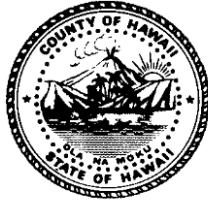


Mitchell D. Roth
Mayor

Deanna S. Sako
Managing Director



Dennis Lin, Chair
Louis Daniele III, Vice Chair
Lauren Balog
Wayne De Luz
Chantel Perrin

County of Hawai'i

WINDWARD PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720
Phone (808) 961-8288 • Fax (808) 961-8742

January 04, 2024

Danette Martin
MP Properties Services
76-6557 Kololia Street
Kailua-Kona, HI 96740
VIA EMAIL

Dear Ms. Martin:

SUBJECT: Use Permit (PL-USE-2023-000020)
Applicant: Renegade Towers, LLC
**Permitted Use: Allows the Construction of an Unoccupied, Multi-Carrier
Telecommunication Facility to Include a 150-Foot Tall
Monopole Tower and Related Equipment**
Tax Map Key: (3) 9-2-101:071, Ocean View, Ka'ū, Hawai'i

The Windward Planning Commission, at its duly held public hearing on December 7, 2023, voted to grant petitioner, Colleen Conifer, standing to participate in a contested case hearing procedure. However, the enclosed legal opinion provided by the County Corporation Counsel states that telecommunication facility permit applications are not subject to a contested case hearing.

Additionally, Hawai'i Revised Statute §46-89 contains express directives to counties relative to issuing broadband related permits. In relevant part it states: *(a) A county shall approve, approve with modification, or disapprove all applications for broadband-related permits within sixty days of submission of a complete permit application and full payment of any applicable fee. If, on the sixty-first day, an application is not approved, approved with modification, or disapproved by the county, the application shall be deemed approved by the county.*

Based on this statute, Use Permit PL-USE-2023-000020, to allow the construction of an unoccupied, multi-carrier telecommunication facility to include a 150-foot-tall monopole tower and related equipment **was automatically approved on December 21, 2023**. This is a

Danette Martin
MP Properties Services
January 04, 2024
Page 2

broadband-related permit issued pursuant to §46-89, Hawai'i Revised Statutes, thus the permit does not contain conditions.

This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies. The applicant must comply with all other relevant rules, regulations, and laws for development of the facility.

Should you have any questions regarding the above, please contact Maija Jackson of the Planning Department at (808) 961-8159 or by email at maija.jackson@hawaiicounty.gov

Sincerely,



January 04, 2024, 03:01 PM

Dennis Lin, Chairman
Windward Planning Commission

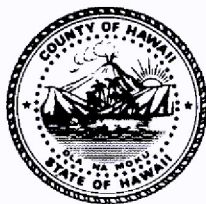
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Enclosure: December 27, 2023 Legal Opinion from Corporation Counsel Strance

cc w/enclosure via email: Windward Planning Commission
Michael Miller, Renegade Towers LLC
GIS Section

cc w/out encl. via email: Department of Water Supply
Department of Public Works
County Real Property Tax Division

Mitchell D. Roth
Mayor



Elizabeth A. Strance
Corporation Counsel

J S. Yoshimoto
Assistant Corporation
Counsel

COUNTY OF HAWAII
OFFICE OF THE CORPORATION COUNSEL

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720 • Phone (808) 961-8251 • Fax (808) 961-8622

December 27, 2023

Via Email

Director Zendo Kern
Department of Planning
County of Hawai'i

Re: Telecommunication Tower Use Permits Approval Process As Required
By HRS §46-89

Dear Director Kern:

This letter provides a legal opinion on the process by which the County of Hawai'i currently processes telecommunication tower use permit applications.

Question Presented: Are telecommunication tower permit applications subject to petitions for contested case hearings?

Short Answer: No. State law, Hawai'i Revised Statutes Section 46-89, requires all broadband-related permits be approved, approved with modification, or disapproved within sixty days of submission of a complete permit application. Further, it bars any action against any county, its officials, or employees on account of actions taken in reviewing, approving, modifying, or disapproving a permit application pursuant to the section. [See, HRS 46-89(a) and 46-89(d)] This state law preempts the Hawai'i Code which contains contrary provisions.

