

DOCKET NO. A92-683
***HALEKUA DEVELOPMENT
CORPORATION***
(HO`OHANA SOLAR 1, LLC)

**MOTION TO BIFURCATE
AND
MOTION FOR ORDER AMENDING
THE AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER DATED
OCTOBER 1, 1996**

Hearing on Motion to Bifurcate and Motion to Amend
November 12-13, 2014

Daniel Orodener, Executive Officer

Submitted: November 7, 2014

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1. UPDATE AS OF MONDAY NOVEMBER 10, 2014

Petitioner has informed the Executive Officer via e-mail (Sunday November 9, 2014 at 5:38pm) that they will be orally requesting at the hearing on Wednesday November 12, 2014, that the Commission defer hearing their Motion to Bifurcate until Thursday November 13. They will be meeting with the Department of Agriculture director in an attempt to negotiate a resolution with respect to off-site infrastructure to the State Agricultural Park which is a condition of approval for the Royal Kunia Phase II development. They propose the following:

1. On Wednesday November 11, 2014, defer the hearing; but should the LUC deny that request then Ho`ohana will present evidence and argument on its Motion to Bifurcate;
2. On Thursday November 12, 2014, open the hearing on the Motion to Bifurcate. If the Motion to Bifurcate is granted, then begin the hearing on the Motion to Amend. Should the Motion to Bifurcate be denied, then Ho`ohana will request that the hearing on the Motion to Amend be deferred until Friday November 21, 2014; and,
3. On Friday November 21, 2014, begin or continue and complete hearing and/or action on the Motion to Amend.

2. CHRONOLOGY OF SIGNIFICANT EVENTS

<u>Date</u>	<u>Event</u>
August 14, 1992	Halekua Development Corporation (“Petitioner”) filed a Petition for Land Use District Boundary Amendment to reclassify approximately 504.865 acres of land identified as Tax Map Keys: 9-4-02: 1, portion of 52, 70, and 71 (“Petition Area”) from the Agricultural District to the Urban District.

The proposed Royal Kunia Phase II¹ development consisted of the following:

Use	Acreage	Units
Single Family	124.0	800
Low-Density Apartments	74.0	1,200
Golf Course	160.0	
Light Industrial	123.0	
School	6.0	
Public Park	10.0	
Circulation	8.0	
<hr/>		
Total	505.0	2,000
Agricultural Park	150.0 ²	

¹ At the time of the Petition’s submittal, the Petition Area and park site were owned in fee simple by Caroline J. Robinson Limited Partnership, a Hawai`i limited partnership; Bishop Trust Company, Limited, a Hawai`i corporation, Trustee; Chinn Ho, Herman G.P. Lemke and Mildred Teresa Centeio, Trustees; Waikele Lands, Ltd., a Hawai`i corporation, and American Trust Co. of Hawaii, Inc., a Hawaii corporation, Trustee (collectively “Robinson Estate”). Petitioner had executed an agreement to purchase the Petition Area and park site from the Robinson Estate in fee simple. By way of Limited Warranty Deeds recorded with the Bureau of Conveyances on September 12, 1995, 347.036 acres of the Petition Area were conveyed from the Robinson Estate to Petitioner. Petitioner, in turn, conveyed 60 percent interest in the fee title to HRT, Ltd. At the present time, Petitioner holds an 85.72 percent interest in the fee title of 210.02 acres (the 137.016-acre balance was conveyed to HRT, Ltd., in 1996-see footnote 4 below). HRT, Ltd., holds the remaining 14.28 percent. Robinson Estate continues to own in fee simple the rest of the Petition Area (approximately 157 acres) and the 150-acre park site.

² The park site consists of approximately 150 acres and is owned by the Robinson Estate. The park site is designated within the State Land Use Agricultural District and was not included within the Petition Area reclassified by the Commission. The Memorandum of Understanding (attached) required that Petitioner convey the fee title to the site at no cost within six months of receipt of all necessary land use approvals from the State and City and County of Honolulu for the Royal Kunia Phase II project or, in the alternative, by December 31, 1997, whichever event occurred sooner. In March 1997, the DOA requested and received from Petitioner an extension to the conveyance date to December 31, 1999. DOA’s request was based on the necessity to secure the legislative appropriation for planning, engineering, and construction of onsite improvements.

December 3-4, 1992; March 31, 1993	The Commission opened and continued hearings on the Petition.
June 16, 1993	Petitioner filed a Motion to Reopen Hearing to address (i) Petitioner's proposal to provide affordable housing; (ii) compliance with the spirit and intent of Act 149 SLH 1993, relating to impacts upon traffic and regional transportation systems; and, (iii) Petitioner's proposal to provide land and offsite infrastructure to the State of Hawai'i for an agricultural park.
July 23, 1993	Commission grants Petitioner's Motion to Reopen hearings.
September 9, 1993	The Commission conducts its reopened hearing on the Petitioner.
December 2, 1993	The Commission votes to approve the reclassification of the Petition Area subject to twenty-eight (28) conditions.
December 9, 1993	The Commission issued its Decision and Order.
August 1, 1995	Petitioner filed a Motion to Change Ownership Interest in the Petition Area ³ .
August 25, 1995	Commission approves Petitioner's Motion to Change Ownership Interest and approved Petitioner's oral request to correct metes and bounds descriptions of the Petition Area.

³ The Motion to Change Ownership Interest requested the Commission to approve the change in ownership interest in a portion of the Petition Area in accordance with Purchase Agreements and a Loan Agreement (collectively "Agreements") by and between Petitioner and HRT, Ltd. The Agreements provided that HRT, Ltd., would eventually hold fee simple title to two parcels consisting of approximately 60 acres and 63 acres zoned I-1 (limited industrial) and a 9-acre parcel (later increased to 13 acres) zoned A-1 (low-density apartment). Petitioner noted that HRT, Ltd., had the desire and long-term financial capacity to develop the industrial parcels. Petitioner would focus instead on developing the residential portions of the project. HRT, Ltd., represented that it intended to fully develop its parcels in accordance with the land use plan proposed by Petitioner, and that it was fully aware of the conditions imposed by the Commission in its Decision and Order and would comply with all of the conditions, as such conditions applied to the Petition Area and/or the HRT, Ltd.-acquired parcels, as the case may be. By way of Warranty Deeds recorded with the Bureau of Conveyances on April 16, 1996, 137.016 acres were conveyed from Petitioner to HRT, Ltd., and related entities in fee simple.

