

BENJAMIN M. MATSUBARA, #993-0
CURTIS T. TABATA, #5607-0
Matsubara, Kotake & Tabata
888 Mililani Street, Suite 308
Honolulu, Hawai'i 96813



Attorneys for
HASEKO ROYAL KUNIA, LLC

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	DOCKET NO. A92-683
)	
HALEKUA DEVELOPMENT	)	HASEKO ROYAL KUNIA, LLC'S
CORPORATION, a Hawai'i corporation)	)	MOTION FOR ORDER AMENDING
	)	THE MEMORANDUM OF
To Amend the Agricultural Land Use	)	UNDERSTANDING'S OFFSITE
District Boundary into the Urban	)	INFRASTRUCTURE DATE IN
Land Use District For Approximately	)	CONDITION A.1; MEMORANDUM
503.886 acres at Waikele and Hō'ae'ae,	)	IN SUPPORT OF MOTION; EXHIBITS
'Ewa, O'ahu, City and County of	)	"1"-"12"; DECLARATION OF PETER D.
Honolulu, State of Hawai'i, Tax Map	)	KWAN; DECLARATION OF CURTIS
Key No. 9-4-02: 01, portion of 52, 70 and	)	T. TABATA; CERTIFICATE OF
71	)	SERVICE
_____)	

HASEKO ROYAL KUNIA, LLC'S MOTION FOR ORDER AMENDING THE
MEMORANDUM OF UNDERSTANDING'S OFFSITE
INFRASTRUCTURE DATE IN CONDITION A.1.

HASEKO ROYAL KUNIA, LLC ("Petitioner" or "Haseko"), by and through its attorneys MATSUBARA, KOTAKE & TABATA, respectfully moves the Land Use Commission of the State of Hawai'i ("Commission" or "LUC") pursuant to § 15-15-70 and § 15-15-94, *Hawaii Administrative Rules* "HAR") for an order: 1) recognizing Haseko


Royal Kunia, LLC's standing to seek and obtain the relief requested herein; and 2) amending the Commission's Amended Order Granting Successor Petitioner (as to Parcel 52) Ho'Ohana Solar 1, LLC's Motion for Modification and Time Extension filed November 1, 2021 ("2021 D&O") to amend the Memorandum of Understanding's offsite infrastructure date in condition A.1. to be consistent with the Fifth Amendment to Amendment and Restatement of Memorandum of Understanding dated January 10, 2024 ("5th Am MOU") and to delete the requirement that the Memorandum of Understanding be executed within six months of the 2021 D&O.

This motion is made pursuant to chapter 205 of the Hawai'i Revised Statutes and HAR §§ 15-15-70 and 15-15-94, and is supported by the attached Memorandum In Support of Motion, declarations, exhibits and the pleadings and files herein.

Pursuant to HAR § 15-15-70(c) Haseko does not request a hearing on this motion.

DATED: Honolulu, Hawai'i, February 15, 2024.

Of Counsel:
MATSUBARA, KOTAKE & TABATA
A Law Corporation



BENJAMIN M. MATSUBARA
CURTIS T. TABATA
Attorneys for
HASEKO ROYAL KUNIA, LLC

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of) DOCKET NO. A92-683
)
HALEKUA DEVELOPMENT) MEMORANDUM IN SUPPORT OF
CORPORATION, a Hawai'i corporation) MOTION
)
To Amend the Agricultural Land Use)
District Boundary into the Urban)
Land Use District For Approximately)
503.886 acres at Waikele and Hō`ae`ae,)
'Ewa, O`ahu, City and County of)
Honolulu, State of Hawai'i, Tax Map)
Key No. 9-4-02: 01, portion of 52, 70 and)
71)
_____)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Petitioner Haseko Royal Kunia, LLC ("Petitioner or "Haseko") has filed Haseko Royal Kunia, LLC's Motion for Order Amending the Memorandum of Understanding's Offsite Infrastructure Date in Condition A.1. ("Motion") to seek an order: 1) recognizing Haseko Royal Kunia, LLC's standing to seek and obtain the relief requested herein; and 2) amending the Commission's Amended Order Granting Successor Petitioner (as to Parcel 52) Ho'Ohana Solar 1, LLC's Motion for Modification and Time Extension filed November 1, 2021 ("2021 D&O") to amend the Memorandum of Understanding's offsite infrastructure date in condition A.1. to be consistent with the Fifth Amendment to Amendment and Restatement of Memorandum of Understanding

