

# BELLES GRAHAM LLP

ATTORNEYS AT LAW

MICHAEL J. BELLES  
MAX W.J. GRAHAM, JR.  
DONALD H. WILSON  
JONATHAN J. CHUN  
IAN K. JUNG

WATUMULL PLAZA  
4334 RICE STREET, SUITE 202  
LIHUE, KAUAI, HAWAII 96766-1388

TELEPHONE NO: (808) 245-4705  
FACSIMILE NO: (808) 245-3277  
E-MAIL: mail@kauai-law.com

OF COUNSEL  
DAVID W. PROUDFOOT

Federal ID. No. 99-0317663



December 27, 2019

Mr. Daniel E. Orodanker  
Executive Officer  
Land Use Commission  
State of Hawaii  
P. O. Box 2359  
Honolulu, Hawaii 96804-2359

**VIA EMAIL & REGULAR MAIL**

Re: **Approving Agency: Planning Commission, County of Kauai  
In The Matter Of The Application Of AES LAWA'I SOLAR, LLC,  
a Delaware limited liability company, for a Use Permit, a  
Class IV Zoning Permit, and a Special Permit for real property  
situated at Kōloa and Lāwa'i, Kona, Kaua'i, Hawai'i, identified by  
Kaua'i Tax Map Key No. (4) 2-6-003:001 (por.)  
Use Permit No. U-2018-1  
Class IV Zoning Permit No. Z-IV-2018-1  
Special Permit No. SP-2018-2**

---

**Approving Agency: State Land Use Commission  
In The Matter Of The Application Of AES Lawa'i Solar, LLC For A  
Special Use Permit To Establish A Solar Energy Facility On  
Approximately 196.33 Acres Of Land Within The State Land Use  
Agricultural District At Kōloa And Lāwa'i, Kaua'i, Hawai'i,  
Tax Map Key (4) 2-6-003:001 (portion)  
Docket No. SP17-408**

---

Dear Mr. Orodanker:

I have attached a copy of the AES Lawa'i Solar, LLC 2019 Annual Report-Special Use Permit Compliance ("2019 Report") for your review. The 2019 Report is being submitted pursuant to the conditions contained in the following approvals:

Mr. Daniel E. Orodenker  
Page 2  
December 27, 2019

1. Condition 8 of the Conditions of Approval contained in the Order Adopting The County Of Kauai Planning Commission's Recommendation, Findings Of Fact, Conclusions Of Law, And Decision And Order To Approve The State Special Use Permit, With Modifications (Docket No. SP17-408) approved by the State Land Use Commission, filed November 22, 2017.

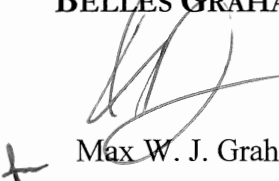
2. Condition 8 of the Conditions of Approval contained in Findings Of Fact, Conclusions Of Law, And Decision And Order (Special Permit SP-2018-2, Use Permit U-2018-1, and Class IV Zoning Permit Z-IV-2018-1) approved by the Planning Commission of the County of Kauai on September 26, 2017.

Please contact me if you have any questions or need additional information concerning the 2019 Annual Report.

Thank you very much.

Sincerely yours,

**BELLES GRAHAM LLP**



Max W. J. Graham, Jr.

