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LAND USE COMMISSION
STATE OF HAWAII
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DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU

**BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII**

In the Matter of the Application of)	DOCKET NO. SP09-403
)	
DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU)	DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MOTION FOR RECONSIDERATION; MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION; CERTIFICATE OF SERVICE
)	
For a New Special Use Permit to supersede Existing Special Use Permit to allow a 92.5-acre Expansion and Time Extension)	
)	
For Waimanalo Gulch Sanitary Landfill, Waimanalo Gulch, Oahu, Hawaii,)	
)	
Tax Map Key Nos. (1) 9-2-003:072 and 073)	
)	

DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU'S MOTION FOR RECONSIDERATION

COMES NOW DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU, by and through its attorneys, GARY Y. TAKEUCHI and JESSE K. SOUKI, Deputies Corporation Counsel, and hereby respectfully requests that the Land Use Commission, State of Hawaii ("LUC"), reconsider its ORDER ADOPTING THE CITY AND COUNTY

OF HONOLULU PLANNING COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER WITH MODIFICATIONS, certified on October 22, 2009 (hereinafter "LUC ORDER"). Specifically, Applicant requests modification of Condition No. 14, and deletion of Condition Nos. 15 and 16, of the LUC ORDER.

This Motion is brought pursuant to Hawaii Administrative Rules Section 15-15-84 and the LUC's inherent power to reconsider its decisions, and is based upon the MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION and the record and files herein.

DATED: Honolulu, Hawaii, October 29, 2009.

Respectfully submitted,



GARY Y. TAKEUCHI

JESSE K. SOUKI

Deputies Corporation Counsel

Attorneys for Applicant

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

**BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I**

In the Matter of the Application of)	DOCKET NO. SP09-403
)	
DEPARTMENT OF ENVIRONMENTAL)	MEMORANDUM IN SUPPORT OF
SERVICES, CITY AND COUNTY OF)	MOTION FOR RECONSIDERATION
HONOLULU)	
)	
For a New Special Use Permit to supersede)	
Existing Special Use Permit to allow a 92.5-)	
acre Expansion and Time Extension)	
For Waimanalo Gulch Sanitary Landfill,)	
Waimanalo Gulch, Oahu, Hawaii,)	
Tax Map Key Nos. (1) 9-2-003:072 and 073)	
_____)	

**MEMORANDUM IN SUPPORT
OF MOTION FOR RECONSIDERATION**

COMES NOW DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (hereinafter, "Applicant" or "ENV"), by and through its attorneys, GARY Y. TAKEUCHI and JESSE K. SOUKI, Deputies Corporation Counsel, and hereby submits this memorandum in support of its motion for reconsideration of the State Land Use Commission's ("LUC") ORDER ADOPTING THE CITY AND COUNTY OF HONOLULU PLANNING COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER WITH MODIFICATIONS, certified on October 22, 2009 ("LUC ORDER"). Specifically, Applicant requests modification of Condition No. 14, and deletion of Condition Nos. 15 and 16, of the LUC ORDER.

I. RELEVANT FACTS

The following relevant facts are from the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER of the Planning Commission, City and County of Honolulu (“Planning Commission”), dated August 4, 2009 (“PC ORDER”). The PC ORDER is part of the record in this matter.

With its application, the Applicant sought a new Special Use Permit (“SUP”) for the use of the approximately 200.622-acre property (the “Property”), identified by Tax Map Key (“TMK”) Nos. (1) 9-2-003: 072 and 073, in Waimanalo Gulch, Oahu, Hawaii. See Application at Figure 1-1 and Planning Division Master Application Form. Applicant proposed expanding the 107.5-acre portion of the Property currently used as the Waimanalo Gulch Sanitary Landfill (“WGSL”) by the remaining approximately 92.5 acres. Id. Applicant concurrently sought to withdraw its existing SUP permit for approximately 107.5 acres, File No. 86/SUP-5, and the conditions imposed therein, if the new SUP permit was granted. See PC ORDER at 3, 4.