dated January 10, 2024 (“5th Am MOU”) and to delete the requirement that the Memorandum of Understanding be executed within six months of the 2021 D&O. Pursuant to HAR § 15-15-70(c) Haseko does not request a hearing on this motion.

This Memorandum In Support of Motion (“Memorandum”) will first provide an overall project status and a summary of the discussions and agreement with the Department of Agriculture, State of Hawai‘i (“DOA”).

The Memorandum will then discuss the grounds for granting the Motion as follows: 1) the Agreement between the DOA and Haseko regarding the completion of the offsite infrastructure; 2) Haseko is not in violation of condition A.1.; 3) a Ka Pa‘akai analysis is not required for this motion; and 4) an additional environmental review is not required for this motion.

A. Project Status

The Royal Kunia II project was first approved in the Findings of Fact, Conclusions of Law and Decision and Order, filed December 9, 1993 in Docket No. A92-683, reclassifying approximately 503.866 acres of land (“Petition Area”) from the Agricultural Land Use District to the Urban Land Use District for residential, light industrial, public park and school site.

The current ownership of the Petition Area is as follows: 1) **Haseko**: TMK Nos. (1) 9-4-002: 070, 078, 084, 085 and 086; 2) **RK II Partners LLC**: TMK No. (1) 9-4-002: 001;

3) **Robinson Kunia Land LLC**: (1) 9-4-002: 052; and 4) **RKES, LLC**: (1) 9-4-002: 079. The Petition Area map is attached hereto as Exhibit "1".

On August 12, 2020, Haseko acquired approximately 211 acres of the Petition Area in Docket A92-683 at Waikele and Ho'ae'ae, Ewa, Oahu ("Property") and identified as TMK Nos. (1) 9-4-002: 070, 078, 084, 085 and 086. *See* Haseko's 2023 Annual Status Report dated October 4, 2023, page 1, attached hereto as Exhibit "2".

Since acquiring the Property, Haseko has had to confirm prior agreements and understandings previously reached with its predecessors. *See* Exhibit "2".

In July of 2021, Haseko submitted its updated drainage master plans to the Civil Engineering Branch of the Department of Planning and Permitting, City and County of Honolulu ("DPP") to reflect the new master plan for the Project. The drainage master plans were approved by DPP on August 11, 2021. *See* Exhibit "2", page 8.

On August 23, 2021, Haseko's traffic consultant submitted a Traffic Impact Analysis Report ("TIAR") to the DPP and the Department of Transportation Services, City and County of Honolulu ("DTS") to identify and assess the traffic impacts related to the Project. DPP/DTS provided its comments and the TIAR was submitted to the Department of Transportation, State of Hawai'i ("DOT") for its final approval. *See* Exhibit "2", page 4.

By letter dated January 3, 2022, Haseko submitted to the LUC its revised master plan and schedules dated December 30, 2021 in compliance with the amended and new

condition 2. *See* Revised Master Plan dated December 30, 2021, attached hereto and Exhibit “3”.

On August 1, 2022, the DPP issued Cluster Housing Permit No. 2022/CL-2 approving Haseko’s development of the first residential neighborhood on that portion of its Property commonly known as “Parcel D”. This first residential development will consist of not more than 334 single family, two family, and multi-family dwelling units, with a mix of affordable and market-rate housing, an internal linear park system, open space, recreational and play facilities and connective walkways. Construction is anticipated to commence in late 2026. *See* Exhibit “2”, page 1.

In December of 2022, Haseko submitted a proposed affordable housing agreement to DPP, and in September 2023 submitted a revised affordable housing agreement to DPP. *See* Exhibit “2”, page 2.