September 6, 1995	Commission issued its Order Granting Motion to Correct Metes and Bounds Descriptions of the Petition Area.
September 19, 1995	Commission issued its Order Granting Motion to Change Ownership Interest in the Petition Area.
December 8, 1995	Petitioner filed its second annual report. Petitioner reported that the City Council voted to rezone Increment I of the project, effective March 23, 1995 (Ordinance No. 95-08). The area covered by the rezoning included 1,000 low-density apartment and single-family residential units, the 123-acre light industrial park, and the park and school sites.
June 25, 1996	Petitioner filed a Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order (“Motion to Amend”). Petitioner subsequently filed amendments to its Motion to Amend ⁴ .
October 1, 1996	Commission approved the Motion to Amend, as amended.
November 7, 1996	Petitioner filed its third annual report. Petitioner reported that its application to amend the Development Plan Land Use Map for Increment 3 of the Project was being processed as part of the 1996 Development Plan Annual Amendment Review process for Central O`ahu. The applicant requested the redesignation of Increment 3 to reflect the change in Petitioner’s development proposal that called for residential uses in place of the golf course uses originally proposed.
April 17, 1998	Petitioner filed its fourth annual report. Petitioner reported that the City Council voted to rezone Increment 2 of the Project, effective April 30, 1997

⁴ The Motion to Amend requested the Commission to amend the Decision and Order to reflect its revised development proposal to delete the 18-hole golf course and replace it with residential uses. The 157-acre site, identified as Increment 3, was proposed to accommodate a portion of the 2,000 housing units originally planned. Petitioner argued that such a change would spread the single-family market units over a larger area, resulting in larger lot sizes and lower residential unit densities. Petitioner also pointed out that all Navy ordnance had been removed from the Waikale Branch of Naval Magazine Lualualei, and that the facilities were disestablished as an ordnance storage location and final approvals had been granted to remove the blast zones. The Motion to Amend also requested that Condition No. 1 relating to the provision of affordable housing be amended to delegate affordable housing oversight to the City and County of Honolulu, and that Condition Nos. 6, 13, and 20 relating to golf course use be deleted.

(Ordinance No. 97-12). The area covered by the rezoning included an additional 1,000 residential units. Petitioner noted that with this rezoning, the Project was considered substantially entitled so as to allow Petitioner to pursue project financing.

- August 25, 1999 Petitioner filed its fifth annual report. Petitioner reported that its application to amend the Development Plan Land Use Map for Increment 3 was still pending before the City Council.
- May 26, 2000 Petitioner filed its sixth annual report. Petitioner reported no additional progress on the Project.
- June 28, 2001 Petitioner filed its seventh annual report. Petitioner reported no additional progress on the Project.
- October 15, 2002 OP filed a Motion for an Order to Show Cause to Rescind the Decision and Order dated October 1, 1996 (“Order to Show Cause”).
- February 26, 2003 Commission approved an Order Granting Office of Planning’s Motion for an Order to Show Cause and scheduled a hearing on the matter for April 25, 2003.
- April 25, 2003 Immediately prior to the scheduled hearing date, Halekua Development Corporation filed a bankruptcy petition with the U.S. Bankruptcy Court of the District of Hawai`i.
- April 25, 2003 Commission opens hearing on Order to Show Cause; is informed of the Petitioner’s bankruptcy filing and subsequently stayed its hearing pending the outcome of bankruptcy proceedings.
- March 16, 2007 Commission approved a Motion to Dismiss Order to Show Cause Proceeding.
- March 16, 2007 Commission approved Motion of Halekua Development Corporation Requesting Approval to Transfer Ownership of Property to Halekua-Kunia LLC.
- April 30, 2007 Petitioner filed a 2007 Status Report. During the bankruptcy proceedings, Halekua Development

Corporation reacquired⁵ the TMK No. 9-4-002:071 and later conveyed it to Halekua-Kunia LLC as of March 12, 2007.

- August 11, 2009 Canpartners IV Royal Kunia Property LLC filed a letter with the Commission indicating that Halekua-Kunia LLC had failed to make required payments and therefore a non-judicial foreclosure was instituted. Canpartners IV purchased the property in foreclosure and was conveyed to Canpartners IV Royal Kunia Property LLC. At that time Canpartners IV Royal Kunia Property LLC acknowledged and affirmed that it would comply with all conditions of the 1996 Decision and Order.
- July 15, 2013 Canpartners IV Royal Kunia Property LLC (“Petitioner”) filed a Motion for Order Amending the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996 (“Motion to Amend”) to be: (i) recognized as having standing to seek and obtain relief requested; and, (ii) amend the 1996 Amended Decision and Order to modify Condition 2 to clarify Petitioner’s responsibilities for implementing transportation improvements.
- August 13, 2013 Petitioner filed its Second Supplement to Motion to Amend containing a revised proposed modification to Condition 2 of the 1996 Decision and Order.
- August 22, 2013 Commission approved the Motion to Amend subject to OP’s proposed additions to Findings of Fact and Petitioner’s proposed amendment to Condition 2 as contained in its Second Supplement.
- October 7, 2013 Commission issues an order for the First Amendment to the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996.
- January 15, 2014 Petitioner filed a Status Report on its compliance with conditions of the Amended Decision and Order dated October 1, 1996. Most conditions were identified for future compliance; a few had prior or

⁵ The reacquisition of parcel 71 was financed by Canpartners Realty Holding Company IV LLC and CMR Mortgage Fund LLC (collectively “Lending Group”).

partial compliance; but most activity was suspended while property was in bankruptcy.

