximum capacity limit on Oahu, Maui, and Hawaii to 100 kW. *See* State of Hawaii Public Utilities Commission, Decision and Order No. 24089 filed Mar. 13, 2008 (Docket No. 2006-0084) at 16-17, *available at* <http://dms.puc.hawaii.gov/dms/>. Similarly, there is a statutory cap on the total power producing capacity of eligible customer-generators of 0.5 percent of the system peak demand, although the Commission may increase this amount. Haw. Rev. Stat. § 269-104. In 2008, the Commission increased this amount to one percent on Oahu and three percent on Maui and Hawaii. *See* Hawaii Public Utilities Commission, Order Approving, in Part, and Denying, in Part, Stipulations Filed on December 3, 2008, filed Dec. 26, 2008 (Docket No. 2006-0084) at 9, 13, *available at* <http://dms.puc.hawaii.gov/dms/>.
- 48 *See* Order Initiating Investigation (Docket No. 2008-0273) filed Oct. 24, 2008, *available at* <http://dms.puc.hawaii.gov/dms/>.
- 49 *See, e.g.*, Mark Niese, *Hawaii gets to work on energy independence*, Associated Press, Apr. 18, 2009, *available at* <http://www.kpua.net/news.php?id=17699>.
- 50 Decision & Order filed Sept. 25, 2009 (Docket No. 2008-0273), *available at* <http://dms.puc.hawaii.gov/dms/>.
- 51 Energy Agreement Summary of Key Agreements at 3, *available at* http://heco.com/vcmcontent/StaticFiles/pdf/HCEI_Summary-Final.pdf.
- 52 Energy Agreement at 16.
- 53 P. Gipe, *Renewable Energy Policy Mechanisms* (Feb. 17, 2006), *available at* <http://www.wind-works.org/FeedLaws/RenewableEnergyPolicyMechanismsbyPaulGipe.pdf/>.
- 54 Hawaiian Electric Company, Inc., “FIT 2012 Annual Status Report” filed Jan. 31, 2013 (Docket No. 2008-0273), *available at* <http://dms.puc.hawaii.gov/dms/>.
- 55 Order No. 30919 (Docket No. 2008-0273) filed Dec. 21, 2012.
- 56 *In the Matter of Public Utilities Comm’n.*, Docket No. 2008-0273, No. CAAP-12-0000853.
- 57 *See* Reliability Standards Working Group Independent Facilitator’s Submittal, Final Report filed Mar. 25, 2013 (“RSWG Final Report”), Appendix 1, Item No. 1-7, “Reliability Standards Working Group Glossary of Terms” at 14.
- 58 Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Ltd. (collectively, “Hawaiian Electric Companies”)
- 59 *See* Docket No. 2010-0015.
- 60 *See* Docket No. 2001-0206.
- 61 *See* RSWG Final Report at Appendix 1, Item No. 4b.
- 62 *See id.* at Appendix 1, Item Nos. 3a, b.
- 63 Haw. Rev. Stat. § 205-2(a).
- 64 Haw. Rev. Stat. § 205-2(d)(6).
- 65 Haw. Rev. Stat. § 205-4.5.
- 66 2008 Haw. Sess. Laws, Act 207 § 1.
- 67 Haw. Rev. Stat. § 196-3. The Director of the Department of Business, Economic Development and Tourism serves as the Energy Resources Coordinator.
- 68 Haw. Rev. Stat. § 201N-3(1)-(3). Renewable energy facility means a new facility with a capacity to produce at least 200 MW of renewable energy, provided that facilities with a capacity of 5-199 MW may apply to the coordinator for designation as a renewable energy facility. Haw. Rev. Stat. § 201N-1; 2009 Haw. Sess. Laws, Act 155 § 7 (Haw. 2009).
- 69 Haw. Rev. Stat. § 201N-3(4).
- 70 Haw. Rev. Stat. § 201N-3(6)-(7).
- 71 Haw. Rev. Stat. § 201N-4(f).
- 72 Haw. Rev. Stat. § 201N-4(b).
- 73 Haw. Rev. Stat. § 201N-4(d)(5).
- 74 Haw. Rev. Stat. § 201N-8(a), (b).
- 75 H.R.S. § 201N-8(b).
- 76 2009 Haw. Sess. Laws, Act 173 § 2, H.B. 589, 25th Leg. (Haw. 2009).
- 77 Haw. Rev. Stat. § 196-6.5(a).
- 78 Haw. Rev. Stat. § 196-6.5(a)(1)-(4).
- 79 2008 Haw. Sess. Laws, Act 204 § 1.
- 80 *See* S.B. 16, S.D. 2, 27th Leg. (Haw. 2013), Testimony of Blue Planet Foundation dated Mar. 19, 2013 at 1; *see also* M. Levine, “Mandatory Solar Hot Water for New Homes: Don’t Believe It,” *Civil Beat* (Nov. 11, 2010), *available at* <http://www.civilbeat.com/articles/2010/11/11/6370-mandatory-solar-hot-water-for-new-homes-dont-believe-it/>; M. Levine, “State Allows Developers to Flout Solar Mandate,” *Civil Beat* (Nov. 12, 2010), *available at* <http://www.civilbeat.com/articles/2010/11/12/6389-dbedt-developers-burn-gas-flout-solar-mandate/>; and M. Levine, “Is Hawaii Expanding Solar Water Loophole?” *Civil Beat* (Feb. 10, 2011), *available at* <http://www.civilbeat.com/articles/2011/02/10/8851-is-hawaii-expanding-solar-water-heater-loophole/>.

Douglas A. Codiga practices energy and environmental law with the law firm of Schlack Ito LLLC and is a member of the firm’s Climate and Sustainability Practice Group.