In August of 2023, a Draft Reconnaissance Level Survey for the Royal Kunia II Residential Development Property, Ahupua’a of Ho’ae’ae, ‘Ewa District, Island of O’ahu, City and County Tax Map Key Parcels (1) 9-4-002:070, (1) 9-4-002:071, and (1) 9-4-002:078 (“RLS”) was prepared at the request of the State Historic Properties Preservation Division (“SHPD”). The RLS is attached hereto as Exhibit “4”.

In December of 2023, a Revised Draft Archaeological Inventory Survey Testing Strategy for the Royal Kunia II Residential Development Propert, Ahupua’a of Ho’ae’ae, ‘Ewa District, Island of O’ahu, City and County Tax Map Key Parcels (1) 9-4-

002:070, (1) 9-4-002:071, and (1) 9-4-002:078 (“AIS”) was prepared at the request of SHPD. **All identified historic properties are plantation-related features.** The AIS is attached hereto as Exhibit “5”.

An updated Royal Kunia II Master Plan Phasing was prepared on February 7, 2024 and is attached hereto as Exhibit “6”. The construction of residential units will commence in 2026 and be complete by approximately 2039. The project is shown in five phases, with projected construction dates and infrastructure requirements for each phase.

Phase 1A, aka Parcel D, is comprised of 324 residential units, including 260 single family units and 64 multifamily units. Construction schedule for Phase 1A is approximately 2026 through 2031. Phase 1B will be located across the street from Road X and is comprised of 36 multifamily units, with a construction schedule from approximately 2028 through 2030. Infrastructure requirements for both Phase 1A and 1B include: Road Y, Phase 1 [2025]; Parcel D’s drainage system; Road X, Phase 1 [2026]; BWS Design Cost [2028]; Irrigation Pump [2024]; and Road Y, Phase 2A [2028]. *See* Exhibit “6”.

Phase 2 is comprised of 217 residential units, including 101 single family units and 116 multifamily units, with a construction schedule from approximately 2029 through 2032. Infrastructure requirements for Phase 2 include: Road X, Phase 2 [2027]; Water improvements [2031]; Electrical improvements [2029]; Road Z, Phase 1 [2031];

Road Z, Phase 2 [2031]; Park Improvements [2031]; Off-site Drainage Line [2027]; and Drainage Outlet Stabilization [2027]. *See Exhibit "6"*.

Phase 3 is comprised of 388 units, including 136 single family units and 252 multifamily units, with a construction schedule from approximately 2030 through 2035. Infrastructure requirements for Phase 3 include Perimeter drainage control. *See Exhibit "6"*.

Phase 4 is comprised of 657 multifamily units, with a construction schedule from approximately 2029 through 2039. Infrastructure requirements for Phase 4 include: Park Improvements [2032]; and Kunia Road Widening [2033]. *See Exhibit "6"*.

Phase 5 is comprised of 228 single family units, with a construction schedule from approximately 2032 through 2037. Infrastructure requirements for Phase 5 include: Road Y, Phase 2B [2032]; Road Z, Phase 3 [2032]; Recreation Center w/Pool [2032]; and Interchange [2034]. *See Exhibit "6"*.

The permit sets for Road Y Phase 1, Road X Phase 1 and Road 3 have been submitted to DPP for permit review. The plans for Road X Phase 2 have been submitted to DPP for permit review. Tentative subdivision approval for Road Y Phase 1 has been obtained. The subdivision map for Road X Phase 1 and Road 3 has been submitted to DPP for review. The subdivision map for Road X Phase 2 is near completion and will be submitted to DPP for review shortly. *See Declaration of Peter D. Kwan.*

B. **Agricultural Park Offsite Infrastructure**

On April 17, 2023, Haseko met with the Department of Agriculture, State of Hawai'i ("DOA") to discuss the Irrigation Line Plans and Utility Services Plans. *See* Declaration of Peter D. Kwan.