- August 11, 2014 Successor Petitioner (to parcel 52) – Ho`ohana Solar 1, LLC (“Ho`ohana” or “Successor Petitioner”) filed a Motion for Order Amending the Findings of Fact, Conclusions of Law, Decision and Order dated October 1, 1996; Memorandum in Support of Motion; and Exhibits 1-16 (collectively the “Motion to Amend”).
- September 19, 2014 Ho`ohana filed a First Stipulation of the Parties setting forth a filing schedule for documents.
- October 6, 2014 City and County of Honolulu, Department of Planning and Permitting (“DPP”) filed DPP’s Reponse to the Motion by Ho`ohana Solar 1, LLC
- October 8, 2014 Ho`ohana filed Successor Petitioner’s First List of Exhibits; Exhibits 17-22; and First List of Witnesses.
- October 8, 2014 State Office of Planning (“OP”) filed Office of Planning’s Response to Ho`ohana Solar 1, LLC’s Motion for Order Amending the Amended FOFOLD&O; and OP Exhibits 1-8.
- October 22, 2014 Ho`ohana filed a Second Stipulation of the Parties Setting Forth Filing Schedule for Motion to Amend in Docket No. A92-683.
- October 22, 2014 Ho`ohana filed Exhibit 4 (Errata); Successor Petitioner’s Second List of Exhibits; Second List of Witnesses; First List of Rebuttal Witnesses; and Exhibits 13D, and 23-33.
- October 22, 2014 Ho`ohana filed Successor Petitioner (to Parcel 52), Ho`ohana Solar 1, LLC’s Motion for Order Bifurcating the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996 in Docket No. A92-683.
- November 3, 2014 LUC mails out and posts agenda for November 12-13 hearing to all Parties, and the Statewide and O`ahu mailing lists

November 5, 2014 OP filed Opposition to Successor Petitioner (to Parcel 52) Ho`ohana Solar LLC's Motion for Order to Bifurcate the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996 in Docket No. A92-683; and Exhibits 9-10.

November 5, 2014 City and County of Honolulu, Department of Planning and Permitting ("DPP") filed DPP's Response to New Motion by Ho`ohana Solar 1, LLC Motion to Bifurcate the Decision and Order Regarding Docket No. A92-683 Halekua Development Corporation.

November 9, 2014 Petitioner Ho`ohana Solar e-mails a request and notice that they will ask the Commission for a deferral of the November 12, 2014 hearing date on its Motions until November 13, 2014.

November 10, 2014 Canpartners IV Royal Kunia Property LLC filed a Memorandum in Response to Successor Petitioner (to Parcel 52), Ho`ohana Solar 1, LLC's: (1) Motion for Order Bifurcating the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996 in Docket No. A92-683, filed October 22, 2014; and (2) Motion for Order Amending the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996, filed on August 11, 2014.

3. SUMMARY OF MOTIONS

Here is an attempt at a simple explanation of the requests by Ho`ohana Solar (“Successor Petitioner” or “Ho`ohana”) as contained in their two motions.

A new lessee for a piece of property (“parcel 52”)⁶ seeks to put in place a use that was not part of earlier development plans and approvals for that property. Conditions placed by the Land Use Commission (“Commission”) on the development approval will need to be changed in order for the new lessee to conduct that proposed use. One of those specific conditions – Condition 21 – requires the Commission’s approval for any change in ownership or lease.

A request to acknowledge a change in ownership interest is usually straightforward for the Commission. And, the use being proposed – a solar farm on a vacant parcel – is generally supported by the public and public policy. Generally, the Commission would be looking at whether the new owner/lessee: is legally in control of the property involved; acknowledges that the property comes with conditions and that it will comply with those conditions; can confirm whether the conditions are currently being complied with; and that they have the financial capability to carry these responsibilities out. In terms of a new use, the Commission looks to see if the public loses or gains anything, whether its compatible with any other previously approved uses, has any different impacts than the previously approved uses, whether new findings and conditions need to apply to the use, and if any changes are required to the previous approval (earlier Decision and Orders).

What makes this application difficult stems from several factors: a lack of progress in the “as approved” development; multiple ownership changes through bankruptcy and sale/lease; a Petition Area consisting of multiple owners who collectively are responsible for complying with conditions of approval; the potential existence of private agreements among parties regarding implementing conditions of approval that have not been recognized by the Commission; multiple owners who don’t appear to coordinate or communicate with each other; and, the confusion created by two separate but related motions.

The two motions filed by Ho`ohana each contain multiple parts, some of which request essentially the same action. The Motion to Amend was filed first; with the Motion to Bifurcate (split in two) coming to us approximately two months later. Below each motion is explained and then issues with each are discussed.

⁶ Tax Map Key (TMK) No. 9-4-02:052 owned by Robinson Kunia Land LLC (“RKL”); under a development option agreement with Forest City Sustainable Resources, LLC (“Forest City”) that ran until August 2014; now proposed as a lease to Ho`ohana Solar.

4. **The Motion to Amend** requests the following:

1. Recognize Ho`ohana Solar as the successor owner/lessee to parcel 52 with the legal authority to come before the Commission to ask for amendments;
2. For Commission to make changes to previous Decisions and Orders that will allow Ho`ohana to operate a solar farm as an interim use for 30 years; and,
3. For Commission to either delete Condition 21 requiring Commission's prior approval to change ownership interests or to approve the lease of parcel 52 between Robinson Kunia Land LLC and Ho`ohana Solar 1, LLC.

The first part of this Motion to Amend is straightforward. Recognition of Ho`ohana Solar as a legal successor in interest, with authority and responsibility to a portion (parcel 52) of the Petition Area is supported by Petitioner's Exhibit 5 (Memorandum of Option Agreement), Exhibit 6 (Ho`ohana Solar 1, LLC Fact Sheet), Exhibit 7 (Landowner Consent to File Motion), and Exhibit 15(see Title Report Schedule B page 3-4).

