

DOCKET NO. DR24-77
RK II Partners LLC

PETITION FOR DECLARATORY ORDER

To consider a petition for declaratory ruling requesting the commission's opinion on whether the land classification for TMK No. (1) 9-4-002:001, approximately 123.712 acres located in the City and County of Honolulu, State of Hawai'i, can remain within the State Land Use Urban District in perpetuity

Staff Report

ACTION MEETING
October 9, 2024



Daniel E. Orodener
Executive Officer

Approved for Submittal: October 4, 2024

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1. EXPLANATION OF THE PROCEEDING BEFORE THE LAND USE COMMISSION

On August 2, 2024, the Land Use Commission (“LUC” or “Commission”) received a petition for declaratory order, DR24-77 (“Petition” or “DR Petition”) filed by RKII Partners LLC (“Petitioner” or “RKII”). The Petition asks the Commission to clarify language in its [2004 Order](#)¹ and then affirm that the interpretation of that language effectively sets the State Land Use District classification for their parcel to State Urban District in perpetuity.

The basis of the Petition is rooted in LUC Docket No. A92-683, which has a long and complicated history, which is summarized below. Significantly, LUC Docket No. A92-683 resulted in, among other things, the reclassification of approximately 504.865 (later amended to 503.886) acres of land (“Petition Area”). Today, the Petition Area is divided into multiple parcels of land, which are also known by their multiple Tax Map Key (“TMK”) numbers (1) 9-4-02:001, 052 (portion), 070, and 071, and which are owned by multiple entities. The instant Petition, however, relates *only* to the TMK No. (1) 9-4-002:001 (the “Parcel”), which is owned only by RKII.

Pursuant to the following discussion, staff of the LUC, with concurrence of the reviewing Deputy Attorney General assigned to this public meeting, recommends that the Commission DENY the Petition’s request in its entirety. Because there is no other question properly noticed and pending before the LUC, staff further recommends that the Commission decline to discuss or decide any issues that fall outside the narrow scope of this Petition.

BACKGROUND

Factual Background of LUC Docket No. A92-683

As stated above, LUC Docket No. A92-683 has a long and complicated history. Significant events providing context for the instant Petition are briefly summarized as follows:

- On December 9, 1993, the LUC issued a Decision and Order, in favor of Halekua Development Corporation (“Halekua”) reclassifying approximately 504.865 acres of land located in `Ewa, O`ahu (Petition Area) into the State Urban District (“[1993 Order](#)”). The 1993 Order was subject to conditions; specifically, “Condition 19” required Halekua to convey a 150-acre agricultural park to the State of Hawai`i; and provide off-site infrastructure to the agricultural park, pursuant to a Memorandum of Understanding between Halekua and the State Department of Agriculture. [RKII DR, pg. 3]
- On March 30, 1993 a [Memorandum of Understanding](#) was signed between Halekau and the State Department of Agriculture (DOA), required by Condition 22² in the 1993 D&O, requiring Halekua to convey a 150-acre agricultural park (Ag Park) to DOA and provide necessary off-site infrastructure to the Ag Park.

¹ In [Docket No. A92-683 Halekua Development Corporation](#) – Order Granting the Office of Planning’s Amended Motion to Exempt HRT, Ltd.’s Property From the Order to Show Cause Granted on February 26, 2003, Pursuant to the Stipulation Filed on December 30, 2003.

² This condition was originally Condition 22 in the 1993 D&O and later renumbered to Condition 19 in the LUC’s Amended Findings of Fact, Conclusions of Law, and [Decision and Order filed on October 1, 1996](#).