On April 27, 2023, Haseko transmitted the proposed Fifth Amendment to Amendment and Restatement of Memorandum of Understanding ("5th Am MOU"). Within the proposed 5th Am MOU was a proposed extension of the Agricultural Park's Permanent Infrastructure completion date, not including the Irrigation Infrastructure, to September 30, 2028. *See* Declaration of Peter D. Kwan.

On May 19, 2023, Haseko reached out to DOA to see if the DOA had any questions regarding the draft 5th Am MOU, and to inform DOA that Haseko Royal Kunia, LLC and Ho'Ohana Solar 1, LLC had jointly let out a bid for the "Irrigation Line for the Royal Kunia Agricultural Park project", with a bid due date of June 9, 2023. *See* Declaration of Peter D. Kwan.

On June 30, 2023, the completion date for the Agricultural Park offsite infrastructure expired per condition A.1. *See* Amended Order Granting Successor Petitioner (as to Parcel 52) Ho'Ohana Solar 1, LLC's Motion for Modification and Time Extension filed November 1, 2021 ("2021 D&O"), attached hereto as Exhibit "7".

On July 5, 2023, the DOA responded to Haseko regarding the draft 5th Am MOU and informed Haseko that the proposed extension to September 30, 2028 was not

acceptable, and that if Haseko had a better alternative, please submit soon. *See* July 5, 2023 letter from the DOA to Haseko, attached hereto as Exhibit "8".

On July 24, 2023, Haseko informed the DOA that the selected contractor, Paradigm Construction, LLC, mobilized and started installing the 12" section of the Irrigation Line for the Agricultural Park. *See* Declaration of Peter D. Kwan.

On November 6, 2023, Haseko provided DOA with an update of the Project, including the agreement with Robinson Kunia Land, LLC regarding onsite and offsite agreements and easements; agreements with Ho'Ohana Solar 1, LLC; the ongoing construction of the offsite Irrigation Line for the Royal Kunia Agricultural Park; the status of the TIAR's; discussions with Jupiter regarding infrastructure; coordinating system upgrade planning with BWS; negotiating a MOU with DOT; obtaining an approved Jurisdictional Determination letter from the Army Corps of Engineers, the filing of reports with the State Historical Preservation Division, and the planning of major onsite roadways. *See* Declaration of Peter D. Kwan.

On November 27, 2023, the Office of Planning and Sustainable Development ("OPSD") coordinated a meeting between OPSD, DOA and Haseko to discuss the Project status and a time extension for the Agricultural Park Offsite Infrastructure. The DOA informed Haseko at this meeting that it needed Temporary Infrastructure consisting of functional electrical power and potable water for agricultural use only at the Agricultural Park by the end of 2025. *See* Declaration of Peter D. Kwan.

After the November 27, 2023 Zoom meeting, Haseko worked on identifying an alignment and determining the feasibility of providing electrical power and potable water (“Temporary Infrastructure”) by the end of 2025 to meet the DOA’s immediate needs for the Agricultural Park. *See* Declaration of Peter D. Kwan.

On November 30, 2023, Haseko requested the potable water volume and electrical power load required for the Temporary Infrastructure, and on December 1, 2023, the DOA provided the gallons per day of potable water and electrical power load needed by the Agricultural Park for both the initial agricultural use, and also for the long term full build out inclusive of its residential component. *See* Declaration of Peter Kwan.

On December 12, 2023, the DOA and Haseko held a Zoom meeting to discuss multiple deadlines for the different portions comprising the offsite infrastructure for the Agricultural Park. Haseko proposed completing the offsite irrigation line and pump station by the end of August 2024 (“Irrigation Infrastructure”); the electrical power and potable water for agricultural use by the end of 2025 (“Temporary Infrastructure”); and roadway access and permanent utilities infrastructure by September 30, 2028 (“Permanent Infrastructure”). The DOA indicated its acceptance of the deadlines subject to negotiating and executing the 5th Am MOU. *See* Declaration of Peter D. Kwan.

On December 19, 2023, Haseko sent a revised draft 5th Am MOU to reflect the deadlines that were agreed to in the December 12, 2023 Zoom meeting with the DOA.

