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LAND USE COMMISSION
STATE OF HAWAII

2020 SEP 25 P 2:08

Attorney for Successor Petitioner Ho'ohana Solar 1, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of

HALEKUA DEVELOPMENT
CORPORATION, a Hawaii corporation

To Amend the Agricultural Land Use District
Boundary into the Urban Land Use District for
Approximately 503.886 Acres at Waikele and
Ho'ae'ae, 'Ewa, O'ahu, City and County of
Honolulu, State of Hawai'i, Tax Map Key No.
9-4-02: 1, portion of 52, 70 and 71

DOCKET NO. A92-683

**SUCCESSOR PETITIONER (AS TO
PARCEL 52) HO'OHANA SOLAR 1, LLC'S
REPLY TO DEPARTMENT OF
PLANNING AND PERMITTING'S
LETTER RE: DOCKET NO. A92-683
HALEKUA DEVELOPMENT
CORPORATION MOTION BY
HO'OHANA SOLAR 1, LLC (MOVANT)
FOR MODIFICATION AND TIME
EXTENSION; CERTIFICATE OF SERVICE**

**SUCCESSOR PETITIONER HO'OHANA SOLAR 1, LLC'S REPLY TO DEPARTMENT
OF PLANNING AND PERMITTING'S LETTER RE: DOCKET NO. A92-683
HALEKUA DEVELOPMENT CORPORATION MOTION BY HO'OHANA
SOLAR 1, LLC (MOVANT) FOR MODIFICATION AND TIME EXTENSION**

Ho'ohana Solar 1, LLC ("**Ho'ohana**"), as Successor Petitioner to that certain portion of
the 503.886-acre Petition Area identified as Tax Map Key No. 9-4-002:052, by and through its
legal counsel, CARLSMITH BALL LLP, hereby respectfully submits to the Land Use
Commission ("**Commission**") of the State of Hawai'i its *Reply* to the Department of Planning

and Permitting's ("**DPP**") *Letter re: Docket No. A92-683 Halekua Development Corporation Motion by Ho'ohana Solar 1, LLC (Movant) for Modification and Time Extension*, filed September 18, 2020 ("**Letter**"). In violation of Hawai'i Administrative Rules ("**HAR**") Title 15, Chapter 15, including HAR § 15-15-45, DPP has not served Ho'ohana with a copy of the Letter. If Ho'ohana's counsel had not discovered the Letter while searching the Commission's website, Ho'ohana would never have received a copy.¹

I. INTRODUCTION

Ho'ohana filed its *Motion for Modification and Time Extension* (the "**Motion**") with the Commission on August 17, 2020. The Motion requests Commission approval of modifications to a utility-scale solar farm that the Commission approved in 2015 (the "**2015 Solar Project**"). The 2015 Solar Project, as modified, will produce 52 megawatts ("**MW**") instead of 20 MW, and have different project start and completion dates (the "**2020 Solar Project**").

DPP approved the 2020 Solar Project prior to Ho'ohana filing the Motion. By way of two letters dated August 14, 2020, DPP approved minor modifications to Conditional Use Permit No. 2014/CUP-76 ("**CUP**"), which was obtained for the 2015 Solar Project, and Zoning Waiver 2020/W-27. *See* Petitioner's Exhibit ("**Pet. Ex.**") 32; Pet. Ex. 35.² Both approvals represent DPP's only discretionary decision-making authority for the 2020 Solar Project.

According to its Letter, DPP has "no objection" to the Motion. However, DPP goes on to state that it "understand[s] that the adjoining landowner, Haseko Royal Kunia, LLC [**Haseko**]", is concerned that [Ho'ohana]'s proposed solar farm would adversely affect Haseko's proposed residential development and required support infrastructure southwest of the

¹ DPP's Letter is also untimely, as it was required to notify the Commission and Ho'ohana of its position within seven days of service of Ho'ohana's Motion. *See* HAR § 15-15-70(f). The Motion was filed and served August 17, 2020; DPP's Letter was filed a month later on September 18, 2020. DPP is weeks tardy.

² Petitioner's Exhibits 1 - 14 were filed with Ho'ohana's Motion. Petitioner's Exhibits 15 - 53 referenced herein are filed concurrently as a separate pleading and are referred to in this Reply.

solar farm." Letter at 1. According to DPP, because "the matter involves discussions and mutual consensus between [Ho'ohana] and adjoining property owners, the DPP recommends that these issues be resolved before [Ho'ohana] applies for any building permit, including for grading or any other ground disturbance, for the [2020 Solar] Project." *Id.* at 1-2. DPP recommends that "a memorandum of agreement among [Ho'ohana] and affected property owners be filed with the building permits for the [2020 Solar] Project, as a condition of approval of the Motion[.]"

Id. at 2.