MWJG:seo  
Enclosure

**AES LAWA'I SOLAR, LLC,**  
**2019 Annual Report - Special Use Permit Compliance**



#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
1	The solar utility facility shall be constructed and operated as represented. Any changes to the facility and/or operation shall be reviewed by the Department to determine whether Planning Commission review and approval is required.	<p><b>2019</b> – The Lawai facility completed construction and is operating as represented. The facility achieved Commercial Operations status on May 28<sup>th</sup>, 2019.</p> <p><b>2018</b> - AES commenced construction in early 2018 and as of December 2018 are still under construction and nearing energization and operation of the project. The construction of the project has progressed as represented.</p>
2	Usable lands of the Petition Area, including areas under PV panels, shall be made available for compatible agricultural use at a lease rate that is at least 50 percent below the fair market rent for comparable properties, as long as the Project is in operation. Compatible agricultural operations shall be established by the Applicant and its successors and/or assigns within six 6 months of the start of commercial power generation. Extensions to this deadline may be granted by the Director of the County of Kaua'i Planning Department (PD) for unforeseen extenuating circumstances. Additional consideration may be given if the Applicant is actively seeking to have such operations established.	<p><b>2019</b> – Not applicable, compatible agricultural operations are in place.</p> <p><b>2018</b> - As of December, 2018 the project is not yet in operation but once in operation in 2019 AES will include a compatible agricultural use of having Sheep grazing at the project site.</p>
3	If at any time during the term of the Special Permit (SP) no compatible agricultural operations exist on the usable lands of the Petition Area for 6 months, the Applicant shall notify the Director of the Kaua'i PD in writing within 30 days of the end of the 6-month period. If requested by the Planning Director, the Applicant shall attend a meeting of the Planning Commission and submit a report to the Planning Commission detailing the Applicant's actual and reasonable efforts to establish compatible agricultural operations on the usable lands of the Petition Area. The Planning Commission may determine whether probable cause exists to re-evaluate the SP and to hold a hearing pursuant to the Rules of the Planning Commission. Extensions to the 6- month deadline may be granted by the Planning Director for unforeseen extenuating circumstances.	<p><b>2019</b> – Not applicable, compatible agricultural operations are in place.</p> <p><b>2018</b> – Not applicable. See comment above in #2</p>

**AES LAWA'I SOLAR, LLC,**  
**2019 Annual Report - Special Use Permit Compliance**

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
4	<p>The Applicant shall submit for review and obtain the approval of the following: from the Director of the Kaua'i PD, prior to the issuance of a grading or building permit:</p> <ol style="list-style-type: none"> <li>Applicant shall minimize or avoid clearing and grading activities from June 1 through September 15.</li> <li>A survey map accompanied by a metes and bounds description of the APPROVED Petition Area.</li> <li>A site plan showing the area required under Condition 1, above, relating to the minimum land area to be made available for compatible agricultural use.</li> </ol>	<p><b>2019</b> – the Lawai facility is operational, nothing additional to provide.</p> <p><b>2018</b> - AES provided all requested documents and received its grading permit on April 4, 2018.</p>
5	<p>Prior to the closing of the building permit for the facility, the Applicant shall submit to the Kaua'i PD proof of financial security, such as a letter of credit or similar assurance, from a creditworthy financial institution satisfactory to Kaua'i PD. The security shall remain in place for the duration of the operation of the Project, with evidence of same provided to the Director of the Kaua'i PD on an annual basis, in an amount approved by the Kaua'i PD as sufficient to decommission the Project and restore the Petition Area to substantially the same physical condition as existed prior to the development of the facility.</p> <p>The applicant shall decommission the facility, including the removal of all equipment related to the facility, within twelve (12) months following the termination of operations of the facility. A change in project ownership or a change in ownership of the land subject to the SP, which warrants a new proof of financial security to decommission the project, shall be submitted to the Kaua'i DP for processing through the Planning Commission, within three (3) months of the ownership change.</p> <p>The Applicant shall incorporate this condition in the license and/or lease agreement with the land owner, and said license and/or lease agreement shall be reviewed for approval by the Kaua'i PD.</p>	<p><b>2019</b> – On May 28<sup>th</sup>, 2019 AES entered into a Guaranty agreement for an amount up to \$2,100,000 with its Lessor, McBryde Sugar Company, LLC, in respect of its Removal Obligations set forth in the Grant of Easement Agreement (dated June 30<sup>th</sup>, 2017) between the Parties.</p> <p><b>2018</b>  AES has a requirement in its executed Grant of Easement Agreement with McBryde Sugar Company, LLC that "on or prior to the Operational Period, Grantee shall cause to be delivered to Grantor either (i) a guaranty from AES Distributed Energy, Inc. of Grantees Removal Obligations provided that AES Distributed Energy, Inc's liability under such guaranty shall be limited to \$2,100,000 or (ii) such other security as the parties may mutually agree."</p> <p>This requirement starts at commercial operations and runs through the entire term of the agreement.</p> <p>Once the system reaches commercial operation, AES will ensure there is the \$2,100,000 guaranty in place to ensure removal of the system.</p>