See Declaration of Peter Kwan.

On December 28, 2023, the DOA sent to Haseko the draft 5th Am MOU with the DOA's revisions. *See Declaration of Peter Kwan.*

On January 5, 2024, Haseko accepted all of the DOA's revisions and transmitted the final version of the 5th Am MOU, signed by Haseko, to the DOA. *See Declaration of Peter Kwan.*

On January 10, 2024, the DOA returned the fully executed 5th Am MOU to Haseko. *See Declaration of Peter Kwan and the fully executed January 10, 2024 5th Am MOU attached hereto as Exhibit "9".*

II. DISCUSSION

A. **The 5th Am MOU contains the agreement between the Department of Agriculture and Haseko for the completion of the Agricultural Park offsite infrastructure.**

Condition A.1. in the 2021 D&O requires Haseko to enter into a Memorandum of Understanding with the DOA within six months of the 2021 D&O and that the "Memorandum shall require that off-site infrastructure to the State of Hawai'i's Kunia Agricultural Park be completed no later than June 30, 2023."

In order to provide the DOA with the offsite infrastructure by the DOA's required timeline, the DOA and Haseko had to breakdown the offsite infrastructure

into three separate categories and dates as stated in the 5th Am MOU dated January 10, 2024:

1. Completion of the Irrigation Infrastructure consisting of the non-potable water lines and pump station by August 31, 2024;
2. Completion of the Temporary Infrastructure consisting of functional electrical power and potable water for agricultural use only by December 31, 2025; and
3. Completion of the Permanent Infrastructure consisting of roadway access, potable water, electrical power, communications and gravity sewer by September 30, 2028.

This request for amendment of the offsite infrastructure date in condition A.1. is based on the written agreement between the DOA and Haseko as contained in the 5th Am MOU. The work to complete the Irrigation Infrastructure has commenced and is ongoing and will be completed by August 31, 2024. The planning and engineering for the Temporary Infrastructure has commenced and is ongoing. The Permanent Infrastructure will coincide with the construction of Road Y Phase 2 the planning and engineering for which has commenced and is ongoing.

Therefore, Haseko requests that condition A.1. be amended to require the offsite infrastructure, which is comprised of the Irrigation Infrastructure, Temporary Infrastructure and Permanent Infrastructure be completed by the dates contained in the 5th Am MOU, and that the requirement for the execution of the 5th Am MOU within six

months of the 2021 D&O be deleted to be consistent with the January 10, 2024 date of the 5th Am MOU.

B. There is no violation of condition A.1. based on the execution of the 5th Am MOU.

In *Lanai Company Inc. v. Land Use Commission*, 105 Haw. 296, 317, 97 P.3d 372, 393 (2004), the Court stated that “[T]he language of [*Hawaii Revised Statutes (“HRS”)*] HRS § 205-4(g) is broad, and empowers the LUC to use conditions as needed to (1) ‘uphold the intent and spirit’ of HRS chapter 205, (2) ‘uphold the policies and criteria established pursuant to HRS § 205-17, and (3) to ‘assure substantial compliance with the representation made by the petition is seeking a boundary change.’”

In this docket, condition A.1. sought to uphold the spirit and intent of chapter 205, the policies and criteria of HRS § 205-17, and the representations of the original petitioner by supporting the State of Hawai‘i Kunia Agricultural Park by having the landowner(s) provide the offsite infrastructure for the Agricultural Park on a stated schedule that was intended to be acceptable to the DOA. Haseko, as the successor landowner who acquired the Property in 2020, has accomplished the purpose and intent of condition A.1. by reaching an agreement with the DOA for the delivery of the offsite infrastructure and, therefore, there is no violation of condition A.1.