- On September 12, 1995, Halekua purchased 347.036 acres of the Petition Area, but not the proposed Ag Park site from the Robinson Estate.
- On September 19, 1995, the LUC issued an Order Granting Motion to Change Ownership Interest in the Petition Area ([1995 Order](#)). Halekua represented that the change in ownership would provide necessary funding allow Halekua to complete the residential portion of the Phase II Project and allow new owner HRT to complete the industrial portion of the Phase II Project.
- On April 5, 1996, Halekua conveyed approximately 123.712 acres of the Petition Area to HRT and related companies, and approximately 13.304 acres to HRT, Ltd. [RKII DR, pgs. 3-4]
- On June 25, July 2, and September 4, 1996, Halekua filed three successive motions to Amend the 1993 D&O to revise the Phase II Project by increasing the number of single family units, lowering the number of multi-family units, and eliminating the golf course. The LUC approved the amendments subject to 25 conditions, including the renumbered Condition 19 pertaining to the Ag Park, on October 1, 1996 ([1996 D&O](#)).
- Annual Reports in [1998](#), [1999](#), [2000](#), and [2001](#) all reported no progress on compliance with Condition 19 pertaining to the Ag Park.
- On July 11, 2001, Halekua conveyed approximately 36.660 acres of land to HRT.
- On October 15, 2002, OPSD filed a Motion For an Order to Show Cause to Rescind the Decision and Order dated on October 1, 1996, to revert the entire Petition Area to its former designation within the State Agricultural District. OPSD argued that Halekua had failed to secure financing for the proposed project and to convey the 150-acre Ag Park as required by Condition 19. And, that despite Halekua’s sale of a portion of the Petition Area, Halekua did not use the funds to obtain and transfer the Ag Park.
- On February 26, 2003, the LUC issued an Order to Show Cause ([OSC](#)) and set hearing dates on April 24-25, 2003. At the start of the hearing, Halekua notified the LUC that it had filed for voluntary bankruptcy. The LUC stayed its hearing indefinitely pending outcome of federal bankruptcy proceedings.
- On December 29, 2003, HRT entered into a stipulation ([Stipulation](#))³ with the State Office of Planning (“OPSD”)⁴ to insure that if Halekua failed to perform its obligation with respect to conveyance of the 150 acres of land for the agricultural park by January 31, 2004, then HRT would proceed to acquire the lands for conveyance to the State no later than February 28, 2004. In return, OPSD agreed to request that HRT lands within the Petition Area should not be reclassified for any use other than the present designation unless requested by HRT. [RKII DR, pg. 4]
- On January 12, 2004, OPSD filed a Motion to Exempt HRT, Ltd.’s Property From the Order To Show Cause Granted on February 26, 2003, Pursuant to the Stipulation Filed on December 30, 2003 (Motion to Exempt).
- On February 23, 2004, the LUC issued the [2004 Order](#), which granted OPSD’s Amended Motion to Exempt HRT, Ltd.’s Property from the Order to Show Cause Granted on February 26, 2003,⁵ Pursuant to The Stipulation filed on December 30, 2003. [RKII DR, pg. 4]

³ See OPSD Testimony, Attachment 2

⁴ For clarity we use the current acronym for the State Office of Planning and Sustainable Development; formerly known as the State Office of Planning.

⁵ The [2003 Order to Show Cause](#) was approved based on a petition by OPSD identifying failures by Halekua and successor landowners from performing conditions imposed and representations and commitments made to the Commission in obtaining reclassification of the Petition Area (see pg. 2, of 2003 Order))

- The 2004 Order contains language that clarified the LUC’s motion and Order that it was intended “...for the purposes of this Commission’s Order to Show Cause proceedings in this docket...” [[LUC Meeting Minutes, January 15, 2004](#), pgs. 7-8; RKII DR, pgs. 4-5]
- On February 27, 2004, HRT conveyed 150 acres to the State of Hawaii for an agricultural park. In 2023, Ho`ohana Solar 1, Inc. (“Ho`ohana”), a subsequent interested party in the Petition Area, completed the infrastructure to the agricultural park. [RKII DR, pg. 5]
- In 2021, RKII purchased the Parcel from HRT. [RKII DR, pg. 5]

Procedural Background Regarding the Petition

On June 26, 2024, Petitioner RKII filed a preliminary Petition for Declaratory Order, Verification of Petition, and Certificate of Service requesting the Commission to confirm that the subject parcel, Tax Map Key No. (1) 9-4-002:001 (the “Parcel”), by prior order, be designated as State Land Use Urban District, in perpetuity.

On July 3, 2024, the City and County of Honolulu, Department of Planning and Permitting (“County”) requested for an extension of time to respond to Petitioner’s filing until August 23, 2024.