**AES LAWA'I SOLAR, LLC,**  
**2019 Annual Report - Special Use Permit Compliance**

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
6	<p>The Applicant shall mitigate impacts to fauna on site as follows:</p> <ol style="list-style-type: none"> <li>Applicant shall develop an endangered species awareness training module, which shall include all potential endangered species that may frequent the Petition area.</li> <li>All construction workers and solar facility employees shall undergo endangered species awareness training prior to starting work.</li> <li>In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping or the ocean shall be prohibited.</li> <li>Barbed wire shall not be used on the top of any fencing.</li> <li>Applicant shall monitor avian injuries occurring at the photovoltaic system, and report occurrences to the USFWS.</li> </ol>	<p><b>2019 –</b></p> <ol style="list-style-type: none"> <li>AES developed and implemented an endangered species awareness program and training module for the Lawai facility's operational phase of life. This program was developed in by Reginald David of Rana Biological Consulting (Kailua-Kona) which was prepared by a local biologist and can be provided upon request.</li> <li>The construction phase for the Lawai facility has ended. All solar facility employees underwent the training prior to starting work on site.</li> <li>The Lawai facility's use of lighting is limited to shielded lighting in its high voltage substation. This lighting will remain off and will only be used in the rare occasion that work must be performed in the substation at night.</li> <li>Barb wire is not used on any top of any fencing.</li> <li>Within the Lawai Facility's <i>Operational Endangered Species Awareness &amp; Protection Plan</i> procedures are detailed for monitoring, recovering and reporting of injured or dead T&amp;E species.</li> </ol> <p><b>2018</b></p> <ol style="list-style-type: none"> <li>AES developed and implemented an endangered species awareness training module which was prepared by a local biologist and is attached to this report:  <a href="https://aesde.box.com/shared/static/112piae66xt2bzdw64wr3nmin2bzic.pdf">https://aesde.box.com/shared/static/112piae66xt2bzdw64wr3nmin2bzic.pdf</a></li> <li>All construction workers and solar facility employees underwent the training prior to starting work on site.</li> <li>Training held March 18<sup>th</sup> onsite before start of work.</li> <li>Barbed wire is not used on any top of any fencing.</li> <li>During construction AES has been monitoring for avian injuries occurring at the photovoltaic system and any incidents immediately reported.</li> </ol>

**AES LAWA'I SOLAR, LLC,**  
2019 Annual Report - Special Use Permit Compliance

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
7	The Applicant shall establish the Project within two (2) years of the date of the LU C's Decision and Order approving the SP. Requests for extension of this deadline shall be submitted to the Director of the Kaua'i PD prior to the expiration of the deadline. The LUC may grant an extension to the deadline to establish the Project due to unforeseen circumstances that were beyond the control of the Applicant. This SP shall be valid for a period of thirty-five (35) years from the start of commercial operations, subject to further extensions upon a timely request for extension filed with the Planning Commission at least one hundred twenty (120) days prior to the SP's expiration. Approval of time extensions shall not be required from the LUC.	<p><b>2019</b> – The LUC's Decision and Order approving the SP was obtained on November 22<sup>nd</sup>, 2017. With the Lawai facility achieving its full operational status as memorialized by achieving Commercial Operations on May 28<sup>th</sup>, 2018, this commitment is deemed to have been fully satisfied and will no longer be reported on.</p> <p><b>2018</b> – As of December 2018 AES is nearly complete with construction of the facility and will reach commercial operations by end of year or in January 2019, well within the 2 year time period from decision from the State LUC.</p>
8	On or before December 31 of each year that the SP is in effect, the Applicant or its successor shall file an annual report to the LUC, OP, and the Kaua'i PD that demonstrates the Applicants' compliance with conditions of the SP.	<p><b>2019</b> - This report shall serve as the annual report as required to demonstrate our compliance with conditions of the SP.</p> <p><b>2018</b> - This report shall serve as the annual report as required to demonstrate our compliance with conditions of the SP.</p>
9	Major modifications to: (1) the Project plans, including but not limited to significant increases in the number of PV panels; (2) amendments to the conditions of approval; (3) significant expansions of the approved area; or (4) change in uses stated herein, shall be subject to the review and approval of the Planning Commission and the LUC. Minor modifications including minor additions to accessory uses and structures, and new incidental uses and structures in the approved area are subject to review and approval by the Director of Kaua'i PD.	<p><b>2019</b> - There were no major modifications to the Project plans including but not limited to significant increases in the number of PV panels, amendments to conditions of approval, significant expansions of the approved area or changes in uses stated herein.</p> <p><b>2018</b> - There were no major modifications to the Project Plans including but not limited to significant increases in the number of PV panels, amendments to conditions of approval, significant expansions of the approved area or changes in uses stated herein.</p>
10	The Applicant and/or landowner shall notify the Director of Kaua'i PD of: <ul style="list-style-type: none"> <li>a. Any change or transfer of licensee on the Petition Area.</li> <li>b. Any change in uses on the Petition Area.</li> <li>c. Termination of any uses on the Petition Area; and/or</li> <li>d. Transfer in ownership of the Petition Area.</li> </ul>	<p><b>2019</b> - There was no change, termination or transfer of any items listed to the Petition Area.</p> <p><b>2018</b> - There was no change termination or transfer of any items listed to the Petition Area.</p>
11	Enforcement of the conditions of the SP shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause as to the reason the SP should not be revoked if the Planning Commission has reason to believe that there has been a failure to perform the conditions herein.	No response required.