C. A Ka Pa‘akai analysis is not required for this motion because this motion is not a “contested case”.

In *Ka Pa‘akai O Ka‘aina v. Land Use Commission*, 94 Haw. 31, 7 P.3d 1068, 1090

(2000), the Court held that the commission was required, on a petition for district boundary amendment, to enter specific findings and conclusions with regarding:

- (1) the identity and scope of ‘valued cultural, historical, or natural resources’ in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

In *Flores-Case ‘Ohana v. University of Hawai‘i*, 152 Haw. 76, 84, 526 P.3d 601,

609 (2023), the Court held the following:

In sum, the Ka Pa‘akai framework applies **to administrative rulemaking in addition to contested case hearings**. Requiring the State and its agencies to consider Native Hawaiian traditional and customary rights **in these contexts** “effectuate[s] the State’s obligation to protect native Hawaiian customary and traditional practices[.]” *Ka Pa‘akai*, 94 Hawai‘i at 47, 7 P.3d at 1084. (*emphasis added*).

The State and its agencies, therefore, are required to apply the Ka Pa‘akai framework in the contexts of: (1) contested case hearings; and (2) rulemaking proceedings. Haseko’s motion is clearly not rulemaking, and neither is it a contested case hearing.

HRS § 91-1(5) defines “contested case” as follows: “‘Contested case’ means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.”

“Thus, ‘[a] contested case is an agency hearing that 1) is required by law *and* 2) determines the rights, duties, or privileges of specific parties.’” (*original emphasis*). *Kaniakapupu v. Land Use Commission*, 11 Haw. 124, 139 P.3d 712, 720 (2006). In other words, if the agency hearing does not satisfy both requirements, then the agency hearing is not a contested case.

1. A hearing on this motion is not required by law because Haseko did not request a hearing on this motion.

The Court in *Kaniakapupu* goes on to state that “[i]f the . . . rule governing the activity in question does not *mandate* a hearing prior to the administrative agency's decision-making, the actions of the administrative agency are not ‘required by law’ and do not amount to a ‘final decision or order in a contested case’ from which a direct appeal to circuit court is possible.” (*original emphasis*) *Kaniakapupu*, 139 P.3d at 720. The Court then turned its attention to the Land Use Commission’s rules:

HAR § 15-15-70, dealing with motions in general, provides in relevant part:

(c) **Every motion**, except one entitled to be heard *ex parte*, **shall indicate whether a hearing is requested on the motion**. If a motion requires the consideration of facts not appearing of record, it shall be supported by an affidavit or affidavits.

....

(i) **If a hearing is requested, the executive officer shall set a date and time for hearing on the motion.** (*original emphasis*).

(j) **If a hearing on the motion is not requested, the [LUC] may decide the matter upon the pleadings, memoranda, and other documents filed with the [LUC].** (*emphasis added*).

(Bold emphases added.) HAR § 15-15-70(i) plainly states that, once a hearing is requested, the executive officer must set a date and time for the hearing on the motion. In other words, **if a motion is accompanied by a request for a hearing, the LUC must conduct a hearing on the motion.** Inasmuch as the LUC does *not* have any discretion to determine whether to hold a hearing once a hearing is requested and the Hui did request a hearing on its motion, the January 2004 hearing was required by HAR § 15-15-70. *Cf. Lingle v. Hawai'i Gov't Employees Ass'n, AFSCME, Local 152*, 107 Hawai'i 178, 184, 111 P.3d 587, 593 (2005) (stating that "**discretionary hearings are not contested cases because they are not required by law**"). Thus, the January 2004 hearing was "required by law. (*emphasis added*).

Kaniakapupu, 139 P.3d at 721.

Here, Haseko did not request a hearing on its motion pursuant to HAR § 15-15-70(c) and, therefore, any hearing on this motion is discretionary and not required by law. Because both elements are required to constitute a contested case, the analysis stops here and Haseko's motion is not a contested case and the Ka Pa'akai analysis is not required for this motion.

2. This motion does not determine the rights, duties, or privileges of specific parties.

But even if a hearing was required by law for this motion, this motion does not determine the rights, duties, or privileges of specific parties.

In *E & J Lounge Operating Co. v. Liquor Commission of the City and County of Honolulu*, 118 Haw. 320, 331, 189 P.3d 432, 443 (2008), the Court stated that a development permit application seeks to have the legal rights, duties, or privileges of specific parties determined that is relative to the development of land; and a liquor

permit application seeks to have the legal rights, duties, or privileges of specific parties determined that is relative to the sale of liquor in its establishment.

