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LAND USE COMMISSION
STATE OF HAWAII

2020 SEP 25 P 2:07

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

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 Hoʻaeʻae, ʻEwa, Oʻahu, City and County of Honolulu, State of Hawaiʻi, 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 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; CERTIFICATE OF SERVICE

SUCCESSOR PETITIONER (AS TO PARCEL 52) HO'OHANA SOLAR 1, LLC'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

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SUCCESSOR PETITIONER (AS TO PARCEL 52) HO'OHANA SOLAR 1, LLC'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

Successor Petitioner Ho'ohana Solar 1, LLC ("**Ho'ohana**"), a Hawai'i Limited Liability Company, 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: (a) *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* ("**Opposition**"); and (b) *Joinder of HRT Realty, LLC and Jupiter Investors II LLC* ("**Joinder**"), filed together on August 25, 2020.[1] To date, in violation of HAR Title 15, Chapter 15, including HAR § 15-15-45, counsel for Haseko Royal Kunia, LLC ("**Haseko**") has not served its Opposition on Ho'ohana, nor have HRT Realty, LLC ("**HRT**") and its prospective purchaser, Jupiter Investors II ("**Jupiter**"), served their Joinder on Ho'ohana. If it were not for an email from Riley K. Hakoda, the Commission's clerk, to Ho'ohana's counsel, Ho'ohana would never have received the Opposition and Joinder.

I. INTRODUCTION

Ho'ohana filed its *Motion for Modification and Time Extension* (the "**Motion**") with the Commission on August 17, 2020, requesting Commission approval of modifications to a utility-scale solar farm that the Commission approved in 2015 (the "**2015 Solar Project**") so that the project can produce more renewable energy. The 2015 Solar Project, as modified, will produce

[1] Although Haseko named its filing a "Motion in Opposition" that is clearly wrong. Haseko's filing was under Hawaii Administrative Rules ("**HAR**") § 15-15-70(e). *See* Opp. at 2. That section applies to "counter affidavits and memorandums in opposition" to already filed motions. Ho'ohana is the only party that has filed a motion. Thus, this filing by Ho'ohana is deemed Ho'ohana's "Reply to: (a) 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; and (b) Joinder of HRT Realty, LLC and Jupiter Investors II LLC."

52 megawatts ("**MW**") instead of 20 MW, and have different project start and completion dates (the "**2020 Solar Project**"). The 2020 Solar Project is located at the same property; at Tax Map Key ("**TMK**") No.: (1) 9-4-002:052 ("**Parcel 52**"), which is an approximately 161.023-acre portion of the 503.886-acre Petition Area. *See* Petitioner's Exhibit ("**Pet. Ex.**") 1.[2] As set forth in the Motion, the 2020 Solar Project will generate significantly more renewable clean energy, thereby contributing more to the State's goal of reaching 100% renewable energy by 2045, all while remaining entirely within Parcel 52 and avoiding the use of any neighboring land in the State Land Use ("**SLU**") Agricultural District.

Haseko recently acquired three parcels within the Petition Area (TMK Nos. 9-4-002: 070, 078, and 071 ("**Parcel 71**")) and has opposed the Motion, claiming it lacks sufficient information regarding: (a) "the location of a planned 138 kV transmission line" and its potential to impact Haseko's undisclosed residential development; and (b) the proximity of Ho'ohana's solar farm to Parcel 71 and potential impacts to Haseko's eventual development. Opp. at 4-5.

Haseko also asks the Commission to find that Ho'ohana and the other Petition Area landowners are obligated to construct certain infrastructure improvements for the State of Hawai'i Department of Agriculture's ("**DOA**") Kunia Agricultural Park ("**Ag Park**"), notwithstanding that Haseko is already contractually obligated to the DOA to complete those same improvements. Opp. at 5-8. Petition Area landowner HRT and its prospective purchaser, Jupiter, joined the Opposition to request more information related to the transmission line and solar panels, but only seek "clarification as to Ho'ohana's obligations" for infrastructure improvements. *See* Joinder.

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[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.

Haseko has not presented the Commission with any basis to deny or delay approving the Motion. **First**, Haseko's concerns over "a planned 138 kV transmission line" are baseless because Ho'ohana is **not** proposing to construct a **new** 138 kilovolt ("**kV**") transmission line. The 2020 Solar Project will connect to the Hawaiian Electric Company, Inc. ("**HECO**") grid through an **existing** 138 kV transmission system that runs just outside of Parcel 52's northern boundary. These HECO lines exist today and are apparent to anyone performing even the most minimal and cursory due diligence. The 2020 Solar Project's point of interconnection to these existing HECO lines is more than a quarter mile from Parcel 71 and will not materially impact Haseko's future development. Haseko has not presented the Commission with any credible evidence to the contrary.

Second, Haseko's concerns about the location of photovoltaic ("**PV**") panels are also without merit because the setback of the panels from Parcel 71 will not be materially different from what the Commission approved for the 2015 Solar Project. Moreover, the low-rise panels will extend only approximately six feet off the ground and their view will be shielded from Parcel 71 with a perimeter fence and an approximately seven-foot high landscaping screen. As a result, the 2020 Solar Project should not adversely impact any eventual development activity that Haseko may pursue on Parcel 71 (or elsewhere within the Petition Area). Moreover, Haseko purchased Petition Area property with full notice that Ho'ohana had been approved for a utility-scale solar farm on Parcel 52, as that approval is a matter of public record, and its conditions run with the land pursuant to a Declaration of Conditions Imposed by the State Land Use Commission, recorded in 2015 against all Petition Area lands. *See* Pet. Ex. 15.

Haseko's unsubstantiated and generalized concerns about impacts to some future development it may eventually pursue are not for the Commission to resolve in these

proceedings. Notably, Haseko has failed to acknowledge that its three new parcels surround HRT's property at TMK No. 9-4-002: 001 ("**Parcel 1**") (under contract for sale to Jupiter), which is largely zoned I-1 (Limited Industrial) and B-1 (Neighborhood Business) by the City and County of Honolulu ("**City**").[3] *See* Pet. Ex.; Pet. Ex. 3.