The Office of Planning ("OP") stated in their response to Ho`ohana's Motion to Amend (dated October 8, 2014, page 2) that they had no objection to recognizing Petitioner Ho`ohana as a successor petitioner. Further, OP indicates that there are several new landowners that may also be named "successor" petitioners, that all new landowners are bound by the conditions of the LUC's Decision and Orders, that those obligations are jointly held by all of the new landowners, and that a failure to comply with conditions by any landowner could be the basis for the LUC to issue an Order to Show Cause against all the landowners.

The City and County, Department of Planning and Permitting ("County") expressed no objections in its filing (dated October 6, 2014, page 2).

Canpartners IV Royal Kunia Property LLC ("Canpartners") does not oppose the Motion to Amend as long as the Motion to Bifurcate is granted by the LUC; without bifurcation Canpartners will be improperly impacted (filing dated November 10, 2014).

Staff Recommendation: *Approval of this part of the Motion to Amend. Commission may want to question the Petitioner to make clear they understand that they are bound by and jointly responsible for compliance with all the conditions of the prior Decision and Orders.*

The third part of the Motion to Amend requests changing an existing condition (Condition 21) that requires that any change in ownership of the Petition Area must receive prior approval from the LUC. The Motion to Amend (page 2) asks for deletion of Condition 21, however, Petitioner's memorandum in support of the Motion (pages 24-25) asks that Condition 21 be modified to allow for notification of any change in ownership instead of formal LUC prior approval or that the LUC approve the proposed lease of parcel 52 between RKL and Ho`ohana.

OP supports amending the language of Condition 21 but does not support its deletion.

The County expressed no objections.

Staff Recommendation: *Approve the lease between RKL and Ho`ohana pursuant to existing Condition 21. Any amendment of the language of this condition which applies to the entire Petition Area should be based on a request or stipulation by all the ownership interests for a change. An amendment of the language in Condition 21 that applies specifically to RKL, Ho`ohana, and parcel 52 should be considered after the Motion to Bifurcate is completed. In that way any changes to existing conditions will affect and apply only to RKL, Ho`ohana and parcel 52.*

The second part of the Motion to Amend requests the Commission to make changes to the Amended Findings of Fact, Conclusions of Law, and Decision and Order dated October 1, 1996 (“1996 Order”) and the First Amendment to the Amended Findings of Fact, Conclusions of Law, and Decision and Order dated October 7, 2013 (“2013 Order”) that would allow a 30-year interim use on parcel 52 for a solar farm. The specific change requested is for the Commission to find that the proposed 30-year interim use of parcel 52 for a solar farm is consistent with the representations previously made to the Commission. Condition 20 of the 1996 Order requires that the Property be developed in substantial compliance with the representations made to the Commission. The Petitioner’s arguments in support are:

1. That the Commission had previously determined the proposed Royal Kunia Phase II development to be consistent with the Hawai`i State Plan (“HSP”) in its 1996 Order (Findings of Fact 220, pages 57-58) and that the proposed use is also consistent with the HSP (Petitioner’s Motion to Amend, pages 31-34);
2. That urban development of parcel 52 is an appropriate use of the Property (Petitioner’s Motion to Amend, page 30-31; Petitioner’s Exhibit 2B; Petitioner’s Exhibit 2D);
3. That parcel 52 is within the Urban Growth Boundary in the 2002 Central O`ahu Sustainable Communities Plan (Petitioner’s Exhibit 2C) and that the proposed interim use is consistent;
4. That Royal Kunia Phase II, Increment 3 (parcel 52) is intended to be developed after Increments 1 and 2 pursuant to the development plan for Increment 3 (Petitioner’s Exhibit 4, Section 2.2.3, page 15) and that developers for Increments 1 and 2 estimate at least 15 years to complete those areas;
5. That the proposed interim use does not change the original proposed development of Royal Kunia Phase II Increment 3 nor will it adversely affect the interests or entitlements of the owners of other properties in the Petition Area and that RKL consents and acknowledges that parcel 52 will be developed as Increment 3, as represented to the Commission (Petitioner’s Motion to Amend, page 27);
6. That the remaining conditions 1-19, 22, and 24-25 are either not applicable, have been or will be complied with, or minimal impacts involved will be mitigated

(Petitioner's Motion to Amend, Status of Remaining Conditions, pages 28-30); and,

7. That the proposed interim use contributes to meeting State of Hawai'i Department of Business, Economic Development and Tourism ("DBEDT") Energy Policy goals (Petitioner's Motion to Amend, page 34);

OP has no objections to the change in use - subject to certain conditions. OP has identified the following issues and requests conditions to mitigate them:

- A. After 2 decades none of the development has been completed. Although the 1996 Order does not require Project completion by a deadline, Phase II was represented to be completed in 12 years. The proposed interim use on parcel 52 would encumber the property until 2045, roughly 50 years after the original project approval. OP recommends requiring a revised master plan for Phase II (including all Increments 1, 2, and 3), along with a schedule for the development of the entire Petition Area.
- B. At the time this Motion to Amend was submitted, the State Historic Preservation Division ("SHPD") had received but not completed a review of Ho`ohana's August 1, 2014 Archaeological Inventory Survey (see Petitioner's Exhibit 12). OP recommends a condition that no ground altering permits shall be obtained prior to the approval by SHPD of the Archaeological Inventory Survey.
- C. The Department of Transportation ("DOT") has indicated that glare from the solar arrays could create hazardous conditions for visibility of pilots overflying the area. OP/DOT recommends a condition that Petitioner shall immediately mitigate any hazardous condition for pilots caused by the solar array upon notification by the DOT, Airports Division or the Federal Aviation Administration.
- D. Although the proposed solar farm should not produce adverse impacts to State highway facilities once it is constructed; if it does create any safety concerns then these should be mitigated. OP recommends that the facility operator shall immediately mitigate any hazardous conditions for motorists caused by the solar array upon notification by DOT.
- E. OP disputes that Condition 19 of the 1996 Order has been met. This required not only conveyance of a 150-acre Agricultural Park to the State, but also provision of off-site infrastructure to the park, pursuant to the terms of the March 30, 1993 Memorandum of Understanding (OP Exhibit 4) between Petitioner and the Department of Agriculture ("DOA"). The latest deadline for submittal of infrastructure plans has expired. DOA has funding to plan and develop on-site infrastructure. The development of the required off-site infrastructure within the Petition Area is becoming time-sensitive. OP/DOA recommends that: preliminary infrastructure site plans be submitted to and approved by DOA within six months of the date of a Decision and Order; and, that construction of such infrastructure should be commenced before beginning construction for the solar project.
- F. Concerns were raised by the U.S. Fish and Wildlife Service (OP Exhibit 5) regarding federally endangered the Hawaiian Hoary Bat and safety of Hawaiian water birds. OP recommends a condition that Petitioner consult with USFWS to

