

DOCKET NO. A92-683
HALEKUA (Royal Kunia Phase 2)

**Motion for Order Amending the
Memorandum of Understanding's
Offsite Infrastructure**

STAFF REPORT

Hearing
April 4, 2024



Daniel E. Orodener, Executive Officer

Submitted: March 28, 2024

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1. EXPLANATION OF THE PROCEEDING

The proceeding before the Land Use Commission (“LUC”) is a Motion to Amend, filed by Haseko regarding the **memorandum of understanding's offsite infrastructure date in condition a.1 of the 2021 Decision and Order to reflect the 5th memorandum of understanding** (see pg.7 for further explanation).

Hawai'i Administrative Rules (“HAR”) §15-15-70(a) provides that “[a]ny party may make motions before, during, or after the close of a hearing.”

Pursuant to HAR §15-15-94, a petitioner who desires to have a modification or deletion of a condition that was imposed by the Commission, or a modification of the Commission’s order shall file a motion in accordance with HAR §15-15-70, including proper service and affidavits or declarations if the motion requires the consideration of facts not appearing in the record.

If good cause is shown, the Commission may modify or delete any of the conditions imposed or modify the Commission’s order (HAR §15-15-94(b)). “Good cause” can mean “a substantial reason amounting in law to a legal excuse,” and that it will also depend on the specific circumstances of an individual case. Determining “good cause” is at the discretion of the Commission.

Pursuant to Hawai'i Revised Statute (“HRS”) §91-10(5), the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

The Commission has discretion based on the facts presented in the case to consider other factors, including (1) whether the need for the condition still exists; (2) whether an alternative method for ensuring compliance exists that protects the public trust; or (3) whether compliance with the condition would create an undue hardship.

2. BACKGROUND INFORMATION

Original Order:

In 1993, the original Docket involved the reclassification of approximately 504.865 acres of land from the State Land Use Agricultural District to the State Land Use Urban District at Waikele and Ho’ae’ae, ‘Ewa, O’ahu, City and County of Honolulu, Hawai’i, TMK 9-4-02: Portion of 1 and Portion of 52. The District Boundary Amendment (“DBA”) was granted on December 9, 1993, subject to 28 conditions

([see the 1993 Decision and Order](#)).

Department of Agriculture: Agriculture Park

Condition 22 of the [1993 Decision and Order](#) established the Agricultural Park.

Condition 22) Petitioner shall convey the agricultural park to the State of Hawaii, and provide off-site infrastructure to the agricultural park, pursuant to the terms of the Memorandum of Understanding dated March 30, 1993, entered into by Petitioner and the Department of Agriculture.

In 1995, the metes and bounds description was amended to change the acreage from 504.865 to 503.886.

On August 1, 1995, Halekua filed a Motion to Change Ownership Interest in the Petition Area to convey two parcels of approximately 60 acres and 63 acres zoned I-1 (Limited Industrial) and a parcel of approximately 9 acres zoned A-1 (Low-Density Apartment) to HRT, Ltd. the Motion was granted, ([see the 1995 Decision and Order](#)).

1996 Amendment

In 1996, Docket A92-683, amended the Tax Map Key Numbers: 9-4-02: 1, portion of 52, 70 and 71. The Amendment was approved on September 12, 1996, subject to 25 conditions ([see the 1996 Decision and Order](#)).

Department of Agriculture: Agriculture Park

The 1996 Decision and Order states that the

Petitioner and the Department of Agriculture of the State of Hawai'i ("DOA") have entered into a Memorandum of Understanding, dated March 30, 1993, in which Petitioner agrees to convey 150 acres of land within the Royal Kunia Phase II development to the State of Hawai'i for the purpose of establishing a State agricultural park. In accordance with the terms of the Memorandum of Understanding, the parties have been negotiating the terms of a more detailed Development Agreement. The DOA has accepted the final negotiated terms and conditions for the Development Agreement. The parties have agreed to an extension of time for executing the Development Agreement so that the DOA may conduct an environmental assessment of the site, in accordance with requirements by the Office of the Attorney General (1996 D&O, pg.12, ln 38)

As well as

Petitioner will design and construct off—site infrastructure improvements for the agricultural park including off—site roadways, potable and irrigation water lines, and sewer lines and other utility connections, up to the property boundary of the agricultural park at no cost to the DOA (1996 D&O, pg.13, ln 41)

Condition 19) Petitioner shall convey the agricultural park to the State of Hawai'i, and provide off-site infrastructure to the agricultural park, pursuant to the terms of the Memorandum of Understanding dated March 30, 1993 entered into by Petitioner and the Department of Agriculture.