Third, Haseko's claim that Ho'ohana carries the same infrastructure obligations as the Petition Area landowners is **not** supported by the Commission's January 28, 2015 *Order Granting Successor Petitioner (To Parcel 52), Ho'ohana Solar 1, LLC's Motion for Order Amending the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996* ("**2015 Order**"). *See* Pet. Ex. 16. The 2015 Order imposed two very distinct sets of conditions: One set of conditions was expressly applicable to the Petition Area "**landowners**," while the other set was applicable only to Ho'ohana (as a future, interim-use, lessee) and applied only in the event that the 2015 Solar Project was developed. *See id.* at 53-55. Ho'ohana is indisputably not a "landowner" as that term is universally understood or used in the 2015 Order. Therefore, the conditions under the 2015 Order applicable to Petition Area "landowners" are not applicable to Ho'ohana. Ho'ohana's obligations were separately broken out and addressed in a separate section of the 2015 Order. *See id.* at 54-55. Haseko cannot be allowed to use Ho'ohana's Motion as a means to avoid its existing contractual obligations with the DOA.

Haseko ignores the long history behind the actual allocation of responsibilities for providing the Ag Park infrastructure improvements. Instead, Haseko seeks to have this Commission interfere with the contractual obligations that Haseko was assigned when it

[3] Under the Honolulu Land Use Ordinance ("**LUO**"), solar farm development is permitted in all zoning districts. Significantly more intensive uses of land are permitted in the I-1 and B-1 zoning districts. *See* Pet. Ex. 29 (LUO Table 21-3 (Master Use Table) showing that I-1 zoned land can be used for, *e.g.*, food manufacturing and processing, light manufacturing; repair establishments are permitted in both I-1 and B-1 zoned land, as are commercial parking lots. More intensive uses are permitted under additional permitting.).

purchased Parcel 71. At least since 2007, the off-site infrastructure improvements for the Ag Park have been the sole contractual obligation of the owner of Parcel 71, which today is Haseko. Haseko's Opposition does not mention that in May 2018 its predecessor-in-interest to Parcel 71, RP2 Ventures, LLC ("**RP2**"), represented to the Commission in no uncertain terms that it -- and it alone -- would be responsible for completing all of the infrastructure improvements for the Ag Park. RP2 subsequently memorialized those representations through an infrastructure agreement with the DOA, which Haseko freely admits it assumed when it purchased Parcel 71. Opp. at 6, n.13. Landowner Haseko has no authority to shift its own contractual infrastructure obligations onto Ho'ohana.

Fourth, the Commission's 2015 Order expressly limited Ho'ohana's obligation to providing a non-potable waterline to the Ag Park ("to specifications mutually acceptable to Ho'ohana and the Department of Agriculture."), which obligation was triggered "only upon development of the solar farm on Parcel 52," and which was to be designed and built "concurrent with construction of the solar farm." *See* Pet. Ex. 16 at 54. The Commission quite deliberately did not make Ho'ohana subject to the much broader infrastructure requirements that it imposed on the **landowners** under Condition A.1, which required that all "off-site infrastructure to the State of Hawaii's Kunia Agricultural Park be completed no later than December 31, 2016." *See id.* at 53. Not only was Ho'ohana never a landowner within the Petition Area, at the time of the 2015 Order, Ho'ohana was not even a lessee. *See id* at 70, ¶70 ("RKL and Ho'ohana are in the process of finalizing a land lease and solar easement for the solar farm development.").

As discussed in the Motion, Ho'ohana could not develop the 2015 Solar Project because the Hawaii Public Utilities Commission ("**PUC**") rejected the power purchase agreement ("**PPA**") between HECO and Ho'ohana. Thus, Ho'ohana's non-potable water line obligations

were never triggered. As such, the question now before the Commission is what, if anything, related to the Ag Park should reasonably be required of Ho'ohana now that it seeks Commission approval for the 2020 Solar Project. Respectfully, the Commission should not give into Haseko's desire to retrade the deal it cut with RP2 and the DOA -- the very deal that was presented to the Commission in May 2018.

HRT's and Jupiter's Joinder to the Opposition also lacks substance and is simply misguided. They join with Haseko, essentially looking to crush the 2020 Solar Project with infrastructure obligations far in excess of what the Commission imposed in 2015, while at the same time, HRT asserts that it has no obligations under the Commission's orders. *See* Pet. Ex. 17 (HRT's August 10, 2020 letter to the Commission asserting that HRT "is **not** the successor to Petitioner, and to be clear, has not assumed Petitioner's obligations under the LUC Orders."). If HRT truly believes it has no infrastructure obligations, it is unclear why it or Jupiter are concerned about Ho'ohana's infrastructure obligations.

Ho'ohana remains committed to supporting the DOA and the Ag Park at a level commensurate with its obligations under the 2015 Order. This includes providing a non-potable waterline at "specifications mutually agreeable to Ho'ohana and the [DOA]." However, Ho'ohana cannot and will not agree to fulfill the larger and more extensive obligations that RP2 (and its predecessors) owed to the DOA and that Haseko assumed with its purchase of Parcel 71. Haseko's attempt to dodge its obligations to the DOA and shift them to Ho'ohana, and HRT's and Jupiter's support of this trick, hardly seems an auspicious start to working with their neighbors or this Commission.

II. **BACKGROUND**

A. HO'OHANA'S OUTREACH EFFORTS TO PETITION AREA LANDOWNERS AND PROSPECTIVE PURCHASERS.

In January 2020, Ho'ohana reached out to RP2 to discuss matters of importance for both Parcel 52 and Parcel 71, and to establish a working relationship. At that time, Ho'ohana learned from RP2 that it was under contract to sell Parcel 71 to Haseko. Following those discussions, Ho'ohana tried to engage with Haseko as its future neighbor, but was ignored.