coordinate training programs and measures to mitigate any adverse impacts on endangered and migratory avian species.

- G. OP requests that a specific deadline be placed on the substantial completion of the proposed solar farm within two years from the date of the approved amended Decision and Order.
- H. OP requests a specific condition that Petitioner shall develop the solar farm in substantial compliance with its representations reflected in the amended Decision and Order. Failure to so develop the Petition Area may result in reversion of the Petition Area to its former classification, or change to a more appropriate classification.

The County has no objections. County noted that: the existing zoning allows solar farms; construction of Royal Kunia Phase II, Increment 3 can only proceed after spine infrastructure for Increments 1 and 2 are built; does not appear to have a realistic chance to contribute to the housing market for the next couple of decades; and, the delay until 2045 is unlikely to negatively impact O`ahu's overall housing market.

Staff Recommendation: *The Motion to Amend is most appropriately taken up after the Commission makes a decision on the Motion to Bifurcate. As noted by Canpartners, prematurely deciding on the Motion to Amend may create legal impacts to the other successor owners of the Petition Area.*

Ho`ohana has recently informed the Commission staff (Sunday November 9, 2014 e-mail) that they will be requesting the Commission to defer the Wednesday November 12, 2014 hearing and take up their Motion to Bifurcate on Thursday November 13, 2014. The reason given is a crucial negotiation with the Department of Agriculture that might address some issues affecting the Motion to Amend and the Motion to Bifurcate.

The proposed use, a solar farm, appears to be consistent with the 1996 Order and the 2012 Order, and that issues raised by OP, and concurred with by LUC staff, can be mitigated through appropriate conditions. The parties will need to create, through the hearing process, the necessary record to identify any new findings of fact, conclusions of law, and the specific language of conditions that will be required. This will also require the Petitioner and other parties to draft proposed findings of fact, conclusions of law, and a decision and order ("proposed D&O") prior to the Commission rendering a decision. The timing of such a proposed D&O must take into account: the court reporter's timing on completing the hearing transcript(s); adequate review time by OP, the County, and Canpartners; and LUC staff time for compiling the various parties' responses into a proposed final D&O for the Commission to consider and vote on.

Staff recommends that once the hearing is closed, that Ho`ohana be directed to negotiate with the other parties and submit to the Commission within seven days of the close of the

hearing a stipulated time schedule for: receiving hearing transcripts from the court reporter; drafting a proposed D&O and distributing to all parties and the Commission; receiving responses from the parties on the proposed D&O; and rebuttal responses from the parties. The Commission should strongly encourage the Petitioner to seek, if possible, a stipulated time schedule and a stipulated proposed D&O with the parties.

Commission staff has met with the Petitioner several times over the past year and a half; reminding them that in order for the Commission and staff to expedite their motions – they needed to do their homework and secure agreements in advance. Commission should be aware that Petitioner will be pushing for extremely short turnaround times for review by parties and the Commission and a subsequent decision by the Commission in order to meet their own internal time constraints. Any proposed time schedule should be coordinated with Commission staff.

Staff Recommended Proposed Conditions

Given the proposed new use within a portion of the Petition Area (parcel 52), there are currently no conditions that address its specific impacts. Staff recommends that the following standard Commission conditions be imposed to apply specifically to parcel 52:

1. *Petitioner shall develop the Petition Area, including the implementation of measures to mitigate potential impacts as a result of the development, in substantial compliance with the representations made to the Commission. Failure to so develop the Petition Area may result in the reversion of the Petition Area to its former classification, or change to a more appropriate classification.*
2. *Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Petition Area, prior to development of the Petition Area.*
3. *Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of Planning, and the City and County of Honolulu Department of Planning and Permitting in connection with the status of the subject project and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.*
4. *The Commission may fully or partially release the conditions provided herein as to all or any portion of the Petition Area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.*
5. *Within seven (7) days of the issuance of the Commission's Decision and Order for the subject reclassification, Petitioner shall: (a) record with the Bureau of Conveyances a statement that the Petition Area is subject to conditions imposed herein by the Commission in the reclassification of the Petition Area; and (b) shall file a copy of such recorded statement with the Commission.*
6. *Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to section 15-15-92 Hawai'i Administrative Rules (HAR).*

Staff also recommends the following conditions proposed by OP (and other state agencies) be imposed on parcel 52 requiring that:

1. Revised Master Plan. *Petitioner shall submit a revised master plan and a schedule for the development of the Petition Area within one (1) year from the date of this Decision and Order.*
2. Fish and Wildlife Protection. *Petitioner shall consult with the U.S. Fish and Wildlife Service to coordinate training programs and measures to mitigate adverse impacts on endangered and migratory avian species.*
3. Archaeological and Historic Resources. *No ground altering activities shall occur prior to obtaining approval of the Archaeological Inventory Survey from the State Historic Preservation Division (SHPD).*
4. Aircraft and Traffic Hazard. *If the photovoltaic array creates a hazardous condition for pilots or motorists, the facility operator shall immediately mitigate the hazard upon notification by the Department of Transportation.*
5. State Agricultural Park. *A preliminary infrastructure site plan acceptable to the State Department of Agriculture shall be completed within six (6) months from the approval date of this Decision and Order. Construction of the required infrastructure shall be commenced prior to the start of construction of the solar farm. Construction of the required infrastructure shall be completed to the satisfaction of the Department of Agriculture prior to the commencement of full operation of the solar farm.*
6. Development Schedule. *The proposed solar farm shall be substantially completed within two (2) years from the approval date of this Decision and Order.*
7. Compliance with Representations. *Petitioner shall develop the solar farm in substantial compliance with its representations reflected in this Decision and Order. Failure to so develop the Petition Area may result in the reversion of the Petition Area to its former classification, or change to a more appropriate classification.*