The Court points out that “[a]s noted before, a liquor license, such as the Class 5 Dispenser's license sought by Petitioner, ‘authorize[s] the licensee to sell liquors ... for consumption on the premises.’” (*emphasis added*). *Id.*

In comparison, Haseko’s motion does not seek to determine the legal rights, duties, or privileges of specific parties inasmuch as Haseko’s motion does not request any authorization to conduct any activity. Haseko’s motion seeks to amend the date to be included in the memorandum of understanding for the completion of the offsite infrastructure, as stated in condition A.1.

Haseko currently has the right to develop the property. Haseko also has the current right and duty to construct its portion of the offsite infrastructure. This motion does not seek any authorization to perform any activity because this motion is not a permit application.

Therefore, Haseko’s motion is not a contested case because any hearing on this motion is not required by law, but even if a hearing was required by law it still wouldn’t be a contested case because it does not seek to determine the legal rights, duties, or privileges of specific parties, and because this motion is not a contested case, the Ka Pa’akai analysis is not required for this motion.

D. A Ka Pa’akai analysis was conducted in 2020 for the Ho’Ohana Solar Energy Facility at Royal Kunia II.

But even if a Ka Pa‘akai analysis was required before deciding Haseko’s motion, one was conducted as a part of a Cultural Impact Assessment (“CIA”) in 2020 for the Ho‘Ohana Solar Energy Facility project, and that CIA studied the entire Ahupua‘a that contains the Royal Kunia II project, which includes Haseko’s Property. “The CIA provides a detailed account of cultural and historical significance of the Waikele and Ho‘ae‘ae Ahupua‘a, where parcel 52 is located.” See finding of fact 75 of the 2021 D&O, attached hereto as Exhibit “7”.

The CIA makes clear that “regardless of the specific acreage or overall size of the proposed solar project, CIA work involves documenting and interpreting cultural connections and associations that go far beyond the immediate, physical (“project area”) boundaries.” See page 1 and Figures 1, 2 and 3 of the Final Cultural Impact Assessment of Ho‘Ohana Solar Energy Facility, Waikele and Ho‘ae‘ae Ahupua‘a, Ewa District, Oahu Island, Hawai‘i, attached hereto as Exhibit “10”.

“Community outreach was received from a total of 23 individuals and organizations. There was little substantive feedback on the extent to which traditional and customary rights were being exercised in our around parcel 52.” See finding of fact 75 of the 2021 D&O, Exhibit “7”.

“The CIA concludes that the Hawaiian sense of place was essentially erased from Parcel 52 over more than a century of plantation agriculture; and, that, traditional and customary practices are overwhelmingly focused on the makai areas at or near the

shoreline of Pearl Harbor and the mouths of Waikele and Ho‘ae‘ae streams.” See finding of fact 76 of the 2021 D&O, Exhibit “7”.

The 2020 CIA’s Ka Pa‘akai analysis determined that “consistent with the decision of the Hawai‘i Supreme Court in *Ka Pa‘akai O Ka‘aina v. Land Use Commission*, 94 Haw. 31, 74, 7 P.3d 1068, 1084 (2000), there are no valued cultural, historical or natural resources in the project area and therefore no such resources - including traditional and customary native Hawaiian rights - will be affected or impaired by the proposed solar farm.” See page 78 of Exhibit “10”.

E. Environmental review under HRS chapter 343 is not required for this motion because this motion is not an “action”.

Haseko’s motion seeks to amend the memorandum of understanding’s offsite infrastructure date in condition A.1. of the 2021 D&O. It is important to note that this motion is not needed to construct the offsite infrastructure because Haseko already has the right and duty to construct its portion of the offsite infrastructure.

Environmental review under HRS chapter 343 is required for “actions” that constitute any of the triggers listed in HRS § 343-5. First, changing the date for the construction of offsite infrastructure is not one of the listed triggers in HRS § 343-5. Second, changing the date for the construction of offsite infrastructure is not an “action” as defined by HRS § 343-2.