In an effort to provide full disclosure and transparency about its plans, resolve any concerns, and avoid the situation now before the Commission, Ho'ohana kept all landowners and prospective purchasers, as well as the DOA, apprised of its plans to file a motion related to the 2020 Solar Project. More recently, on August 4, 2020, Ho'ohana provided a draft of the Motion and exhibits to all landowners and known prospective landowners. *See* Pet. Ex. 18 (copies of emails transmitting the draft Motion to representatives of Haseko (Sharene Tam), RP2 (David Tanoue), HRT (Giorgio Caldarone), Jupiter (Norman Tatch and Ed St. Gene), RKES (Patrick Kobayashi, Bert Kobayashi and Kathy Inouye), attorney for its lessor, Robinson Kunia Land LLC ("**Robinson**") (Stephen Mau)). Ho'ohana received no substantive feedback, objections, questions, comments, or requests for additional information from any of the landowners or prospective purchasers. Similarly, all were notified and, where appropriate, served copies of the Motion upon filing.

Ho'ohana has since made multiple requests to meet with Haseko to discuss the Motion, the 2020 Solar Project, and Haseko's purchase of Parcel 71. Ho'ohana did not receive any responses until September 21, 2020, when RP2 contacted Ho'ohana to request a meeting on Haseko's behalf, which yielded nothing towards resolving the issues before the Commission.

B. THE COMMISSION'S 2015 ORDER.

The 2015 Solar Project was approved under the 2015 Order (*see* Pet. Ex. 16), which included 11 conditions of approval that were recorded as encumbrances against the entire Petition Area. *See* Pet. Ex. 15. Four of those conditions applied only to landowners, and the remaining seven conditions applied to Ho'ohana. *See id.*; Pet. Ex. 16 at 53-54. The 2015 recorded Declaration of Conditions clearly identifies the following as "Landowners of the Petition Area": "Robinson Kunia Land LLC . . . ; Canpartners IV Royal Kunia Property LLC . . . ; HRT Realty, LLC . . . ; 300 Corporation . . . ; Honolulu Limited . . . ; RKES, LLC[.]" *See* Pet. Ex. 15 at 2. Ho'ohana is identified separately as "Successor Petitioner" and "Ho'ohana." *Id.* at 1.

Conditions A.1 through A.3 of the 2015 Order require the **landowners** to perform the following:

> 1. Royal Kunia Agricultural Park Offsite Infrastructure. Within six (6) months of the date of the Commission's Order, the **landowner(s) within the Petition Area** shall finalize an amendment to the Memorandum of Understanding (dated 1993 and subsequent amendments in 2007, 2009 and 2012) with the Department of Agriculture, and comply with this amended Memorandum of Understanding. This Memorandum shall require that off-site infrastructure to the State of Hawai'i's Kunia Agricultural Park be completed no later than December 31, 2016.
>
> 2. Revised Master Plan. Within twelve (12) months of the date of the Commission's Order, **the landowners within the Petition Area** shall submit revised master plan(s) and schedule(s) for the development of their respective Increments 1, 2, and 3, comprising the Royal Kunia Phase II project.
>
> 3. Status Report. By March 31, 2015, **all landowners within the Petition Area** shall submit to the Commission a status report on the development of their respective parcels of land.

See Pet. Ex. 16 at 53 (emphases added). Conditions A.1 through A.3 replaced the Commission's prior Condition No. 19. Condition A.4, requiring notice to the Commission in the event of any sale of Petition Area property, replaced the Commission's prior Condition No. 21, which had required Commission approval prior to any sale.

The remaining conditions, Conditions B.1 through B.7, were imposed only on the 2015 Solar Project and Ho'ohana as the future ground lessee of Parcel 52, and were conditionally applicable "only upon development of the solar farm use on Parcel 52." *Id.* at 53-54. Relevant here, Condition B.1 provides as follows:

> 1. Royal Kunia Agricultural Park Non-Potable Water Connection. By December 31, 2016, Ho'ohana shall, at no cost to the State and concurrent with construction of the solar farm, design and provide an offsite, non-potable waterline from Reservoir 225 to the boundary of the Royal Kunia Agricultural Park (the "**non-potable waterline**"), to specifications mutually acceptable to Ho'ohana and the Department of Agriculture. Prior to providing the non-potable waterline, Ho'ohana shall at its sole cost and expense, cause Robinson Kunia Land LLC to grant any required non-exclusive, perpetual utility easement(s) to the State of Hawai'i for the alignment of the non-potable waterline. Ho'ohana shall provide contracted Maintenance on the installed non-potable waterline and maintain the non-potable waterline in an operable condition for the duration of the operation of the solar farm at no cost to the State. The Department of Agriculture shall be solely responsible for obtaining the non-potable water allocation to service the Royal Kunia Agricultural Park. If Ho'ohana is required to perform an environmental impact statement pursuant to Chapter 343, Hawai'i Revised Statutes, then the time period set forth in this condition shall be extended by the number of days that Ho'ohana is delayed as a result.

Id. at 54.

C. THE AG PARK INFRASTRUCTURE IMPROVEMENTS ARE A LONGSTANDING CONTRACTUAL OBLIGATION OF THE LANDOWNER OF HASEKO'S PARCEL 71.

Ag Park infrastructure has always been a condition of the development of the Petition Area as the Royal Kunia Phase II subdivision. In fact, that obligation was established even before the Commission reclassified the Petition Area from the SLU Agricultural District to the SLU Urban District in December 1993.[4] Based on that agreement, as documented in a Memorandum of Understanding, dated March 30, 1993 ("**DOA MOU**"), by and between the DOA and the original petitioner, Halekua Development Corporation ("**Halekua**"), the DOA

[4] Pursuant to that certain *Findings of Fact, Conclusions of Law, and Decision and Order*, dated December 9, 1993 ("**Original D&O**").

agreed to "assist and support" Halekua in its efforts to obtain the necessary land use entitlements for the Petition Area. *See* Pet. Ex. 19a at 5.