Staff further recommends the following conditions be imposed on parcel 52 based upon Ho`ohana's representations that (i) the interim use of the Petition Area will be limited to a utility-scale solar farm; (ii) the proposed solar farm on the Petition Area will not exceed 30 years (not including construction and decommissioning); (iii) that decommissioning will take between four (4) and six (6) months, and (iv) permitting and construction need to occur no later than December 31, 2016 or two (2) years, to take advantage of federal investment tax credits:

1. *The interim use of the Petition Area shall be limited to a utility-scale solar energy development, or solar farm. No other use shall be permitted without prior written approval of the Commission.*
2. *The interim use of the Petition Area for the proposed solar farm, including any and all permitting, construction, operation, and decommissioning activities associated with the solar farm, shall not exceed a period of 33 years from the date of this Decision and Order without the prior written approval of the Commission.*

3. *The proposed solar farm shall be limited to the acreage and boundaries identified in Petitioner's Exhibit 9 and Exhibit 11 (filed August 11, 2014). Petitioner shall provide a metes and bounds map and description to the Commission within one year from the date of this Decision and Order.*

Finally, staff recommends a condition be imposed on parcel 52 requiring decommissioning of the solar farm following its operational life and requiring that any future use of the Petition Area shall be subject to the environmental review process promulgated under Chapter 343, HRS, as applicable, and require Petitioner to submit a motion to amend for Commission approval.

1. *The solar farm shall be decommissioned following its operational timeframe. The decommissioning activities shall include but not be limited to the complete removal of the foundational piers and modules and all associated components. All metal components shall be recycled to the extent possible and no solar farm components shall be disposed of in any landfill in the State of Hawai`i. Any future use of the Petition Area following the decommissioning of the solar farm shall be subject to the environmental review process promulgated under chapter 343, Hawai`i Revised Statutes (HRS), as applicable, and shall require filing of a motion to amend the Decision and Order with the Commission. Such motion to amend shall include a revised master development plan for Royal Kunia Phase II, Increment 3 and shall further include but not be limited to a revised Traffic Impact Analysis Report, Engineering Report, Socio-Economic Analysis Report, Environmental Report, and Archaeological Inventory Survey Report.*

5. **The Motion to Bifurcate** requests the following:

1. Recognize Ho`ohana Solar as the successor owner/lessee to parcel 52 with the legal authority to come before the Commission to ask for amendments;
2. For Commission to “bifurcate” or split apart parcel 52 from the other parcels in the Decision and Order;
3. Issue a new docket or sub-docket number for parcel 52;
4. Include within the new docket or sub-docket – the entire record from all previous hearings and filings, to also include all filings to date by Ho`ohana Solar and other parties in Ho`ohana’s Motion to Amend;
5. For Commission to issue a new Decision and Order that keeps all of the historic conditions from the 1996 Decision and Order that apply to parcel 52 but suspends (“abeyance”) application or enforcement of those conditions for the time period that Ho`ohana is developing and operating the solar farm; and,
6. For Commission to determine new and appropriate findings of fact, conclusions of law, and conditions that would apply to Ho`ohana’s solar farm on parcel 52.

The first part of this Motion to Bifurcate is the same as requested by Petitioner’s Motion to Amend. Recognition of Ho`ohana Solar as a legal successor in interest, with authority and responsibility to a portion (parcel 52) of the Petition Area is supported by Petitioner’s Exhibit 5 (Memorandum of Option Agreement), Exhibit 6 (Ho`ohana Solar 1, LLC Fact Sheet), Exhibit 7 (Landowner Consent to File Motion), and Exhibit 15(see Title Report Schedule B page 3-4).

Although OP had no objection to recognizing Petitioner Ho`ohana in their Motion to Amend; OP in its filing (dated November 5, 2014) is opposed to the Motion to Bifurcate in its entirety.

The County expressed no objections in its filing (dated November 5, 2014).

Canpartners does not oppose the Motion to Bifurcate; without bifurcation Canpartners believes they will be improperly impacted (filing dated November 10, 2014).

Staff Recommendation: *Approval of this part of the Motion to Bifurcate. Commission may want to question the Petitioner to make clear on the record that they understand they are bound by and jointly responsible for compliance with all the conditions of the prior Decision and Orders.*

Parts two (bifurcation of the Commission’s 1996 Order), three (providing a new docket or sub-docket number) and four (preserving conditions from 1996 Order, but suspending them for 33 year duration of solar farm) most appropriately go together as an efficient method to carve out parcel 52 as distinct from the rest of the Petition Area, while retaining all the legally binding representations, conditions and responsibilities applicable to all successor owners.

Part four of the Motion to Bifurcate specifically asks the Commission to preserve the conditions imposed by the 1996 Order as they apply to parcel 52. However, in addition they then ask that these conditions be held in abeyance (or suspended from applying) for the 33 years during which the solar farm is developed and operated (Petitioner's Motion to Bifurcate, Memorandum in Support of Motion; page 2, 12-13).

Ho`ohana states in its Motion to Bifurcate (page 3) that "...the intended result of this Motion to Bifurcate is that the other five Petition Area properties will continue to be treated together as they currently are under the original Docket and subject to the original conditions of approval in the 1996 Order (as amended by the 2013 Order)."