The MOU has been extended four times since the 1996 D&O

The 1996 Decision and Order Amended the Original 1993 Order and reduced the number of conditions to 25. The 1996 Decision and Order is the current Order that runs with the land, aside from the 2021 Order which is specific to Ho'ohana Solar.

Other Historical Motions and Orders associated with the Docket:

[2003 Order Granting OPSD's Motion for Order to Show Cause](#)

[2003 Order to Show Cause](#)

[2004 Order Granting OPSD's Motion to Exempt HRT from OSC](#)

[2007 Order Granting Halekua's Motion to Dismiss OSC](#)

[2007 Order Granting Timely Motion to Intervene](#)

[2007 Order Granting Halekua's Motion for Transfer of Ownership](#)

[2013 1st Amendment to Amended Decision & Order](#)

[2014 Order Approving Successor Petitioner \(to Parcel 52\) Ho'ohana Solar 1, LLC's Request to Continue Proceedings](#)

Continuation of explanation of recent and relevant Motions on the following page.

2014 Motion to Amend the 1996 Order	On August 11, 2014, Ho'ohana Solar 1, LLC ("Ho'ohana") filed its Motion for Order Amending the Amended Findings of Fact, Conclusions of Law, and Decision and Order filed on October 1, 1996.
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The Motion moved that:

- (1) recognize Ho'ohana as the Successor Petitioner to Parcel 52 with standing to seek and obtain relief requested;
- (2) issue an order modifying the Commission's 1996 Order, as amended by the Commission's 2013 First Amendment to the 1996 Decision and Order ("2013 Order"), to expressly authorize the proposed interim 30-year operational use of Parcel 52 for solar farm development; and
- (3) to delete Condition No. 21 of the 1996

Order, as amended by the 2013 Order, requiring the Commission's prior approval to change any ownership interest in the Petition Area, because it has been fully satisfied, or, in the alternative, pursuant to requirements of Condition No. 21, approve the proposed lease of Parcel 52 by the landowner Robinson Kunia Land LLC ("RKL") to Ho'ohana to allow the solar farm development.

The Motion was approved with the amendment of conditions 19 and 21, an additional 7 conditions pertaining ONLY to the solar farm, and the original conditions imposed in the previous Halekua Orders ([see the 2015 Decision and Order](#))

Condition One: 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 nonpotable 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.

On July 14, 2020, the Land Use Commission received the [2020 Annual Report](#) from RP2 Ventures

On August 14, 2020, The Land Use Commission received the notice of [change in ownership from RP2 to Haseko](#)

2020 Ho'ohana Solar Motion to Modify and Extend

On August 17, 2020, Ho'ohana moved to
1) allow modification to the solar farm previously authorized; and,
(2) extend the timeframe for development of the modified solar farm.

Conditions set in the [2021 Order](#) include Sections A and B (A applies to the Petition Area, and B Applies ONLY to the solar farm):

A) Amended and New Conditions Imposed on the Petition Area. The following amended Conditions A1 through and including A3 shall replace Condition A1 through A3 of the 2015 Order:

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 execute an amendment to the Memorandum of Understanding (dated 1993 and subsequent amendments in 2007, 2009, 2012, 2015 and 2020) 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 June 30, 2023. "Offsite-infrastructure" includes, but is not limited to, all utilities and appurtenant works, roadways, potable water lines, electrical utilities, sewer lines, utility connections, and the non-potable waterline appurtenances in place, complete.
2. Revised Master Plan. All 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 to the Commission no later than December 31 , 2021.