Condition 22 (later renumbered to 19) of the Original D&O required Halekua to "convey the agricultural park to the State of Hawaii, and provide off-site infrastructure to the agricultural park, pursuant to the terms of the [DOA MOU]." The DOA MOU required Halekua to incorporate the Ag Park into its plan for Royal Kunia Phase II (*i.e.*, the Petition Area), convey fee title of the Ag Park to the State, and design and construct off-site infrastructure improvements for the Ag Park. *See* Pet. Ex. 19a at 3-4. The required off-site infrastructure improvements included "roadway, potable and irrigation water lines (exclusive of water commitment), and sewer lines and utility connections, up to the property boundary of the agricultural park at no cost to the DOA." *Id.*

The required land conveyance took place by Warranty Deed With Reservation, recorded February 23, 2004, whereby Halekua conveyed 150 acres of land to the State of Hawai'i Department of Land and Natural Resources for the development of the Ag Park.[5]

Halekua and the DOA later amended and restated the DOA MOU by way of that certain Amendment and Restatement of Memorandum of Understanding, dated March 2, 2007, to extend the deadlines for the DOA infrastructure. *See* Pet. Ex. 19b. A few days later, by way of Limited Warranty Deed recorded March 12, 2007, Halekua conveyed Parcel 71 to Halekua-Kunia, LLC ("**Halekua-Kunia**"). Parcel 71 is the only parcel within the Petition Area ever owned by Halekua-Kunia.

Halekua-Kunia and the DOA subsequently amended the DOA MOU by way of that

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[5] Recorded in the State of Hawai'i Bureau of Conveyances as Regular System Document No. 2004-040601. The "reservation" that encumbers the Warranty Deed is in favor of the "Robinson Owners," as described therein; in the event that the State stops using the property as an agricultural park, the property ownership shall revert back to the "Robinson Owners."

certain First Amendment to Amendment and Restatement of Memorandum of Understanding, dated February 19, 2009, to further extend the deadlines. *See* Pet. Ex. 19c. Halekua-Kunia was the only Petition Area landowner who was a party to the agreement with DOA.

On June 10, 2009, Canpartners IV Royal Kunia Property LLC ("**Canpartners**") became the fee owner of Parcel 71. Parcel 71 is the only parcel within the Petition Area that Canpartners acquired. Canpartners and the DOA further amended the DOA MOU by way of that certain Second Amendment to Amendment and Restatement of Memorandum of Understanding, dated September 20, 2012. *See* Pet. Ex. 19d. Canpartners and the DOA again amended the DOA MOU by way of that certain Third Amendment to Amendment and Restatement of Memorandum of Understanding, dated July 28, 2015. *See* Pet. Ex. 19e. These amendments further extended the deadlines for the Ag Park infrastructure. Canpartners was the only Petition Area landowner who was a party to the agreement with DOA.

RP2 acquired Parcel 71 from Canpartners in October 2017. At the request of the DOA and State of Hawai'i Office of Planning ("**OP**"), the Commission held a status hearing on May 24, 2018. A copy of the transcript from the status hearing is filed as Pet. Ex. 20. The DOA and OP requested the status hearing in hopes that the Commission would compel RP2 to complete the infrastructure improvements required under the DOA MOU. *See id.* at 90:18-91:11.

David Tanoue appeared on behalf of RP2 and explained that RP2 had purchased Parcel 71 at the request of a client of its affiliate, R.M. Towill Corporation ("**RMTC**"), which client would later purchase Parcel 71 from RP2. *See id.* at 79:12-14, 80:20-25, 82:24-25. Mr. Tanoue presented the arrangement as a beneficial business deal for RP2 and RMTC (which would get contractually-guaranteed engineering, planning and consulting work in the future for the

development of the Petition Area), and one that would finally result in satisfaction of the obligations to the DOA. *See id.* 117:17-23, 119:3-120:7, 129:20-130:5.

Mr. Tanoue estimated that RP2's design plans for the non-potable waterline, which had been prepared by RMTC, would be approved by the end of 2018. *Id.* at 114:13-20, 116:15-117:2. Mr. Tanoue also represented that RP2 was hopeful that construction of the non-potable waterline would at least break ground by 2019. *Id.*

At one point, then-Commission Chair Arnold Wong sought clarification as to whether any parties other than RP2 were involved in getting the infrastructure designed and built for the DOA. *Id.* at 123:4-20. Mr. Tanoue responded that RP2 was "working with Robinson Trust because [RP2 needs] an easement going through their property," but did not identify any other party involved in the design or construction of the infrastructure. *Id.*

Chair Wong asked OP whether it was requesting an amendment to Condition A.1 to reflect an updated agreement between the DOA and RP2, and whether the other Petition Area landowners would need to be involved in that process. *See id.* at 123:21-124:3. OP's Deputy Attorney General responded: "**No**, I don't think so actually. **I think is** [sic] **strictly between RP2 and -- because the condition 19 is based on the MOU with -- and the parties to the MOU are RP2 or the successor to Halekua and Canpartners and DOA**." *Id.* at 124:4-8 (emphases added).

Near the end of the status hearing, Commissioner Dawn Chang and Mr. Tanoue had the following exchange:

> Commissioner Chang: **Is there any circumstances upon which RP2 would walk away from this if there is any -- any additional -- I don't want to call them burdens because they are already Conditions**. But is there anything upon which RP2 -- 'cause I think OP had a hesitancy about doing an order to show cause 'cause there's -- you guys are all kind of working together. **So is there any**

circumstances upon which RP2 would step out and say we're not going to do this?

. . .

There is a lot of things that won't happen. **But is there anything, David, that RP2 would walk away from this?**

Mr. Tanoue: **Not that I can see.**

. . .

'Cause we put in -- you know, **we put in our money. It's our money upfront. It wasn't the potential developer's money. It was our money. So we -- we took the responsibility.**

Id. at 128:23-129:14 (emphasis added).