On July 5, 2024, Commission staff, after review, responded to Petitioner’s preliminary filing. Staff identified that the filing was incomplete as it was not ADA compliant and failed to contain the required filing fee.⁶

On August 2, 2024, Petitioner resubmitted its Petition for Declaratory Order, Verification of Petition, and Certificate of Service, which was ADA compliant and included the required filing fee (“[DR](#)” or “[DR Petition](#)”).⁷

On August 7, 2024, Haseko Royal Kunia, LLC (“Haseko”) requested for an extension of time to respond to Petitioner’s filing until September 9, 2024.

On August 12, 2024, the State Office of Planning and Sustainable Development (“OPSD” or “State”) requested for an extension of time to respond to Petitioner’s filing until September 9, 2024.

On August 12, 2024, the Petitioner filed an Amended Certificate of Service.

On September 30, 2024, the Commission filed and mailed an Agenda and Notice of Meeting to the parties, and the Statewide, and O`ahu mailing and email distribution lists for a hearing to be held on October 9-10, 2024.

On September 30, 2024, Haseko filed its comments and recommendation on the Petition for Declaratory Order.

On October 4, 2024, Staff Report was made available for public review at the LUC’s office, posted to the LUC website, and distributed to commissioners. As of the date of this Staff Report, public

⁶ Pursuant to Hawai‘i Administrative Rules (“HAR”) § 15-15-45.1.

⁷ The subject Petition for Declaratory Order is designated DR24-77.

testimony is ongoing and can be found on the LUC website, here [Land Use Commission | DR24-77 RK II Partners LLC, Petition for Declaratory Order \(hawaii.gov\)](#) [Public comments tab].

A hearing is scheduled on October 9, 2024, on this matter.

2. PROCEDURE: DECLARATORY ORDER ANALYSIS

Standing

Pursuant to Hawai'i Revised Statutes ("HRS") § 91-8 and HAR § 15-15-98(a), an agency, including the Land Use Commission, may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the LUC to a specific factual situation on petition of an interested person.

Pursuant to HRS § 91-1, "persons" are defined to include "individuals, partnerships, corporations, associations, agencies, or public or private organizations." Pursuant to this subsection, as an owner of the property identified in the petition for declaratory order, RKII meets the definition of an interested person.

Form and Content Requirements

Pursuant to HAR § 15-15-99 the petitioner is required to meet several form and content provisions:

- (1) The name, address including zip code, and telephone number of each petitioner; [DR, pg. 2]
- (2) A statement of the petitioner's interest in the subject matter, including the reasons. for submission of the petition; [DR, pg. 2]
- (3) A designation of the specific statutory provision, rule, or order in question, together with a complete statement of the relevant facts and a statement of the issues raised or controversy or uncertainty involved; [DR, pgs. 3-5]
- (4) A statement of the petitioner's interpretation of the statute, rule or order or the petitioner's position or contention with respect thereto; [DR, pg. 5 Issue Presented; and pg. 10 Conclusion]
- (5) A memorandum of authorities, containing a full discussion of reasons and legal authorities in support of such position or contention. The commission may require the petitioner to file additional data or memoranda; [DR, pgs. 5-10]
- (6) The names of any other potential parties; [DR, pg. 10]
- (7) The signature of each petitioner; and, [DR, pg. 11]
- (8) A statement whether the petition for declaratory ruling relates to any commission docket for district boundary amendment or special permit, and if so~ the docket number and identification of all parties to the docket. [DR, pg. 10]

Petitioner's filing has met each of the required form and content provisions pursuant to HAR § 15-15-99. In addition, Petitioner has met the additional form and content requirements in HAR § 15-15-38 to -40. These later sections refer to format, verification of authorized signatory, and filing of paper original, one paper copy, and an electronic copy.

Three options for acting in a Petition for Declaratory Ruling:

HAR § 15-15-100(a), provides the alternative actions required of the Commission for processing a petition for declaratory order. Paraphrasing that subsection:

The Commission, within ninety days after submission of a petition for declaratory order⁸, shall deny the petition in writing, or issue a declaratory order on the matters contained in the petition, or set the matter for contested case hearing, as provided in § 15-15-103, HAR, provided that if the matter is set for hearing, the Commission shall render its findings and decision within one hundred twenty days after the close of the hearing.

The Commission is required to decide at this time whether it will: (1) deny the Petition; (2) issue a declaratory order; or (3) set the matter for contested case hearing.