OP opposes the Motion to Bifurcate. In particular, OP cites continuing non-compliance with all elements of Condition 19; requiring not only conveyance of 150 acres for a State Agricultural Park to DOA but also development of necessary off-site infrastructure to the Agricultural Park. Since Ho`ohana's Motion to Bifurcate is asking "...to hold the existing conditions in "abeyance" in order to avoid its responsibilities under the existing Order, including Condition 19, OP opposes the motion for bifurcation.

The County has no objections to the Motion to Bifurcate. They did have some recommendations relating to conditions requiring provision of the solar farm site for compatible agricultural activities and a plan for disposal and recycling that is kept up to date as recycling technologies improve to be implemented when the solar farm is decommissioned (County's Response to Ho`ohana Motion to Bifurcate, dated November 5, 2014; page1).

Part five of the Motion to Bifurcate asks the Commission to issue new findings of fact and conditions of approval that are specifically applicable to Ho`ohana's proposed interim development of parcel 52 for a solar farm. This request duplicates the process at the heart of the Ho`ohana's Motion to Amend and would most appropriately be determined during that hearing process.

Staff Recommendation: *Approval in part and denial in part of the Motion to Bifurcate. Specifically the Commission should move to approve and:*

- i. recognize RKL and Ho`ohana Solar 1, LLC as successor petitioners to parcel 52 with standing to seek and obtain the relief requested;*
- ii. order the bifurcation of the Commission's 1996 Order in Docket No. A92-683 as applied to parcel 52;*
- iii. issue a new sub-docket number for that portion of the Petition Area identified as parcel 52;*
- iv. incorporate by reference all other pleadings, papers, legal memoranda, exhibits, and filings in Docket No. A92-683 into this matter, including all filings made pursuant to Ho`ohana's Motion for Order Amending the Findings of Fact, Conclusions of Law, and Decision and Order dated October 1, 1996, filed August 11, 2014*

and Ho`ohana's Motion for Order Bifurcating the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996, filed on October 22, 2014; and,

- v. *all conditions of the 1996 Order, and as amended by the 2013 Order, shall continue to run with the land and remain in full force and effect.*

The Commission should move to deny:

- i. *Ho`ohana's request to hold conditions imposed by the 1996 Order in abeyance during the period that parcel 52 is being developed and operated as a solar farm; and,*
- ii. *Ho`ohana's request to issue new findings of fact and conditions of approval that are specifically applicable to the proposed interim development of parcel 52 as a solar farm.*

Petitioner Ho`ohana has indicated to the Commission that they would like to have the Motion to Bifurcate heard first and then the Motion to Amend. Staff believes that the most efficient method to approach the requests contained in both motions would be to recognize successor petitioner Ho`ohana, order a bifurcation of the Decision and Order and create a new sub-docket that includes all previous documents, orders and conditions from the original docket A92-683. In this way, the Commission will have a separate docket, geographically distinct, that has not released any conditions from the newly recognized successor petitioner Ho`ohana or parcel 52; while not adversely affecting the other successor petitioners who own the remainder of the Petition Area or releasing any of them from conditions. This should address OP's primary concern regarding conditions being held in abeyance and Canpartners concern about improper impacts to their interests. The determination of any necessary amendments to the 1996 Order as well as what new findings of fact and conditions should be applied to parcel 52 would be best addressed during the hearing on the Motion to Amend.

6. **EXISTING CONDITIONS** (as of October 7, 2013)

The original Decision and Order dated December 9, 1993 contained twenty-eight conditions (“Original Decision and Order”). The Decision and Order was amended on October 1, 1996 and at that time contained twenty-five conditions (“1996 Decision and Order”). On October 7, 2013, the Commission issued the First Amendment to the 1996 Decision and Order; this included revisions to the Findings of Fact and modification of Condition No. 2 regarding regional transportation improvements.

1. *Petitioner shall provide affordable housing opportunities for low to moderate income residents of the State of Hawai`i to the satisfaction of the City and County of Honolulu. The location and distribution of the affordable housing and other provisions for affordable housing shall be under such terms as are mutually agreeable to the Petitioner and the City and County of Honolulu.*
2. *Petitioner shall fund, design, and construct the local and regional transportation improvements necessitated by the proposed development, on a pro rata basis, and as determined and approved by the State Department of Transportation and the City and County of Honolulu, Department of Transportation Services, including without limitation the dedication of any rights-of-way to the State and County. Petitioner shall also be required to provide the following:*
 - A. *All of the other improvements needed (which will not be provided by the Village Park and Royal Kunia, Phase I projects) to make Kunia Road a 4-lane highway with auxiliary lanes for both left and right turning movements (between Kunia Interchange and the northernmost boundary of Royal Kunia Phase II) and a third northbound lane between Kunia Interchange and the north Kupuna Loop intersection.*
 - B. *A report that analyzes the impact of the proposed Phase II project’s traffic on the Kunia Interchange and evaluate alternatives that will mitigate the impacts.*
 - C. *Plans for construction work within the State highway right-of-way must be submitted to DOT, Highways Division for review and approval.*

Agreement by the State Department of Transportation on the level of funding and participation shall be obtained prior to the Petitioner applying for county zoning.

3. *Petitioner, at no cost to the State, shall appoint a permanent transportation manager whose function is the formulation, use, and continuation of alternative transportation opportunities that would optimize the use of existing and proposed transportation systems. In the*

alternative, Petitioner may participate in a regional program for transportation management with other developers and/or landowners. This program shall address the transportation opportunities that would optimize the use of existing and proposed transportation systems. Either option will continue to be in effect unless otherwise directed by the State Department of Transportation. The program for either option shall be reviewed and approved by the State Department of Transportation prior to implementation. The transportation manager or Petitioner shall conduct a yearly evaluation of the program's effectiveness and shall make a written report of its evaluation available to the State Department of Transportation for program review and modification, if necessary.