The Commission concluded the status hearing by directing RP2 and the DOA to reach an agreement for new deadlines for the design and construction of the infrastructure for the Ag Park, including the non-potable waterline. *Id.* at 131:10-14.

Based on that directive and RP2's representations to the Commission, nearly two years later RP2 and the DOA amended the DOA MOU by executing a Fourth Amendment to Amendment and Restatement of Memorandum of Understanding, dated March 16, 2020. *See* Pet. Ex. 19f. In its letter transmitting an executed copy of the DOA MOU to RP2, Haseko, OP and the Commission,[6] the DOA confirmed that the DOA MOU was intended to satisfy Condition A.1 of the 2015 Order. *See id.* at 1. The DOA's letter further notes its understanding that RP2 was in the process of selling Parcel 71 to Haseko and that Haseko was expected to comply with the terms of the DOA MOU. *See id.* Like all of the amendments since 2007, the current DOA MOU is a two-party agreement between DOA and the owner of Parcel 71. No other Petition Area landowners are parties to that agreement.

The DOA MOU now provides that:

RP2 shall design and construct **off-site infrastructure improvements** for the State Agricultural Park **including roadway, potable and irrigation lines**

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[6] The DOA's letter was addressed to RP2 and Haseko, with the Commission and OP copied.

> **(exclusive of water commitment), and sewer lines and utility connections**, up to the property boundary of the State Agricultural Park at no cost to the DOA.

Id. at 3 (emphasis added). The DOA MOU states that RP2 prepared preliminary design plans for the infrastructure, and that upon the DOA's approval of the plans,

> RP2 shall, at its sole cost and expense, (i) **obtain all necessary governmental permits and approvals** for construction of such off-site infrastructure, (ii) arrange for and **complete the construction and installation of the irrigation infrastructure no later than February 28, 2021**, and (iii) arrange for and complete the **construction and installation of the remainder of the off-site infrastructure to service the State Agricultural Park no later than** ~~June 30, 2020~~, **June 30, 2021**, unless approved by DOA.

Id. (emphases added; strikethrough in original).

Haseko has admitted that it was assigned RP2's obligations under the DOA MOU when it purchased Parcel 71. Opp. at 6 n.13 ("[P]ursuant to Assignment and Assumption of Amendment and Restatement of Memorandum of Understanding, the DOA MOU was assigned to Haseko."). Haseko also admits that the non-potable waterline required for the Ag Park under the 2015 Order is one of the infrastructure improvements covered by the DOA MOU. *Id.* at 8.

III. DISCUSSION

A. HO'OHANA'S OBLIGATIONS UNDER THE 2015 ORDER.

1. Ho'ohana Has No Obligations Under Condition A.1 Because Ho'ohana is Not a "Landowner."

Condition A.1 of the 2015 Order expressly applies to "landowner(s) within the Petition Area" and does not apply to Ho'ohana, which was a party to the proceedings that resulted in the 2015 Order. Nevertheless, Haseko asks the Commission to "confirm that [Condition A.1] . . . applies to all landowners within the Petition Area (**inclusive of Hoohana** . . .)." Opp. at 6 (emphasis added; underline in original).[7] Haseko insists that "[t]he fact that RP 2 [sic] entered

[7] HRT and Jupiter request "clarification as to Ho'ohana's obligations under the 2015 Order," but not as to the obligations of any of the landowners. *See* Joinder.

into [the DOA MOU] does not relieve the remaining landowners (**or lessee**) from this condition until such time that such condition is completely fulfilled and the condition is released by the Commission." *Id.* (emphasis added). Haseko's argument that Ho'ohana is obligated to provide infrastructure improvements under Condition A.1 is completely unsupported by the text of the 2015 Order, the long history behind the DOA MOU, and the representations of the parties at the Commission's 2018 status hearing.

First, the 2015 Order clearly establishes two distinct sets of conditions. The first set, Conditions A.1 through A.4, was imposed on the entire Petition Area and its "landowners," and was expressly intended to replace Conditions 19 and 21. *See* Pet. Ex. 16 at 53 (2015 Order). Those two conditions existed long before Ho'ohana ever became an interim-use lessee of Parcel 52.

The second set, Conditions B.1 through B.7, were imposed only on Parcel 52 and expressly upon Ho'ohana, and applied only if the 2015 Solar Project was developed. *See id.* at 54 - 55. The Commission's intent to distinguish between the conditions imposed on the Petition Area "landowners" and the conditions imposed on Ho'ohana could not be more clear. The fact that both sets of conditions contemplate infrastructure improvements for the Ag Park does not provide a basis for Haseko to conflate those otherwise clearly delineated obligations. At the point that the Commission approved the 2015 Solar Project, it was uncertain whether the project would in fact get built because Ho'ohana and HECO had not yet executed a PPA. *See* Pet. Ex. 16 at 24, ¶104 ("The total operating period will ultimately be determined by the [PPA] that Ho'ohana executes with [HECO]."). However, with or without the Ho'ohana solar project, the long-standing obligations owed to the DOA remained unsatisfied, and therefore the Commission refreshed the obligations it had originally imposed at the point that the Petition Area was

reclassified.

Second, the express plain language of Condition A.1 is clear: It applies only to the Petition Area "**landowner(s)**." The 2015 Order does not define "landowner(s)," but Black's Law Dictionary defines a "landowner" as "[s]omeone who **owns** land." LANDOWNER, Black's Law Dictionary (11th ed. 2019) (emphasis added). The Hawai'i Supreme Court has rejected past attempts to interpret the terms used in the Commission's conditions as "carry[ing] a 'special interpretation' other than [their] common sense meaning." *Lana'ians for Sensible Growth v. Land Use Comm'n*, 146 Hawai'i 496, 503, 463 P.3d 1153, 1160 (2020). It is indisputable that Ho'ohana does not "own" any land in the Petition Area. Ho'ohana holds only a lease for Parcel 52 from fee owner Robinson. *See* Pet. Ex. 2 (Fee Owner's Authorization). Ho'ohana is clearly not a "landowner." Moreover, at the point that the 2015 Order was issued, Ho'ohana was not even a lessee. *See* 2015 Pet. Ex. 16 at 18, ¶70 (explaining that there was only an executed option agreement and that "[Robinson] and Ho'ohana are in the process of finalizing a land lease and solar easement for the solar farm development."). If the Commission wanted Condition A.1 to also apply to Ho'ohana, it could have easily done so. But that is not what the 2015 Order says.