3. Status Report. By March 15, 2021, all landowners within the Petition Area shall submit to the Commission a status report on the development of their respective parcels of land and their construction or contribution to the construction of the off-site infrastructure.
4. Notice to Commission. Petitioner shall provide notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the subject property prior to or during development of the subject property, excluding, however, sales or leases of the 53 individual lots or condominium units in a residential development, or leases in an industrial development.
5. Compliance with Representations. Failure of the landowners to construct the off-site infrastructure for the Kunia Agricultural Park will constitute good cause for the Commission to issue an Order to Show Cause to the landowners pursuant to HAR § 15-15-93 of the Commission's Rules.
6. Failure of Solar Project. Should Ho'ohana fail to construct and complete the Solar Project, the easement(s), construction, maintenance and cost of the non-potable waterline described under Condition B.1, shall revert to the responsibility and expense of the landowners.

B) Amended Conditions Imposed Solely on Solar Farm to be Developed on Parcel 52 The following conditions B 1 through and including B7 shall be applicable only to the solar farm on Parcel 52, and shall be applicable only upon development of the solar farm use on Parcel 52:

1. Royal Kunia Agricultural Park Non-Potable Water Connection. Prior to the connection of the Solar Project to the grid, Ho'ohana shall, at no cost to the State and concurrent with construction of the solar farm, design and provide an off-site, non-potable waterline from Reservoir 225 to the boundary of the Royal Kunia Agricultural Park (the "nonpotable waterline"), using the design and specifications acceptable to the Department of Agriculture that were submitted to the Department of Planning and Permitting by RP2 Ventures, LLC. 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.

The other conditions are available for review on the [2021 Order](#).

On September 3, 2021, the LUC received change in ownership from HRT Realty to RK II Partners LLC., and on December 17, 2021, The LUC received the [2021 Annual Report](#) from Haseko.

On January 14, 2022, in compliance with condition two, Haseko filed their [Revised Master Plan](#). On May 24, 2022, the [2022 Annual Report](#) was received from RKII Partners, LLC, and on November 16, 2022, Haseko filed their [2022 Annual Report](#).

Following the Haseko 2022 Annual Report, the LUC Received [DOA Comments](#). The DOA Comment Letter raised questions on:

- Compliance with the LUC Order that required construction of infrastructure by June 30, 2023.
- The Memorandum of Understanding regarding irrigation facilities, which divides responsibilities for construction of the irrigation infrastructure.
- The delay of infrastructure construction and completion and water commitment

LUC Staff coordinated a meeting with the Department of Agriculture and the Office of Planning and Sustainable Development on May 23, 2023. OPSD and DOA provided a joint [letter regarding the status of the development](#).

LUC Staff Scheduled a Status Report for April 3, 2024, and Petitioners Motion for April 4, 2024 (see other staff Report).

3. SUMMARY OF PETITIONER'S MOTION

Haseko Royal Kunia:

Haseko has filed the following documents in support of their position. These are summarized below and available via the link to the electronic document on the LUC website: [Motion for Order Amending the Memorandum of Understanding's Offsite Infrastructure Date in Condition A.1, Memorandum in Support of Motion; Exhibits 1-12; Declaration of Peter D. Kwan; Declaration of Curtis T. Tabata; Certificate of Service](#)

[Exhibit 1](#) / [Exhibit 2](#) / [Exhibit 3](#) / [Exhibit 4](#) / [Exhibit 5](#) / [Exhibit 6](#) / [Exhibit 7](#) (Part 1) / [Exhibit 7](#) (Part 2) / [Exhibit 8](#) / [Exhibit 9](#) (5th Am. MOU) / [Exhibit 10](#) (Part 1) / [Exhibit 10](#) (Part 2) / [Exhibit 10](#) (Part 3) / [Exhibit 11](#) / [Exhibit 12](#)

The Motion requests that the LUC amend the 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").

Condition A.1: Royal Kunia Agricultural Park Off Site Infrastructure.

Within six (6) months of the date of the Commission's Order, the landowner(s) within the Petition Area shall execute an amendment to the Memorandum of Understanding (dated 1993 and subsequent amendments in 2007, 2009, 2012, 2015 and 2020) 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 June 30, 2023**. "Offsite-infrastructure" includes, but is not limited to, all utilities and appurtenant works, roadways, potable water lines, electrical utilities, sewer lines, utility connections, and the non-potable waterline appurtenances in place, complete (2021 D&O).