**AES LAWA'I SOLAR, LLC,**  
**2019 Annual Report - Special Use Permit Compliance**

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
12	If the PV array creates a hazardous condition for pilots or motorists, the facility operator shall immediately mitigate the hazard upon notification by the DOT, Airports Division, or the FAA.	<p><b>2019</b> – There have been no notifications by the DOT, Airports Division or the FAA of hazardous conditions for pilots or motorists.</p> <p><b>2018</b> – There have been no notifications from DOT, Airports or FAA</p>
13	If required to mitigate visual impacts, new landscaping shall be installed and maintained around the Solar Project to screen it when viewed from Aka Road or Koloa Road. The Planning Department shall determine whether additional landscape screening is necessary and the degree at which it is provided.	<p><b>2019</b> - AES maintained a vegetative screening barrier around the site such that it is not visible from any major roads and has not been notified by the Planning Department of a need for additional landscape screening.</p> <p><b>2018</b> - As discussed in the permit hearings AES maintained a vegetative screening barrier around the site such that it is not visible from any major roads. There have been no complaints and we have a vegetative screening and dust fence installed so there is no visibility to our site from any major roads.</p>
14	In the event that historic resources, including human skeletal remains, structural remains, cultural deposits, artifacts, sand deposits, or sink holes, are identified during demolition and/or construction activities, all work shall cease in the immediate vicinity of the find, the find shall be protected from additional disturbance, and the SHPD and Kaua 'i Island Burial Council, as applicable, shall be contacted immediately. Without any limitation to any other condition found herein, if any burials or archaeological or historic sites are discovered during the course of construction of the facility, all construction activity in the vicinity of the discovery shall stop until the issuance of an archaeological clearance from the SHPD that mitigation measures have been implemented to its satisfaction.	<p><b>2019</b> – Construction of the Lawai facility has been completed and there were no significant findings during the construction phase of life. Agricultural findings were of no concern to the Archeologist and full reports can be provided. No findings.</p> <p><b>2018</b> - AES implemented its approved Archaeological Monitoring Plan (as reviewed and approved by SHPD). AES had archaeologists on site during grading work and implemented contractor training for what to do in the event of a finding. There have been no significant findings. Agricultural findings were of no concern to archeologist and full reports can be provided. No findings.</p>
15	The Applicant shall comply with the requirements of the State Department of Health, the County's Fire Department, the Department of Water, and the Department of Public Works, as well as any other applicable government agencies.	<p><b>2019</b> – AES remains in compliance with all listed governmental agencies. Prior to construction AES received its required permits including grading, noise and NPDES and has maintained those as required through construction.</p> <p><b>2018</b> - AES is in compliance with all listed governmental agencies. Prior to construction AES received its required permits including grading, noise and NPDES and has maintained those as required through construction.</p>