Condition A.2 confirms that the Commission did not consider Ho'ohana a "landowner" under the 2015 Order. Condition A.2 provides that "[w]ithin twelve (12) months of the date of the Commission's Order, the **landowners** within the Petition Area shall submit **revised master plan(s) and schedule(s)** for the development of **their** respective **Increments 1, 2 and 3, comprising the Royal Kunia Phase II project**." *Id.* (emphases added). "Landowners" clearly refers only to those parties owning land within the Petition Area who are required to provide revised master plans for and develop Increments 1, 2 and 3 of Royal Kunia Phase II. Ho'ohana

was never going to develop an increment of Royal Kunia Phase II; the 2015 Solar Project was only an interim use of Parcel 52. Clearly, "landowner" cannot mean one thing for Condition A.1 and another for Condition A.2.

Third, Haseko ignores the history of the amendments to the DOA MOU and the representations Mr. Tanoue made to the Commission on behalf of RP2. Since 2007, the owner of Parcel 71 has been the sole landowner contractually obligated under the DOA MOU to design and construct infrastructure in satisfaction of Condition 19 and later Condition A.1. *See* Section II.C, *supra*. During the May 24, 2018 status hearing, Mr. Tanoue made clear that RP2 was aware of the conditions imposed by the Commission and that many of those conditions were delinquent. *See* Pet. Ex. 20 at 88:1-8. Mr. Tanoue represented that RP2 "put in [its] money . . . up front" and "took the responsibility" for the infrastructure improvements as part of its larger role in facilitating the development of the Petition Area. *Id.* at 128:23-129:14. Mr. Tanoue assured the Commission that he could not see any situation in which "RP2 would step out and say we're not going to do this[.]" *Id.* When asked whether any other Petition Area landowner was involved in designing and constructing the infrastructure, Mr. Tanoue responded only by noting that RP2 would need to obtain an easement from Robinson. *Id.* at 123:4-20.

All requirements for satisfying Condition A.1 are set forth in the DOA MOU, which Haseko freely admits it assumed with its purchase of Parcel 71. If Haseko now has buyer's remorse over the obligations it purchased along with Parcel 71, the Commission is not the appropriate forum for Haseko to attempt to retrade the deal that it bought into, particularly at the expense of a sorely needed and nearly shovel-ready renewable energy project.

2. Ho'ohana's Position on the Non-Potable Waterline.

To be clear, Ho'ohana is committed to supporting the DOA and the Ag Park at a level commensurate with what was required under Condition B.1, including constructing and

maintaining a waterline at specifications that are mutually acceptable to Ho'ohana and the DOA, or providing funding commensurate with the costs of satisfying Condition B.1. That is what is fair and equitable under the circumstances. RP2's commitments to the Commission and the DOA, as assigned to Haseko, are no basis for Haseko to urge the Commission to foist entirely new and far more extensive obligations on a renewable energy project.

Haseko argues that "[b]ecause Condition B.1 was intended to be a separate obligation of Ho'ohana, RP 2's [sic] contractual agreement to provide off-site infrastructure improvements for the State Agricultural Park should not be construed to mean that Ho'ohana is released from its obligation under Condition B.1." Opp. at 8 (emphases in original). Haseko's argument fails to acknowledge or address a central point of the 2015 Order. The 2015 Order specified that Conditions B.1 through B.7 were applicable "only upon development of the solar farm use on Parcel 52." Pet. Ex. 16 at 54. The 2015 Solar Project could not be developed; thus, those conditions were not triggered.

In the interim, RP2, as the owner of Parcel 71, made very firm commitments to the Commission and the DOA that it would provide **all** of the off-site infrastructure for the Ag Park, including the waterline, and subsequently reaffirmed those obligations through executing the current DOA MOU. *See* Pet. Ex. 19f ("RP2 shall design and construct off-site infrastructure improvements for the State Agricultural Park including roadway, potable and irrigation lines (exclusive of water commitment), and sewer lines and utility connections, up to the property boundary of the State Agricultural Park at no cost to the DOA."). The DOA MOU has been assigned to Haseko, as the new owner of Parcel 71.

Notwithstanding that all Ag Park obligations fall to Haseko under the DOA MOU (for which Haseko received the DOA's promise to support any land use approvals it may need in

return (*see* Pet. Ex. 19f at 4)), Ho'ohana remains committed to supporting the DOA and the Ag Park at a level commensurate with its obligations under the 2015 Order. What Ho'ohana cannot do is fulfill the larger commitments to the DOA that were made by RP2 under the DOA MOU and assumed by current landowner Haseko in its purchase of Parcel 71.

Following issuance of the 2015 Order, Ho'ohana commissioned an engineering study to determine how to best satisfy Condition B.1, and engaged in further discussions with the DOA on this matter. Thereafter, Ho'ohana identified two options for the DOA's selection. It could (a) retrofit an existing 24" waterline that crosses land owned by Robinson; or (b) install a new 12" line along Kunia Road. *See* Pet. Ex. 21a (graphic from engineering study illustrating two options). Ho'ohana determined that it would cost approximately $16,000 to retrofit the existing 24" line, and approximately $300,000 to install the new 12" line. *See* Pet. Ex. 21b (email estimating new 12" waterline to cost between $275,000 and $300,000); Pet Ex. 43 at 9 (Written Direct Testimony of Laurence Robert Greene).