Of the approximately 92.5 acres in the expansion area, approximately 37 acres were proposed for use as new landfill cells. See Exhibit “A1.”¹ In addition, Applicant proposed that the expansion area include the development of landfill-associated support infrastructure, including drainage, access roadways, a landfill gas collection and monitoring system, leachate collection and monitoring systems, stockpile sites, a public drop-off center, a landfill gas-to-energy system and other related features. Id.; see also Application at Part I. The SUP was to cover the entire Property. See Application at Part I.

¹ Applicant introduced Exhibits “A1” through “A37,” which the Planning Commission accepted into the record during the contested case hearing at the Planning Commission. See Planning Commission Transcript (“PC Tr.”) at 6/22/09; PC Tr. 6/24/09; PC Tr. 7/1/09; PC Tr. 7/2/09; PC Tr. 7/8/09.

The Planning Commission conducted a contested case hearing on the Application on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009. The PC ORDER was issued on August 4, 2009. It was based on the evidence presented at the contested case hearing, the credibility of the witnesses testifying at the hearing, the proposed findings of fact, conclusions of law, and decisions and orders submitted by the parties and their respective responses thereto, and the written arguments of the parties. See PC ORDER at 1.

On August 11, 2009, the LUC received the PC ORDER and a portion of the record of the Planning Commission's proceedings on the Application. See LUC Staff Report, September 11, 2009 at 6. On August 20, 2009, the LUC received the remaining portion of the record. Id. Pursuant to Hawaii Revised Statutes ("HRS") Section 205-6(e) and Hawaii Administrative Rules ("HAR") Section 15-15-96(a), the LUC was required to approve, approve with modification, or deny the Application based on the record established at the Planning Commission within 45 days, or on or before Monday, October 5, 2009.²

At its meeting on September 24, 2009, the LUC considered the Application, and Commissioner Reuben Wong offered the following motion:

. . . I'd like to move that the special use permit application before us be granted with a number, a number of conditions such as that all of the conditions that were set forth in the '86 SUP be incorporated.

That is to say, for example, conditions dealing with blasting, with hours of operation, building a berm -- and I believe there are 19 of them, that we ultimately ended up with 19; subject also to the condition that solid waste be allowed at the Waimanalo Gulch but only up to July 31, 2012.

² Since the 45-day period under HRS Section 205-6 fell on a Sunday (October 4, 2009), the final day for the LUC to act on the Application was the following day. See HRS § 1-29.

Let me comment momentarily. I think the record indicates that the third [H-Power] burner would be built by around the end of 2011 but fully operational by July 31st, 2012.

Another condition would be that after July 31, 2012 only ash and residue from the H-Power be allowed to be placed on the Gulch. To make that clear, what we're saying is that no more municipal waste, no rubbish, trash, that sort of thing, save and except the ash and residue that may come from the H-Power plant.

Another condition is that the City Administration is a party in this case and the city council through the City Administration be required to report to the public every three months what the City Administration is doing and what the city council is doing with respect to the continued use of the Waimanalo Gulch.

Those reports shall also include what funding arrangements are being considered by the city council and the City Administration to fulfill whatever position they plan to report on.

By that I mean, for example, if they're gonna say that, 'We hope to reduce the amount of municipal waste on Waimanalo Gulch' that the report should indicate whether or not -- how it's going to be done, and whether or not there's money for it.

Another condition is that in reporting to the public that the city council and the Administration every three months would have a public hearing to report to the public the status of the attempt to either reduce or continue use of the Waimanalo Gulch so that it's not only publication through the media but there will be public hearings so that people can attend and the officials can face the public and tell them face-to-face, 'This is what we are going to do.'

So that, Mr. Chairman, is my motion. I know it's lengthy but hopefully with the second I can have further discussion.

See LUC Transcript at 9/24/09, 200:19–25, 201:1–25, 202:1–19. Commissioner Nicholas Teves seconded the motion. Id. at 202:20–21.