**AES LAWA'I SOLAR, LLC,**  
**2019 Annual Report - Special Use Permit Compliance**

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
16	The Applicant shall develop and utilize Best Management Practices (BMP's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.	<p><b>2019</b> – The Lawai facility completed construction using Best Management Practices in Dust Control, Matting, Silt Fencing and SWPPP and did not impact anyone downstream of the site or any abutting properties or waterways.</p> <p><b>2018</b> - Dust Control, Matting, Silt fencing and all SWPPPs were utilized as best practices during all phases of construction to minimize erosion, dust, and sedimentation impacts. No reports from any neighbor or county, nor anyone else downstream of the site complained and we did not impact any abutting properties or waterways.</p>
17	The Applicant shall develop and operate the facility, including the implementation of measures to mitigate potential impacts of the Project, in substantial compliance with the representations made to the Planning Commission and the LUC as reflected in this Decision and Order. Such mitigation measures include, but are not limited to, the use of temporary and pennant BMPs to ensure that the development and operation of the facility do not result in an increase in storm water runoff that adversely impacts downstream properties. Failure to so develop the Petition Area may result in revocation of the SP.	<p><b>2019</b></p> <ul style="list-style-type: none"> <li>• The Lawai facility completed construction using Best Management Practices in Dust Control, Matting, Silt Fencing and SWPPP and did not impact anyone downstream of the site or any abutting properties or waterways.</li> <li>• AES developed and implemented an endangered species awareness program and training module for the Lawai facility's operational phase of life. This program was developed in by Reginald David of Rana Biological Consulting (Kailua-Kona) which was prepared by a local biologist and can be provided upon request.</li> <li>• AES developed and implemented a Spill Prevention Control &amp; Countermeasures Plan for the Lawai facility's operational phase of life. This program was developed by EA Engineering, Science, and Technology, Inc. (Honolulu) and can be provided upon request.</li> </ul> <p><b>2018</b> - See above response to #16. The project has not yet reach commercial operations.</p>



**AES LAWA'I SOLAR, LLC,**  
**2019 Annual Report - Special Use Permit Compliance**

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
18	To the extent possible within the confines of union requirements and applicable prohibitions against discrimination in employment, the Applicant shall seek to hire Kaua'i contractors, and shall seek to employ residents of Kaua'i in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-Kaua'i residents for particular skilled jobs where no qualified Kaua'i resident possesses such skills. For the purpose of this condition, the Commission shall relieve the applicant of this requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practice.	<p><b>2019</b> – AES hired and used local Kauai contractors throughout the construction of the project. For the project's operational phase AES has hired two Kauai residents to facilitate maintenance and operation of the facility.</p> <p><b>2018</b> - AES hired and used local Kauai contractors for the construction of the project.</p>
19	The Applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environmental Design (LEED) standards or another comparable state approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy fixtures, low energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.	Not applicable to our project.
20	The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may create, or to revoke the permits through the proper procedures should conditions of approval not be complied with or be violated.	No comment.
21	The Applicant is advised that additional government agency conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agencies.	No comment.
22	As recommended by the State Office of Planning the Applicant shall develop an endangered species awareness training module, which shall include all potential endangered species that may frequent the Petition area. The County shall receive a copy of the training module materials before utilization.	<p><b>2019</b> - AES developed and implemented an endangered species awareness program and training module for the Lawai facility's operational phase of life. This program was developed in by Reginald David of Rana Biological Consulting (Kailua-Kona) which was prepared by a local biologist and can be provided upon request.</p> <p><b>2018</b> - See above answer to #6. The training module is attached to this report.</p>

**AES LAWA'I SOLAR, LLC,**  
2019 Annual Report - Special Use Permit Compliance

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	AES RESPONSES
23	As recommended by the State office of Planning, Applicant shall ensure all construction workers and solar facility employees shall undergo endangered species awareness training prior to starting work.	<p><b>2019</b> – In accordance with the aforementioned endangered species awareness program all solar facility employees have undergone endangered species awareness training prior to starting work.</p> <p><b>2018</b> - See above answer to #6.</p>
24.	Prior to building permit submittal, the Applicant shall hold a public meeting for residents in the areas of Lawa'i, Oma'o, Koloa, Kalaheo and Po'ipu to review the construction plans for the Solar Project to solicit input and mitigate where possible concerns raised.	<p><b>2019</b> – the Lawai facility is operational, this requirement has been met and no further reporting thereon is required.</p> <p><b>2018</b> - AES held a public meeting at the Koloa Neighborhood Center on Thursday January 25, 2018 and notified local area residences. A newspaper article about the event is attached hereto.</p> <p><a href="http://www.thegardenisland.com/2018/01/27/hawaii-news/amping-up-solar/">http://www.thegardenisland.com/2018/01/27/hawaii-news/amping-up-solar/</a></p>