“‘Action’ means any program or project to be initiated by any agency or applicant” HRS § 343-2.

In *Umberger vs. Department of Land and Natural Resources*, 140 Haw. 500, 403 P.3d 277 (2017), at issue was whether a permit for the collection of aquarium fish constituted an “action” under HRS chapter 343. The Court quoted the statutory definition of “action” in HRS § 343-2, and defined “program” and “project” as follows: “‘Program’ is generally defined as ‘a plan or system under which action may be taken toward a goal.’ ‘Project’ is defined as ‘a specific plan or design’ or ‘a planned undertaking.’” *Umberger*, 403 P.3d at 290.

“In determining whether aquarium collection is a program or project, the crucial first step is properly defining the activity authorized by the aquarium collection permits issued by the DLNR.” (*emphasis added*). *Id.* The Court held that the activity of collecting aquarium fish under permit is an applicant action that required agency approval. *Umberger*, 403 P.3d at 304.

Haseko’s motion, in comparison, does not seek authorization of any activity. The construction of the Irrigation Infrastructure has commenced and continues to be built and will be completed by the end of August of 2024. Planning, engineering, design, and agency review for the overall Haseko project have been and are currently ongoing. This motion does not seek any authorization for any activity related to the planning or undertaking of the project. This motion seeks to amend the date for the construction of the offsite infrastructure for the Agricultural Park in condition A.1. to achieve consistency between the 2021 D&O and Haseko’s agreement with the DOA.

Therefore, Haseko's motion is not an "action" as defined under HRS § 343-2, and, as a result, environmental review under HRS § 343-5 is not required for this motion.

F. A determination was made in 2021 that Haseko's 211 acre Royal Kunia Phase II residential project does not require additional environmental review pursuant to HRS chapter 343

But even if Haseko's motion were to constitute an "action" as defined by HRS § 343-2, additional environmental review would not be required for Haseko's project because a determination has been made by the DPP in 2021 that additional environmental review is not required pursuant to HRS chapter 343.

On August 31, 2021, in anticipation of filing an application for a cluster housing permit, Haseko submitted a request to the DPP for a determination that based on prior accepted environmental impact analyses performed, additional environmental review under HRS chapter 343 is not required. A copy of the August 31, 2021 request is attached hereto as Exhibit "11".

On September 24, 2021, the DPP issued its concurrence that additional environmental review is not required. The DPP compared the 1989 EIS, the 1996 EA, and the currently proposed project and concluded that

The overall Royal Kunia Phase II mixed use development, as currently proposed, is similar to previous iterations that have already undergone review, and will have similar environmental impacts. The scope of the action has not been increased, nor have the intensity of environmental impacts. Mitigation measures originally planned will still be implemented, and there are no new circumstances or evidence that bring to light different or likely increased environmental impacts not previously dealt with.

A copy of the DPP's September 24, 2023 determination letter is attached hereto as Exhibit "12".


Therefore, Haseko's motion does not require additional environmental review because it is not an "action" as defined by HRS § 343-2, but even if Haseko's motion were an "action", additional environmental review is still not required for Haseko's project because the DPP made its determination in 2021 that such additional environmental review is not required.

III. CONCLUSION

Haseko and the DOA have reached an agreement for the completion dates of the offsite infrastructure for the Royal Kunia State Agricultural Park in condition A.1., Haseko is not in violation of condition A.1., a Ka Pa'akai analysis is not required for this motion, and additional environmental review is not required for this project. Therefore, Haseko respectfully submits that the foregoing facts and law constitute good cause shown pursuant to HAR § 15-15-94(b) and requests that its motion be granted.

DATED: Honolulu, Hawai'i, February 15, 2024.

Of Counsel:
MATSUBARA, KOTAKE & TABATA
A Law Corporation



BENJAMIN M. MATSUBARA
CURTIS T. TABATA
Attorneys for
HASEKO ROYAL KUNIA, LLC