The completion date in the MOU and 2021 D&O expired in June 30, 2023, and the current Motion and the [5th Amended MOU](#) includes the following proposed dates: December 31, 2025 (temporary) and September 28, 2028 (permanent infrastructure).

The Petitioner contends that the grounds for granting the Motion are 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.

Ho'ohana Solar 1, LLC:

Successor Petitioner (As to Parcel 52) Ho'ohana Solar 1, LLC

[Statement of No Opposition to Haseko Royal Kunia, LLC's Motion for Order Amending the Memorandum of Understanding's Offsite Infrastructure Date in Condition A.1; Certificate of Service](#)

Ho'ohana Solar has no opposition to the Motion, and notes that the "A" conditions apply to the Petition Area but not to the solar farm development on Parcel 52. The "B" conditions apply "only to the solar farm on Parcel 52, and shall be applicable only upon development of the solar farm use on Parcel 52

Ho'ohana represents that they have completed the non-potable waterline

installation and related grant of nonexclusive utility easement obligations under condition B.1. As such, Ho'ohana has no opposition to the relief sought by Haseko in its motion.

RK II Partners:

[Statement of No Objection to Haseko Royal Kunia, LLC's Motion for Order Amending the Memorandum of Understanding's Offsite Infrastructure Date in Condition A.1; Certificate of Service](#)

RK II Partners has no opposition to the Motion, and states RK II Partners is a party to the instant proceedings in this Docket.

*LUC Staff notes they are also subject to all the conditions set in the 1996 Decision and Order, which should be addressed in the status report.

4. SUMMARY OF THE OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT (“OPSD”) POSITION STATEMENT

OPSD filed their [brief position statement](#) on February 22, 2024, and issued a Notice of Support based on a brief review of the representations of Petitioner and documents filed in these proceedings, and previous communications between Petitioner, HDOA, and OPSD.

On March 27, 2024, OPSD filed their [testimony in support](#) of the Petitioner's Motion.

OPSD provides background information on the Docket's history and basis regarding the housing project, Memorandum of Agreement, Ka Pa'akai Analysis, Archeology Review and Studies, and Chapter 343 Requirements.

It appears that OPSD's statement does not include independent basis, supporting information, or analysis by relevant State Departments and Agencies.

OPSD states the Petitioner made a good faith effort in moving the Project ahead in compliance with applicable laws and in coordination with appropriate agencies since purchasing the property. OPSD recommends that the LUC approve the Motion.

5. SUMMARY OF COUNTY POSITION STATEMENT

As of 3/28/24 no filings or position statements have been received from the C&C of HNL.