Alternative Action 1: Dismiss or Deny Declaratory Ruling request

Pursuant to HAR § 15-15-101, the Commission may dismiss the DR Petition, without notice or hearing, if it deems that the Petition fails in material respect to comply with the declaratory order requirements of HAR subchapter 14. Staff has assessed that the DR Petition meets the minimum requirements for standing and form and contents. Thus, the Commission should *not* summarily dismiss the request for DR.

Pursuant to HAR § 15-15-100(a), the Commission, for good cause, may also deny the Petition and refuse to issue a declaratory order under four circumstances. Based on review of the Petition for Declaratory Order, staff has made the following assessment of the relevant criteria:

- 1) The question is not speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future.** [See HAR § 15-15-100(a)(1)(A).]

The Petition requests that the Commission clarify the meaning of language contained in its 2004 Order. Further, Petitioner asks the Commission to affirm Petitioner's position that the 2004 Order effectively grants State Land Use Urban District classification in perpetuity pursuant to HRS HRS §§ 205-2, -4, -16, and -17.

Therefore, the question is not speculative or purely hypothetical, and does involve facts that exist on the record.

- 2) The petitioner's interest is of the type which confers sufficient standing to maintain an action in a court of law.** [See HAR § 15-15-100(a)(1)(B).]

⁸ Petitioner submitted its petition for a declaratory ruling on August 2, 2024. The LUC has 90 days, until October 31, 2024, to deny the request, issue a declaratory order, or set the matter for a hearing. [See HAR § 15-15-100(a).]

Based on Petitioner’s declarations and information contained in the DR Petition, RKII appears to have standing pursuant to HRS §§ 91-1 and 91-8, in the event they elect to seek judicial relief.⁹

- 3) **The issuance of the declaratory order will not adversely affect the interest of the State, the Commission, or any of the officers or employees in any litigation which is pending or may reasonably be expected to arise.** [See HAR § 15-15-100(a)(1)(C).]

At this time, the Commission is not involved in any pending docket or litigation involving this particular issue, and the Commission does not anticipate that litigation is reasonably expected in this matter. Accordingly, there are no grounds to dismiss for this reason.

- 4) **The Petitioner does not request a ruling on a statutory provision that is not administered by the Commission, and the matter is otherwise within the jurisdiction of the commission.** [See HAR § 15-15-100(a)(1)(D).]

The subject Petition requests interpretation of a prior order of the Commission, as subsequently amended, and the applicability of the Commission’s statutory authority under HRS §§ 205-2, -4(g), -16, and -17, and HAR chapter 15-15. The authority to interpret its decisions and to redistrict State Land Use boundaries pursuant to the referenced statutes and rules is within the Commission’s statutory jurisdiction. Thus, the Commission has jurisdiction over the Petition.

In conclusion, none of the circumstances set forth in HAR § 15-15-100(a) is present. Therefore, the staff recommends the Commission find that it does not have good cause to dismiss or deny the declaratory ruling request pursuant to HAR § 15-15-100(a).

Alternative Action 2: Issue a Declaratory Ruling

On August 2, 2024, RKII, filed the subject Petition for Declaratory Order (the DR Petition). Section 15-15-100(a)(2), HAR, does not require the Commission to hold a hearing before it may issue a declaratory order on the DR Petition. If the Commission chooses to render a decision on the Petition, then an order must be prepared and adopted by the Commission within the 90-day statutory time period¹⁰—i.e., on or before October 31, 2024.

Staff recommends that the Commission make a determination on the Petition’s request for declaratory order.

Alternative Action 3: Schedule the Matter for a Contested Case Hearing

Sections 15-15-100(a)(3) and 15-15-103, HAR, allow the Commission, on its discretion, to conduct a contested case hearing on a petition for declaratory order. In order to do so, a petitioner or party in interest should set forth in detail why the matters alleged in the petition cannot be disposed of in

⁹ The LUC reserves the right to challenge standing, however, if a lawsuit is filed and further review demonstrates otherwise.

¹⁰ The 90-day time period for the Commission to take action would therefore end on October 31, 2024.

a fair and expeditious manner without a formal contested case hearing. Here, the Petitioner has not indicated that the DR Petition cannot be disposed of in a fair (non-prejudicial) and expedient manner without a contested case hearing.