The DOA selected the more expensive 12" waterline option. In a July 19, 2015 email from Ho'ohana's consultant, Nonie Toledo, to the then-Chair of the Board of Agriculture, Scott Enright, Ms. Toledo reported that Ho'ohana had presented the DOA with the two options identified by the engineering study, both of which had various advantages and disadvantages that were explained to the DOA. *See* Pet. Ex. 22. According to Ms. Toledo's email, the DOA's staff preferred the new 12" waterline, but Ho'ohana was awaiting final confirmation from Chair Enright that it was the DOA's preferred option.

Ho'ohana understands that RP2, Haseko, and the DOA have since been working together on a much more expensive non-potable waterline for the Ag Park, as depicted on certain construction drawings that have been filed with the Honolulu Department of Planning and

Permitting ("**DPP**"). *See* Pet. Ex. 23 . Ironically, while both Haseko and others seek to push this obligation onto Ho'ohana, Haseko never provided Ho'ohana with a copy of the plans, much less informed Ho'ohana that the plans had been submitted to DPP for approval.

However, because RP2, Haseko and the DOA failed to inform Ho'ohana of their submitted plans, Ho'ohana only very recently learned of their existence and obtained a copy from a third party. As a result, as of the time of this filing, Ho'ohana has still not received an estimate back from its contractor who was immediately provided the plans. Based upon Ho'ohana's preliminary review of the plans, Ho'ohana believes the waterline will cost at least cost $1,000,000 or more to construct.[8] *See* Pet. Ex. 44 at 9 (Written Direct Testimony of Jon Wallenstrom). According to Robinson, the engineering estimate is $2,200,000. *See id.*

Arbitrarily imposing a condition on Ho'ohana with three-to-seven times the financial burden for a substantially similar project is a clear violation of the constitutional mandate that land use entitlement conditions have a "rough proportionality" to the development being proposed, meaning that they must be "related both in **nature** and **extent** to the **impact of the proposed development**." *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S.Ct. 2309, 2319-20 (1994) (emphasis added). Imposing Haseko's promised waterline on Ho'ohana lacks rough proportionality on its face. There is simply no basis to impose an obligation on Ho'ohana so far in excess of what was required under the 2015 Order.

B. 138 KV TRANSMISSION LINE.

Haseko's purported concern about the "location of a planned 138 kV line" is not based on any credible evidence and erroneously assumes that Ho'ohana is proposing to install a **new** 138 kV transmission line. Opp. at 4. Haseko is wrong. Ho'ohana is not constructing a new 138 kV

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[8] A waterline of the nature designed by RP2 cost between $300 and $500 per linear foot. This large range is largely a function of the regulatory requirements. *See* Pet. Ex. 44 at 9.

line. Ho'ohana's Motion states only that "the 2020 Solar Project will connect to the HECO grid through a 138 kV transmission system." Mot. at 7. The "138 kV transmission system" referenced in the Motion is HECO's already **existing** transmission system that runs across Oahu, including just outside the northern boundary of Parcel 52. *See* Pet. Ex. 24 (showing the location of HECO's **existing** 138 kV transmission system in parallel yellow lines relative to Haseko's Parcel 71). That transmission system has been in place for decades and is an integral part of HECO's grid. At its closest point, Haseko's Parcel 71 is approximately 1,520 feet from HECO's 138 kV line. *See id.* That fact remains with or without the 2020 Solar Project.

HECO's 138 kV transmission system is an existing condition that is visible from Haseko's Parcel 71 regardless of whether the Commission approves the 2020 Solar Project. *See* Pet. Ex. 25 (photograph taken from boundary of Parcels 52 and 71 showing HECO's existing 138 kV and 46 kV transmission lines in distance). To the extent Haseko has concerns over its residential development being located in proximity to HECO's transmission system, Haseko should have investigated that as part of its due diligence prior to purchasing Parcel 71. Similarly, if Jupiter has any concerns about HECO's transmission system, it should evaluate that existing condition prior to closing its purchase with HRT. In any event, HECO's existing transmission system is not a matter for Commission deliberation, and provides no basis for the Commission to delay or deny Ho'ohana's Motion.

The 2020 Solar Project will merely connect to HECO's 138 kV transmission system through interconnection lines from the Ho'ohana substation at the northern boundary of Parcel 52. *See* Pet. Ex. 24 (showing interconnection in green). Ho'ohana's proposed interconnection is more than a quarter mile (1,600 feet) from the northern-most boundary of Parcel 71. *See id.*

Moreover, HECO's existing 46 kV transmission lines are closer to the boundary of Parcel

71 than Ho'ohana's proposed point of interconnection. *See* Pet. Ex. 26 (showing existing 46 kV line in pink and Ho'ohana's point of interconnection in green). These details could have easily been confirmed for Haseko if it had simply requested them directly from Ho'ohana upon receiving the draft of the Motion. *See* Pet. Ex. 18.

Since Ho'ohana is not constructing a new 138 kV line, Haseko's vague concerns that such a line may "have potential adverse impacts including, but not limited to, potential health and safety concerns, visual and sound impacts, and the potential to decrease the value and marketability of Haseko's planned residential development," are baseless. Opp. at 4. This includes Haseko's completely unsupported claim that "[s]tudies have found that living closer to high voltage power lines result in an increase in the risk of leukemia and other cancers." Opp. at 4 n.11. Haseko's future development on Parcel 71 will not be impacted in any measurable way by Ho'ohana's proposed interconnection to HECO's existing 138 kV transmission system.

Moreover, Haseko should not be surprised that the 2020 Solar Project will connect to HECO's grid. The 2015 Solar Project was approved to connect to HECO's grid through the existing 46 kV transmission line that currently crosses Parcel 52. *See* Pet. Ex. 27 (showing existing 46 kV line and location of the 2015 substation). This is in contrast to the 2020 Solar Project, which proposes to relocate HECO's existing 46 kV line further away from Parcel 71. *See* Pet. Ex. 26 (showing proposed relocation of 46 kV line in blue and current 46 kV line in pink). Thus, what Haseko vaguely complains about in its Opposition has no basis in fact.