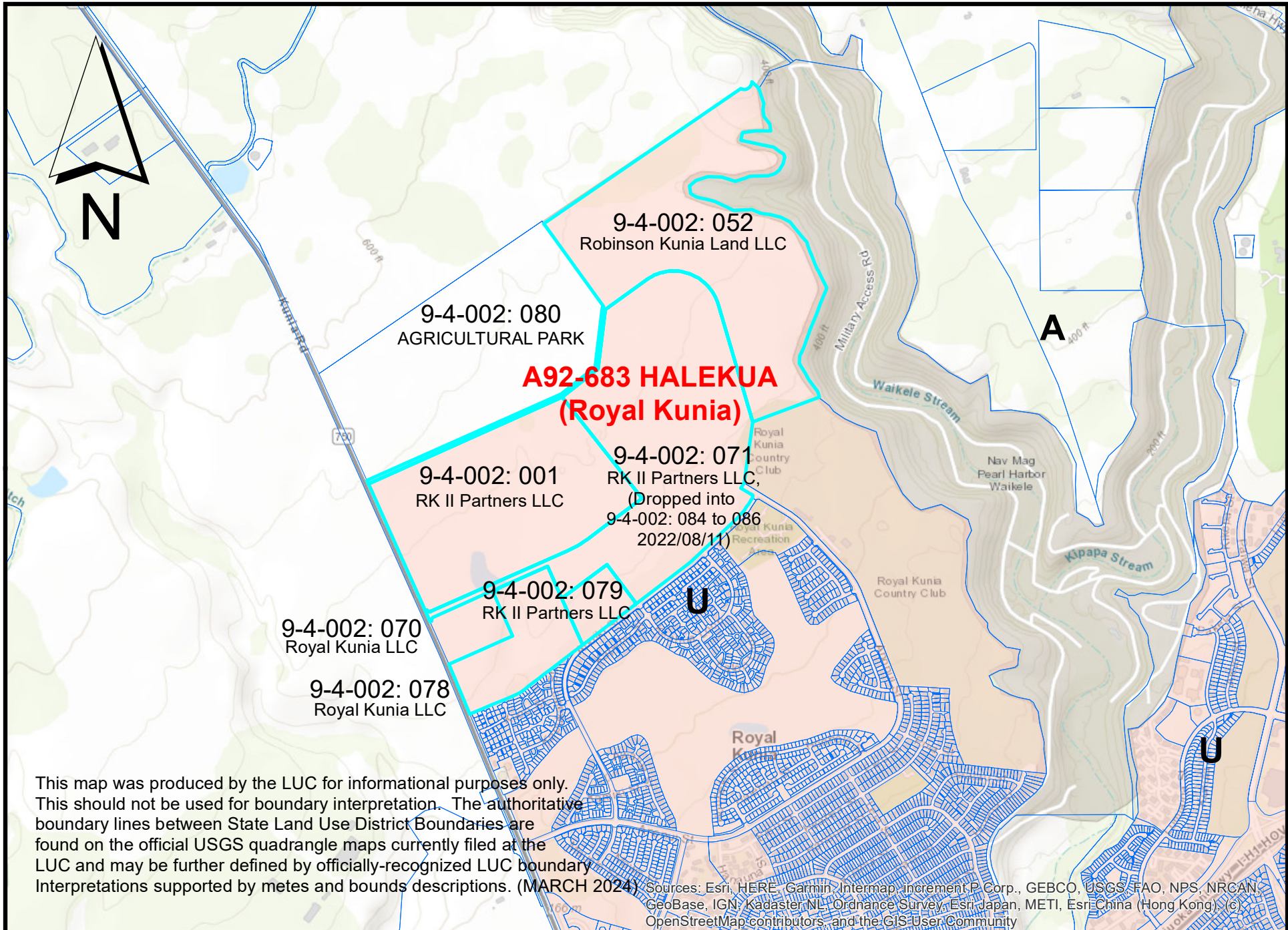
6. STAFF NOTES

Landowners in the Petition Area	
Haseko Royal Kunia LLC.	(1)9-4-002:070, 078, 084, 085, 086;2 (formerly 071)
Robinson Kunia Land LLC. Ho'ohana Solar LLC (Successor Petitioner)	(1)9-4-002:052
RKII Partners LLC.	(1)9-4-002: 001
RKES LLC.	(1)9-4-002:079
Department of Agriculture (Ag Park)	(1)9-4-002:080

See map attached to the end of the staff report

Staff concerns and possible points of questioning:

- Staff notes, that the Motion is supported by DOA, however, any further delay in delivering the waterline would not be in DOA’s best interest. The Department of Agriculture has been waiting since 1993 (31 years), resulting in the Agricultural Park’s slow and lack of development.
- Staff believes it is important to have information on the record regarding the applicability of conditions to other Petitioners involved in the Docket
- Staff notes that annual reports have not be received from Robinson Kunia Land or RKES LLC. The Commission received RKII Partners Annual report for 2022, Haseko consistently files their annual reports, and their Revised Master Plan was filed with the Commission in 2022.
 - o All other Peitioners have not filed their Revised Master Plans as required by Condition 19 of the 1996 Order
- Staff notes that bifurcation is a possible action if parties are interested in order to clean up/ straighten out the record
- OPSD does not offer independent analysis on sufficiency of the analysis that Petitioner presented in support of their Motion. OPSD should be asked - what is the basis of OPSDs conclusion that the Petitioner’s requested amendment is consistent with the Ka Pa’akai Decision?
 - o Has OPSD conferred with DLNR-SHPD regarding the cultural impact assessment that was cited as sufficient?



This map was produced by the LUC for informational purposes only. This should not be used for boundary interpretation. The authoritative boundary lines between State Land Use District Boundaries are found on the official USGS quadrangle maps currently filed at the LUC and may be further defined by officially-recognized LUC boundary Interpretations supported by metes and bounds descriptions. (MARCH 2024)

Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community