4. *Petitioner shall monitor the traffic attributable to the proposed Project at on-site and off-site locations and shall undertake subsequent mitigative measures that may be deemed to be required by Petitioner, the State Department of Transportation, or the City and County of Honolulu. The mitigative measures shall be coordinated with and approved by the State Department of Transportation and the City and County of Honolulu.*
5. *Petitioner shall cooperate with the State Department of Health and the City and County of Honolulu Department of Public Works to conform to the program goals and objectives of the Integrated Solid Waste Management Act, Chapter 342G, Hawai'i Revised Statutes, in accordance with a schedule satisfactory to the Department of Health and the City and County of Honolulu.*
6. *Petitioner shall contribute to the development, funding, and/or construction of school facilities on a pro rata basis as a result of the development on the Property, as determined by and to the satisfaction of the Department of Education (DOE). Agreement by the DOE on the level of funding and participation shall be obtained prior to Petitioner applying for county zoning.*
7. *Petitioner shall coordinate with the Honolulu Board of Water Supply and the Department of Land and Natural Resources to obtain the required water for the project. In the event that water is not available from existing sources due to insufficient supply, Petitioner shall fund and develop the necessary water source, storage, and transmission systems and facilities.*
8. *Petitioner shall participate, on a pro rata basis, in the funding for construction and installation of appropriate civil defense measures as determined by State and City civil defense agencies.*
9. *Petitioner shall erect a chain link fence along the eastern boundary of the Property that is common with the Waikele Branch of Naval Magazine, Lualualei.*

10. *Petitioner shall clear and maintain the land situated within 20 feet of the eastern boundary of the Property, free of trees and vegetation taller than eight inches high.*
11. *Petitioner shall coordinate with the State Department of Health and the City and County of Honolulu to establish appropriate systems to contain spills and prevent materials, such as petroleum products, chemicals, solvents or other pollutants from leaching into the storm drainage system and adversely affecting the groundwater and coastal waters.*
12. *Petitioner shall participate in the funding and construction of adequate wastewater treatment, transmission and disposal facilities, on a pro rata basis, as determined by the State Department of Health and the City and County Department of Public Works.*
13. *Petitioner shall implement effective soil erosion and dust control measures both during and after construction to the satisfaction of the State Department of Health.*
14. *Petitioner shall participate in an air quality monitoring program as specified by the State Department of Health.*
15. *Petitioner shall provide notification to all owners and occupants of the Property of the potential odor, noise, and dust pollution resulting from surrounding Agricultural District lands, and that the Hawai`i Right-to-Farm Act, Chapter 165, Hawai`i Revised Statutes, limits the circumstances under which pre-existing farming activities may be deemed a nuisance.*
16. *Petitioner shall provide drainage improvements for the subject project and shall coordinate off-site improvements with adjoining landowners and developers, and/or other Federal, State, and City agencies.*
17. *Should any archaeological resources such as artifacts, shell, bone or charcoal deposits, human burials, or rock or coral alignments, paving or walls of historic or prehistoric significance be encountered during the development of the Property, Petitioner shall immediately stop work on the impacted area and contact the Historic Preservation Division of the State of Hawai`i Department of Land and Natural Resources.*
18. *Petitioner shall obtain Development Plan approvals from the City and County of Honolulu within five (5) years from the date of this Order.*
19. *Petitioner shall convey the agricultural park to the State of Hawai`i and provide off-site infrastructure to the agricultural park, pursuant to the*

terms of the Memorandum of Understanding dated March 30, 1993 entered into by Petitioner and the Department of Agriculture.

20. *Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Petitioner's or its successor's failure to so develop the Property may result in reversion of the Property to its former classification, or change to a more appropriate classification.*
21. *In reliance upon Petitioner's representation that it will develop the Project on his own and in its entirety, the Petitioner shall obtain the prior approval from the Land Use Commission before it can sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interest in the Property or Project covered by the approved Petition.*

Petitioner shall request the prior approval from the Land to alter the ownership interest in the Property or Project by filing a motion to request approval to alter ownership interest and supporting affidavits that will provide relevant information, including without limitation (1) the name(s) and address(es) of the prospective owner(s) or real party(ies) in interest; (2) the reason for the alteration of ownership interest; (3) any information related to any proposed change in the representations made by Petitioner to the Commission and in its Petition filed pursuant to section 15-15-50, Hawai'i Administrative Rules, including without limitation any information pertaining to the financial capabilities of the prospective owner(s) to proceed with the Project as set forth in section 15-15-50(8); and, (4) a written acknowledgement and affirmation of the prospective owner(s) that the prospective owner(s) shall comply with all of the conditions in this Order.

22. *Petitioner shall promptly provide without any prior notice, annual reports to the Land Use Commission, the Office of Planning, and the City and County of Honolulu Planning Department in connection with the status of the Project and Petitioner's progress in complying with the conditions imposed. The annual reports shall summarize: (1) Petitioner's progress in complying with the conditions imposed; and (2) changes to the Project as represented to the Land Use Commission. The annual report shall also include a written statement from each state and county agency affected by these conditions that Petitioner's representations in the annual report related to the respective state or county agency being affected is true and accurate.*
23. *The Land Use Commission may fully or partially release these conditions as to all or any portions of the Property upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.*

Adequate assurance of satisfaction may be evidenced by execution of a certificate of satisfaction in recordable form stating that such condition has been satisfied, in whole or in part. The Office of Planning will certify for itself and all state departments and agencies, and the City and County of Honolulu Planning Department will certify for itself and all county departments and agencies. Any other party to the boundary amendment proceeding may be asked to indicate whether they concur in the certification of satisfaction.

24. *Within 7 days of the issuance of the Commission's Decision and Order for the subject reclassification, Petitioner shall (1) record with the Bureau of Conveyances a statement to the effect that the Property is subject to conditions imposed by the Land Use Commission in the reclassification of the Property; and (2) shall file a copy of such recorded statement with the Commission.*
25. *Petitioner shall record the conditions imposed by the Commission with the Bureau of Conveyances pursuant to Section 15-15-92, Hawai'i Administrative Rules.*