Discussion:

An express limitation on county authority to enact laws is that a county may not enact laws which are "inconsistent with, or tending to defeat, the intent of any state statute". HRS §46-1.5. See also, *Ruggles v. Yagong*, 135 Hawai'i 411, 422, 353 P.3d 953, 964 (2015) (County of Hawai'i law placing low enforcement on cannabis laws was preempted by state law which placed primary enforcement of penal laws on the counties. The laws were of general application throughout the state and the comprehensive nature of the laws implied an intent they be uniform throughout the state.)

Hawai'i Revised Statute §46-89 contains express directives to counties relative to issuing broadband related permits. In relevant part it states:

(a) A county **shall** approve, approve with modification, or disapprove all applications for broadband-related permits within sixty days of submission of a complete permit application and full payment of any applicable fee. If, on the sixty-first day, an application is not approved, approved with modification, or disapproved by the county, the application shall be deemed approved by the county.

(b) Permits issued pursuant to this section **shall** contain the following language: "This is a broadband-related permit issued pursuant to section 46-89, Hawaii Revised Statutes."

* * * * *

(d) No action **shall** be prosecuted or maintained against any county, its officials, or employees on account of actions taken in reviewing, approving, modifying, or disapproving a permit application pursuant to this section, or against public utilities resulting from such actions.

(e) The sixty day time period established by subsection (a) **shall** be extended in the event of a natural disaster, state emergency, or union strike that prevents the applicant, agency, or department from fulfilling application review requirements.

(h) For the purposes of this section, "broadband-related permits" means all county permits required to commence actions with respect to the installation, improvement, construction, or development of infrastructure relating to broadband service or broadband technology, including the interconnection of telecommunications cables, cable installation, tower construction, placement of broadband equipment in the road rights-of-way, and undersea boring, or the landing of an undersea communications cable. The term does not include any county permit for which the approval of a federal agency is explicitly required pursuant to federal law, rule, or regulation, prior to granting final permit approval by the county.

(Emphasis added). This statute requires action on a permit within sixty days unless there is a disaster, state of emergency or union strike. Further, it contains the extraordinary provision of prohibiting actions against a county and its employees for their actions taken in the permit process.

Hawai'i County Code ("HCC") Section 25-2-61(a)(11) requires a landowner to obtain Planning Commission approval of a use permit for the construction of a telecommunications tower in certain zoning districts. HCC §25-2-63 governs the procedure for issuing the use permit. It requires scheduling a public hearing within 90

days of accepting a permit application. Upon close of the hearing, HCC §25-2-64(a) allows the commission up to sixty days to deny or approve a permit application. A person aggrieved by a commission's decision may file a lawsuit with the third circuit court pursuant to HCC §25-2-66 and in accordance with HRS Chapter 91. In other words, the HCC envisions a process that may take more than 60 days and allows an aggrieved party to file a legal action in violation of HRS §46-89.


Additionally, the Planning Commissions have adopted Rule 4-1 which governs the procedure for contested case hearings in violation of HRS §46-89. Rule 4-1 provides in relevant part:

This rule governs contested case procedure whenever it is required by law, This procedure shall be used in all cases where the action of the commission is the final action of a county official or agency, prior to the opportunity to appeal to the third circuit court, whenever it is required. It shall therefore be followed in all cases where state statutes provide for direct appeal from the commission to the third circuit court.

This contested case hearings and appeal process described above and set forth in the State Administrative Act, HRS Ch. 91 is inconsistent with the mandate of HRS §46-89. A standard rule of statutory construction is that special or particular provisions control over general provisions. *Ho'omoana Foundation v. land use Commission, 152 Hawai'i 337, 344, 526 P.3d 314, 321 (2023)*. With that in mind, any provision of HRS Chapter 91 which might generally suggest that a contested case hearing provides an opportunity to appeal from an administrative decision such as a use permit is preempted by the very specific terms of HRS 46-89.

Based upon the foregoing, we recommend the Planning Department introduce amendments to the Hawaii County Code and the planning commissions' administrative rules which exempt broadband related permits from the current use permit process or create a different process which conforms to HRS §46-89.

Sincerely,

 Digitally signed by Elizabeth Strance
Date: 2023.12.27 14:10:33 -10'00'

Elizabeth A. Strance
Corporation Counsel

cc: Jean Campbell