Any concerns that HRT or Jupiter may have are even more attenuated and remote than Haseko's. Parcel 1 is located significantly further from the location of Ho'ohana's proposed interconnection than Parcel 71. *See* Pet. Ex. 24. Therefore, Jupiter's future development on its industrial-zoned Parcel 1 would not be impacted in any measurable way by Ho'ohana's proposed

interconnection to the HECO grid.

C. LOCATION OF THE SOLAR PANELS.

Haseko's unspecified concerns about the location of the solar panels are similarly misguided. The Opposition claims that the Site Plan attached as Pet. Ex. 5 to the Motion "does not provide sufficient detail on the physical placement of the solar panels near the Parcel 71 boundary." *Id.*[9] The Opposition does not explain what details cannot be gleaned from the Site Plan, which clearly shows the location of the PV racks relative to Parcel 71. *See* Pet. Ex. 5. The Opposition also does not articulate any specific concern about the proximity of the solar panels to Haseko's development, perhaps because Haseko has not disclosed its own development plans. If Haseko simply wants more information about the location of the solar panels, although that information appears abundantly evident from the materials Ho'ohana filed, Haseko could have (and should have) requested that information directly from Ho'ohana after receiving the draft of the Motion and exhibits on August 4, 2020. *See* Pet. Ex. 18.

The design and location of the PV panels for Ho'ohana's 2020 Solar Project, as compared to the previously approved 2015 Solar Project, show little material difference with respect to proximity to Parcel 71. *See* Pet. Ex. 28 (graphic depicting the 2015 Solar Project in orange and outlining the 2020 Solar Project in blue; relative distances from Parcel 71 boundary line provided). This graphic makes clear that solar panels were always going to be located near the boundary of Parcel 71, and in that respect, any differences between Ho'ohana's two solar projects are negligible. The 2020 Solar Project is also consistent with the setback requirements under the LUO. Moreover, the approved 2015 Solar Project is a matter of public record, and the conditions imposed under the 2015 Order are recorded against the entire Petition Area, including

[9] The Joinder similarly "request[s] more information from Ho'ohana . . . about the location of . . . solar panels." Joinder at 10.

Parcel 71. *See* Pet. Ex. 15. Thus, Haseko was on notice that it was purchasing land immediately adjacent to an approved utility-scale solar farm.

Haseko questions whether the "PV panels will result in creating more heat to the surrounding area or other impacts from the associated power stations located within the solar array" (Opp. at 5), but cites no scientific data or studies demonstrating that its concern is legitimate or even remotely justified. Nor does Haseko identify any specific "impacts from the associated power stations" that might be of concern, making a response impossible. *See id.* Moreover, Haseko ignores the fact that neighboring Parcel 1 is zoned for industrial uses by the City, which authorizes uses with far greater potential impacts than a solar farm. *See* Pet. Ex. 3 (City zoning map); Pet. Ex. 29 (LUO Master Use Table).

Ho'ohana's Motion explains that the 2020 Solar Project will be fenced and that vegetation will be maintained around the solar array. *See* Mot at 6, 8. A landscaping concept plan prepared by Walters Kimura Motoda, Inc. shows that landscape screening will be planted along the perimeter of Parcel 52's common boundary with Haseko's Parcel 71, as well as the neighboring golf course. *See* Pet. Ex. 30 (landscape concept plan). That landscape screen will be maintained approximately seven feet high along the boundary with Haseko's Parcel 71.

Moreover, renderings of the 2020 Solar Project show that the solar array will not be readily visible from Parcel 71. *See* Pet. Ex. 31. The proposed fencing and landscaping should mitigate virtually any potential view or contact impacts from the 2020 Solar Project.

Furthermore, DPP has already considered the potential impacts of the 2020 Solar Project. By letter dated August 14, 2020, DPP granted modifications to the previously-approved Conditional Use Permit 2014/CUP-76 (the "**CUP**") to allow for development of the 2020 Solar Project. *See* Pet. Ex. 32. In granting the CUP, the Director of DPP found, *inter alia*, that: (a)

Parcel 52 was suitable for the project considering its size, shape, location, topography, infrastructure and natural features; (b) 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 (c) the project would provide a service or facility that contributes to the general welfare of the community. *See* Rev. Ord. Hon. § 21-2.90-2(a). To determine whether the 2015 Solar Project satisfied those requirements, the Director considered, *inter alia*, 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: (a) were reasonable and consistent with the intent of the CUP; (b) would not significantly increase the intensity or scope of the use; and (c) would not create adverse land use impacts on the surrounding neighborhood. *See id.* at § 21-2.20(k)(1).

Haseko, and RP2 before it, were aware of the approved 2015 Solar Project. It strains credulity to think that neither buyer nor seller of Petition Area land, especially locally-based companies, were not aware of Ho'ohana's plans for an upgraded solar farm. In fact, in late 2018 and early 2019, Ho'ohana approached both RP2 and HRT about the possibility of purchasing or leasing portions of their neighboring parcels for Ho'ohana's solar project, signaling to both that Ho'ohana was actively proceeding with a solar project. Shortly thereafter, the PUC's approval of Ho'ohana's new PPA for the 2020 Solar Farm was reported in the local press, further putting all relevant parties on notice. *See, e.g.*, Pet. Ex. 33 (3/27/19 Star Advertiser article).

Haseko did not close its purchase of Parcel 71 until August 12, 2020. At that time, Haseko was on notice that Parcel 71 was adjacent to a planned solar farm, and had already been provided a draft of Ho'ohana's Motion for the 2020 Solar Project. Haseko cannot now be heard

to complain of that fact.

IV. **CONCLUSION**

Ho'ohana respectfully requests that its Motion be granted as set forth therein.

DATED: Honolulu, Hawaii, September 25, 2020.

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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

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 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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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