Therefore staff recommends that the Commission exercise its discretion not to schedule the matter for a contested case hearing pursuant to HAR §§ 15-15-100(a)(3) and 15-15-103.

3. POSITION OF PETITIONER DR24-77 (RKII Partners)

RKII asks that the Commission consider a single issue: Whether to “clarify[y] and affirm[] that the land classification for the Parcel shall remain a State Land Use Urban District, in *perpetuity*.” [DR, pg. 5] RKII contends the Commission’s [2004 Order](#)¹¹ was ambiguous as to the future designation of the Parcel and the applicability of HRS §§ 205-2, -4(g), -16, and -17 as to the authority of the Commission to revert where there has been substantial commencement in use of the land.

RKII arguments set forth in the Petition ([DR](#)) appear to fall into three over-arching points in support of RKII’s position that the 2004 Order is ambiguous, and that (Petitioner believes) the context shows an intent for the Parcel to remain classified in the Urban District in Perpetuity.

- The 2004 Order contains language that creates ambiguity. RKII indicates that the language “...for the purposes of this Commission’s Order to Show Cause proceedings in this docket..” could be interpreted as the Parcel’s Urban District classification was limited only to the 2004 Order to Show Cause proceedings or if the classification [Urban District] continues in perpetuity. [RKII DR, pgs. 5-7]
- Reversion of the Parcel would need to comply with HRS §§ 205-2, 205-16, 205-17 and 205-4(g), provided the petitioner has not substantially commenced use of the property in accordance with its representations. RKII argues that they have substantially commenced use of the Parcel. Therefore, it would be next to impossible for the statutory requirements for reclassification (reversion) to be met. [RKII DR, pgs. 8-10] (As noted elsewhere, “substantial commencement” is a question that falls outside the scope of the Petition.)

As noted below, staff disagrees with all of these arguments and recommends that the LUC deny the Petition.

4. **PUBLIC COMMENTS ON THE PETITION**

SUMMARY OF POSITION OF THE COUNTY

¹¹ In Docket No. A92-683 Halekua Development Corporation – Order Granting the Office of Planning’s Amended Motion to Exempt HRT, Ltd.’s Property From the Order to Show Cause Granted on February 26, 2003, Pursuant to the Stipulation Filed on December 30, 2003.

County requested an extension of time to comment until August 23, 2024. No further comments have been provided as of posting date of Staff Report.

SUMMARY OF POSITION OF THE OPSD

OPSD requested an extension of time to comment until September 9, 2024. On October 3, 2024, OPSD submitted its comments, which provide a comprehensive analysis of the relevant issues for disposition. In short, OPSD argues that the 2004 LUC Order is clear and unambiguous, so no further clarification by the Commission is appropriate or necessary at this time.

As to each of the Petitioner’s three arguments, OPSD notes that: (1) “the 2004 Order was not required to be consistent with the intent of the Stipulation,” [OPSD Comments pg. 6, para. 4], that the LUC intentionally included the phrase “for the purposes of this Commission’s Order to Show Cause proceedings in this docket” [OPSD Comments pg. 7, para. 1], that the LUC provided that all other conditions “shall continue to run with the land” [OPSD Comments, pg. 7, para. 1], and that HRT agreed to the 2004 Order [OPSD Comments, pg. 7, para. 3].

SUMMARY OF POSITION OF HASEKO ROYAL KUNIA, LLC

On September 30, 2024, Haseko filed its comments and recommendation on the Petition for Declaratory Order. Haseko states that HRS § 205 does not provide the LUC authority to grant any land use district in perpetuity. [Haseko Response, pg. 1, para. 3] Haseko agrees with RKII that lands within the Petition Area have substantially commenced use of the land, although that question is outside the scope of the narrow issue presented by the Petition. Further, Haseko argues that the declaratory ruling should be reformed to clarify and affirm that the entire Petition Area has substantially commenced pursuant to HRS §205-4(g). [Haseko Response, pg. 1, para. 2] Again, any question regarding “substantial commencement” of activity on the *entire* Petition Area owned by *many* entities, and not just RKII, is outside the scope of the issue properly before the Commission pursuant to the subject Petition.

