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SUMMARY¹

SCAP 10-0000157 Dept. of Environmental Services v. Land Use Commission

I. Overview

Because the Waimanalo Gulch landfill (sometimes WGSL) is a use that is “other than agricultural,” a Special Use Permit (SUP) is required, in accordance with Hawai'i Revised Statutes (HRS) § 205-6. Because the site is greater than 15 acres in size, it is subject to the two-step process: SUP granted by the Planning Commission of the City and County of Honolulu, and then approval obtained from the LUC. Pursuant to § 205-6(d), the LUC may impose additional restrictions as may be necessary or appropriate in granting approval, including adherence to representations made by the applicant.

In the present case, the LUC approved the most recent SUP for the Waimanalo Gulch landfill, but added additional restrictions, including the requirement that the landfill cease accepting municipal solid waste (MSW) on July 31, 2012 (Condition #14). The Honolulu Department of Environmental Services (ENV) appealed the LUC's imposition of Condition #14, and on May 4, 2012, the Hawai'i Supreme Court issued its Decision, holding that the imposition of Condition #14 was not supported by substantial evidence in the record. The Court ordered the matter to be remanded back to the LUC for further proceedings.

II. History of Prior Permits

The first SUP for the Waimanalo Gulch site was issued in 1987, for 60.5 acres with 26 additional acres for accessory uses. Subsequent amendments and extensions were obtained over the following years.

¹ Updated from Summary originally provided in 2012.

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In 1989, the SUP was amended to expand the landfill by 26 acres, to allow for an administration building, weighing station, drainage structures, and access roads.

On June 9, 2003, ENV obtained a SUP that added 21 acres to the site, of which 14.9 acres were to be used for landfill expansion. This SUP required a May 1, 2008, closure date (Condition #10). The Planning Commission had recommended, but did require, that ENV submit an alternative site or sites to the City Council by December 31, 2003. The LUC, however, adopted the May 1, 2008, closure date and also required the City Council to select new site for a landfill by June 24, 2004/

After receiving an extension from the LUC on the deadline to select a new site, the City Council selected the Waimanalo Gulch as its future landfill site on December 1, 2004 (Resolution No. 04-348). At oral argument, ENV argued that the selection of Waimanalo Gulch as the future landfill site satisfied the LUC's requirement that a "new" site be selected because the Waimanalo Site was to be expanded, and therefore akin to a new site.

In 2007, ENV sought to amend the deadline to accept MSW under Condition #10 from May 1, 2008, to May 1, 2010, or until capacity was reached, whichever occurred first. On January 16, 2008, the Planning Commission granted the application to amend Condition #10 to extend the closure date as requested by ENV to May 1, 2010, or until capacity was reached. On May 7, 2008, the LUC adopted the Planning Commission's recommendations, but modified the deadline for accepting MSW to November 1, 2009.

III. The SUP at Issue in the Present Proceeding

On December 3, 2008, ENV sought a new SUP to supersede the existing SUP, to allow an expansion of the site to its current size of approximately 200 acres and to extend the time to

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accept MSW. After a contested case hearing, the Planning Commission recommended approval of the application, subject to 10 conditions, and also recommended withdrawal of the prior SUP (SUP File No. 86/ SUP-5) upon the new SUP (2008/ SUP-2) taking effect. The Planning Commission issued its decision on August 4, 2009, and did not impose any expiration date for the landfill's acceptance of MSW, effectively elimination any previous time limits on the landfill.

On October 22, 2009, the LUC adopted the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, with modifications. The application was granted subject to: (1) the withdrawal of SUP File No. 86/ SUP-5, provided that the conditions herein shall be incorporated to the extent they are consistent with and applicable to the LUC's decision; (2) the conditions imposed by the Planning Commission as modified as appropriate; and (3) the following relevant conditions:

14. Municipal solid waste shall be allowed at the WGS� up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012.
15. The Honolulu City Council through the City Administration shall report to the public every three months on the efforts of the City Council and the City Administration in regard to the continued use of the WGS�, including any funding arrangements that are being considered by the City Council and the City Administration.
16. The City Council and the City Administration shall have a public hearing every three months to report on the status of their efforts to either reduce or continue the use of the WGS�.

IV. Proceedings on Appeal

On November 19, 2009, ENV appealed the LUC's decision, specifically Condition #14, to the first circuit court. On September 21, 2010, the circuit court issued its decision affirming

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the LUC's decision, with some modification – namely, Conditions # 15 and # 16 were modified to delete reference to the City Council and City Administration, and substituted ENV in their places. Final Judgment was entered on October 19, 2010.

On November 12, 2010, ENV appealed the circuit court's decision to the Intermediate Court of Appeals. On July 14, 2011, after briefing was completed, ENV filed an application for transfer to the Hawai'i Supreme Court, which was granted.

ENV argued that there was not substantial evidence in the record to support the imposition of Condition #14 in that the LUC wholly adopted the Planning Commission's findings of fact, including findings that it would take seven years to identify and develop a new landfill site, and that even with H-POWER there would always be a need for handling emergency waste or other waste not suitable for H-POWER. The LUC argued that ENV had a history of failing to meet closure deadlines and failure to fulfill the previous conditions imposed by the LUC (such as the requirement to identify a "new" landfill site), and that testimony showed that once H-POWER is complete, which was expected by the end of 2011, the City would not need a daily operating landfill (testimony of Councilmember Apo), such that Condition #14 was supported by substantial evidence.