Ho'ohana appreciates that DPP does not object to a project it already approved. However, Ho'ohana strenuously objects to the Commission imposing new conditions that would further Haseko's efforts to avoid its obligations to provide infrastructure improvements for the State of Hawai'i Department of Agriculture's ("**DOA**") Kunia Agricultural Park ("**Ag Park**") under its infrastructure agreement with the DOA. DPP's proposal would allow Haseko to use Ho'ohana's building permits as leverage in its ongoing campaign to shift its own infrastructure obligations onto Ho'ohana. DPP's proposed condition must be rejected.

II. DISCUSSION

First, Haseko's shameless and orchestrated efforts to avoid its obligations to the DOA are addressed at length in Ho'ohana's *Reply to Petitioner Haseko Royal Kunia, LLC's Motion [or more accurately Memorandum] in Opposition to Successor Petitioner (as to Parcel 52) Ho'ohana Solar 1, LLC's Motion for Modification and Time Extension*, filed September 25, 2020. Ho'ohana's response on those issues will not be repeated here. Haseko's purported "concerns" over the infrastructure do not require a memorandum of agreement between Ho'ohana and Haseko because the Commission can and should resolve them by simply requiring Haseko to comply with its existing infrastructure agreement with the DOA. Nothing more is needed.

Second, any concerns that Haseko may have over the potential for the 2020 Solar Project

to adversely impact its undisclosed residential subdivision have already been addressed by DPP. When DPP granted the CUP for the 2015 Solar Project, its Director found, *inter alia*, that: (1) Parcel 52 was suitable for the project considering its size, shape, location, topography, infrastructure and natural features; (2) the project would not alter the character of the surrounding area in a manner substantially limiting, impairing, or precluding the permitted uses of surrounding properties; and (3) the project would provide a service or facility that contributes to the general welfare of the community. *See* Rev. Ord. Hon. ("**ROH**") § 21-2.90-2(a). In making those determinations, the Director considered screening and buffering, setbacks, lot dimensions, the height, bulk and location of structures, the location of all proposed uses, and noise, lights, dust, odors, and fumes. *See id.* at 21-2.90-2(d).

In approving the modifications to the CUP for the 2020 Solar Project, the Director found that they: (1) were reasonable and consistent with the intent of the CUP; (2) would not significantly increase the intensity or scope of the project; and (3) would not create adverse land use impacts on the surrounding neighborhood. *See id.* at § 21-2.20(k)(1). There is no justifiable basis to allow Haseko to re-litigate the Director's findings, either in public before the Commission, or in private through a forced agreement with Ho'ohana.

Third, DPP has no basis to condition the issuance of building permits for the 2020 Solar Project because building permits are purely ministerial. Once a building permit application is deemed to meet all applicable content requirements under ROH Chapter 18, and found to be otherwise in compliance with the law, DPP **must** issue the building permit. *See* ROH § 18-5.1 (emphasis added). The Hawai'i Supreme Court has explained:

[T]he function of the Building Department, after the acceptance of the application, [is] **purely ministerial**, to process the application for compliance with all applicable statutes, ordinances, rules and regulations, and the conditions attached to the approvals, and to issue the requested building permit after such

processing.

Life of the Land, Inc. v. City Council of City & County of Honolulu, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) (emphasis added).

Those "check marks" are "**ministerial** insofar as they represent[] **no action** on their part but only an **acknowledgement that the permit was in compliance with applicable statutes, ordinances, rules and regulations.**" *Swire Properties (Hawaii), Ltd. v. Zoning Bd. of Appeals of City & County of Honolulu*, 73 Haw. 1, 7, 826 P.2d 876, 879 (1992) (emphases added). DPP has no authority or discretion to condition the issuance of a building permit on a memorandum of agreement between Ho'ohana and Haseko (or others), and should not be allowed to do so indirectly through the Commission.

Finally, DPP should not get into the business of compelling neighbors to resolve their disputes as a condition of obtaining a permit. Allowing disputes between neighbors to become a condition for issuing building permits (or even a delay in the process) would incentivize unending bad-faith negotiations and gamesmanship. Haseko purchased its Petition Area lands with full notice they were located immediately next to a planned utility-scale solar farm. *See* Pet. Ex. 15 (recorded Declaration of Conditions Imposed by the State Land Use Commission); Pet. Ex. 33 (3/27/19 Star Advertiser article announcing the Hawai'i Public Utilities Commission's approval of Ho'ohana's power purchase agreement for the 2020 Solar Project). Haseko has no basis to now complain of that fact, much less use it as a basis to force exactions out of Ho'ohana.

III. CONCLUSION

The Commission should decline DPP's invitation to place one more hurdle before Ho'ohana's nearly shovel-ready solar project. The 2020 Solar Project will contribute significantly to the state's goal of achieving 100% renewable clean energy by 2045, and will be a tremendous benefit to the public at large. The issues injected by Haseko have no basis in law or

fact, and can easily be resolved by the Commission by simply compelling Haseko to comply with its existing obligations to the DOA. Ho'ohana respectfully asks that the Motion be granted.

DATED: Honolulu, Hawai'i, September 25, 2020.



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To Amend the Agricultural Land Use District
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CERTIFICATE OF SERVICE

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I hereby certify that a filed copy of the foregoing document was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service, postage prepaid, as noted:

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