5. STAFF ANALYSIS

As a threshold matter, staff finds that pursuant to HRS § 91-1, as an owner of the property identified in the Petition for declaratory order (the Parcel), RKII meets the definition of an interested person. Therefore RKII has standing.

Next, pursuant to HAR §15-15-99, the petitioner is required to meet several form and content provisions. Petitioner’s filing has met each of the required form and content provisions pursuant to HAR § 15-15-99. In addition, Petitioner has met the additional form and content requirements in HAR § 15-15-38, -39, and -40.

Pursuant to HAR § 15-15-100(a), none of the circumstances is present to provide good cause to dismiss or deny the declaratory ruling request. First, Petitioner’s request that the Commission clarify the meaning of language contained in the Commission’s 2004 Order, is not speculative or purely hypothetical, and does involve facts that exist on the record. Second, at this time, the Commission is not involved in any pending docket or litigation involving this particular issue. Accordingly, there are no

grounds to dismiss for this reason. And third, the Petition requests interpretation of a prior order of the Commission and the applicability of the Commission’s statutory authority under HRS §§ 205-2, -4(g), -16, and -17, and under HAR chapter 15-15, both of which are matters within the Commission’s statutory jurisdiction. Therefore, pursuant to HAR § 15-15-100(a)(1)(D) the Commission may deny the Petition.

There is a lack of specific statutory authority or guidance granting the Commission the ability to grant or affirm State Land Use District boundaries in perpetuity. Petitioner has not shown good cause or provided legal authority or basis for their request. Staff has found no statutory, court ruling, or previous boundary reclassification that allows or establishes an in perpetuity designation. Thus, the Commission cannot affirm that a State Land Use District boundary classification is in perpetuity. Indeed, such a designation would frustrate the ability of landowners, the Commission, the State and the counties and their respective agencies from adequately responding to future events if State Land Use District boundaries, once established, were to remain unchangeable, in perpetuity. Thus, the Commission lacks authority to “affirm” that the Parcel is in the State Urban District in perpetuity.

The 2004 Order specifically clarified the language of the Commission’s motion in granting OPSD’s request and added language that was different from that contained in the HRT-OPSD Stipulated Agreement. And that clarifying language was that HRT lands within the Petition Area at the time of filing of the Motion shall not be reclassified to the Agricultural District **for purposes of this Commission’s Order to Show Cause proceedings...**”

Pursuant to HAR §15-15-82.1(3),

After the hearing, the commission may adopt the proposed stipulation, and if it adopts the stipulated decision and order the commission may amend, accept, modify or reject in part or in whole any of the findings of fact, conclusions of law, conditions of boundary amendment, and anything else contained in the stipulation[.]

In this instance, the Commission can and did amend language contained in the Stipulated Agreement in order to clarify their intent. Specifically, the Commission clarified that if HRT followed through in honoring the commitment (conveyance of 150 acres for an agricultural park), then their Parcel would not be considered for reclassification during the Order to Show Cause proceedings that had been granted in the 2003 Order.

Finally, as to Haseko’s requests that the issue presented be reformed to “clarify[y] and affirm [] that the entire petition area in A92-683 has substantially commenced pursuant to HRS §205-4(g)”—This request is outside the scope of the subject Petition that has been agendaized for a public meeting of the LUC to take place on October 9, 2024. Thus, any determination of this extraneous issue would violate Sunshine Law provisions. Staff notes that if the Commission is so inclined, it may direct Haseko to file its own petition for declaratory ruling on this request.

6. STAFF RECOMMENDATIONS

The singular issue for determination by the Commission is: Whether to “clarify[y] and affir[] that the land classification for the Parcel shall remain a State Land Use Urban District, *in perpetuity*.” [DR, pg. 5 (emphasis added)]. After discussion and based on advice from our deputy Attorney General the staff recommends that the Commission rule on the Petitioner’s request for declaratory ruling as follows:

- Petitioner RKII has standing to bring the DR Petition to the Commission.
- Petitioner RKII has met each of the applicable form and content requirements set forth in HAR chapter 15-15.
- RKII has not provided any legal basis or authority under which the Commission can grant a State Land Use District reclassification *in perpetuity*. Moreover, the LUC’s 2004 Order is clear and unambiguous, and HRT agreed to it. Accordingly, the Commission should DENY the Petition’s request for “clarification” in ites entirety.