On May 4, 2012, the Hawai'i Supreme Court issued its decision, holding that Condition #14 was not supported by substantial evidence in the record. The Court found that the Planning Commission's findings of fact, which the LUC adopted, demonstrate the continuing need to dispose of MSW at WGS� beyond July 31, 2012.

The Supreme Court further held that the LUC's approval of 2008/SUP-2 was expressly "subject to" several conditions, including Condition #14 which is a material condition. The

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Court ruled that because Condition #14 cannot stand, the LUC's approval of 2008/SUP-2 also cannot stand because Condition #14 was a material condition. The Court ordered that the matter be remanded to the LUC for further hearings as the LUC deems appropriate. The Court held that the relevant question is whether the LUC would have reached the same conclusion (i.e., approving 2008/SUP-2) without the imposition of Condition #14; the Court was unable to make that determination, and thus remanded for further proceedings.

However, on June 28, 2011, ENV had also filed with the Department of Planning and Permitting a request to modify Condition #14 of 2008/SUP-2 by deleting the July 31, 2012, deadline to cease disposal of MSW; ENV sought to use WGSL until it reached its permanent capacity, as allowed by the Department of Health.² On May 15, 2012, ENV filed a "Notification of Supreme Court Decision or in the Alternative Motion for Stay of Contested Case Hearing" with the Planning Commission, asserting that due to the Hawai'i Supreme Court's decision overturning the LUC's decision, the Planning Commission lacks jurisdiction over that proceeding, or in the alternative, that the Planning Commission stay that proceeding pending the outcome of further proceedings before the LUC regarding 2008/SUP-2 on remand. The Planning Commission in fact stayed the proceeding and has taken no action since 2012.

With respect to this other proceeding pending before the Planning Commission, the Hawai'i Supreme Court noted:

We have been informed in pleadings filed by the LUC that on June 28, 2011, DES filed a "[r]equest for modification of condition 14 of SUP file No. 2008/SUP-2" with the Planning Commission, and that a contested case hearing is ongoing in the proceeding. On remand, we encourage the LUC to consider any new testimony developed before the Planning Commission in that case.

² A contested case hearing was held in that proceeding on December 7, 2011, January 11, 2012, February 8, 2012, March 7, 2012, April 4, 2012, April 11, 2012, and April 23, 2012

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(Decision, p.36 n.16).

V. Proceedings on Remand

The LUC received the remand for further proceedings consistent with the Hawai'i Supreme Court's decision. The Court encouraged the LUC to consider any new testimony developed before the Planning Commission in the case currently pending. The Court did not specify how that would be accomplished. In 2012, the LUC was advised that the LUC has the power to take official notice of those proceedings, and one option may be to request the record, or portions of the record containing new evidence, in that proceeding for the LUC's consideration of 2008/SUP-2 on remand. The LUC was also advised that it could request that the parties submit any new evidence introduced before the Planning Commission that is relevant to the LUC's reconsideration of 2009/SUP2. Alternatively, the LUC was advised, it could consolidate the two proceedings, provided the Planning Commission makes a determination and forwards the record to the LUC.³

On May 22, 2012, the LUC Chair sent a letter to the Planning Commission urging it to stay its proceedings on the new request to allow the LUC to remand the proceedings and records in File No. 2008/SUP-2 to the Planning Commission for consolidation with the new request.

³ Pursuant to HRS § 205-6(e), a copy of the Planning Commission's decision, together with the complete record of the proceeding before the county planning commission on all special permit request involving a land are greater than fifteen acres or for lands designated as important agricultural lands, shall be transmitted to the land use commission within sixty days after the decision is rendered. Within **fort-five days** after receipt of the complete record from the county planning commission, the land use commission shall act to approve, approve with modification, or deny the petition. Accordingly, the statute does not provide a deadline for reconsideration of 2008/SUP-2 on remand; however, there is a 45-day deadline for the LUC to issue a decision once the Planning Commission transmits the record of its current proceeding to the LUC.

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The Chair of the Planning Commission responded by letter dated May 29, 2012 indicating that the Planning Commission was not interested in consolidating the proceedings and also informing the LUC that the record in the new proceeding would be transmitted to the LUC for it to take official notice of so that it could act on its own in response to the Supreme Court's remand.

The LUC held further hearings and after briefing and argument in September 2012, on October 8, 2012, issued an Order Remanding County Special Use Permit File No. 2008/SUP-2 to the City and County of Honolulu Planning Commission. On May 16, 2014, the LUC met to receive a status report on the proceeding before the Planning Commission relating to File No. 2008/SUP-2. As a result, the LUC issued an Order on May 28, 2014, requiring written status reports on the proceeding every other month starting from July 2014..Since that time, no proceedings have been held by the Planning Commission, the parties have purportedly been in settlement discussions, and the landfill has continued operations.

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