Subsequent to discussion by the LUC, the commissioners adopted the following motion by a 5 to 3 vote (Commissioner Vladimir Devins not present):

[A] motion to approve SP09-403 with all of the conditions recommended by Commissioner Wong, the exact verbiage of

which will be taken from the transcript for purposes of the Order.
So I won't try to summarize them here.

See id. at 221:7–12.

On October 22, 2009, the LUC adopted the written LUC ORDER as to form. The LUC ORDER granted the Application subject to “(1) the withdrawal of County Special Use Permit File No. 86/SUP-5 and LUC Docket No. SP87-362, provided that the existing conditions therein shall be incorporated to the extent they are consistent with and applicable to this decision and are not duplicative of any additional conditions imposed hereafter; (2) the conditions as recommended by the Planning Commission in County Special Use Permit File No. 2008/SUP-2 (LUC Docket No. SP09-403) and 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�.

See LUC ORDER at 4–9.

II. APPLICABLE LAW

A. The LUC Has the Power to Reconsider a Written SUP Order.

Because the subject SUP is for an area of land greater than fifteen (15) acres, the LUC must follow HRS Section 205-6(e), which provides as follows:

A copy of the decision, together with the complete record of the proceeding before the county planning commission on all special permit requests involving a land area 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 forty-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. A denial either by the county planning commission or by the land use commission, or a modification by the land use commission, as the case may be, of the desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii rules of civil procedure.

In carrying out the mandate of HRS Section 205-6, the LUC has inherent authority to reconsider a validly issued permit, such as an SUP. The Hawaii Supreme Court in Morgan v. Planning Dept., County of Kauai, 104 Hawai'i 173, 182 (2004), opined as follows:

[A]dministrative tribunals possess the inherent power of reconsideration of their judicial acts. . . . New York courts have balanced such consideration against the grave consequences that might follow if a decision once made were to be considered beyond recall or the public interest and the supervisory nature of the administrative agency's powers which warranted the finding of an implied power to reconsider. . . . [T]hese courts have found an implied power to reconsider absent express statutory grant or denial of such power where the latter considerations prevail.

Morgan, 104 Hawai'i at 183 (citations and internal quotation marks omitted).³

The LUC's enabling statute, HRS Section 205-6, requires that the LUC, among other things, make the final determination over SUPs for land the area of which is greater than fifteen (15) acres. In order to effectively regulate unusual and reasonable uses within agricultural and

³ Based on this reasoning, the Hawaii Supreme Court held as follows in Morgan:

The [Kauai County] Planning Commission has authority to reconsider a validly issued [special management area] SMA Use permit, inasmuch as the Planning Commission's enabling statute requires that the Planning Commission carry out the policies and objectives of the [coastal zone management act] CZMA and ensure its compliance. In order to effectively minimize any development that would reduce the size of any beach or public recreation area, the Planning Commission must maintain its jurisdiction over validly issued SMA Use permits.

Morgan, 104 Hawai'i at 182.

rural districts for properties of such size, the LUC must maintain jurisdiction over validly issued SUPs. The LUC's rules provide several mechanisms that allow the LUC to maintain its jurisdiction over validly issued SUPs, including conditions to enforce representations or commitments under HAR Section 15-15-93, and procedures for modification or deletion of conditions or orders under HAR Section 15-15-94. In particular, HAR Section 15-15-84 ("Reconsideration Rule"), provides as follows:

Reconsideration of decision. (a) A motion for reconsideration shall be filed with the commission within seven calendar days after issuance of the commission's written decision and order. The motion for reconsideration shall clearly specify that the motion is for reconsideration.

(b) The motion for reconsideration shall state specifically what points of law or fact the commission has overlooked or misunderstood together with brief arguments on the points raised.

(c) In no event will the commission consider any motion for reconsideration on any petition after the period within which the commission is required to act on the petition.

B. LUC Decisions Must be Based on the Record Before it.

The LUC must make its decision based on the record developed below at the Planning Commission. The Hawaii Supreme Court described the SUP process as follows in Maha'ulepu v. Land Use Commission, 71 Haw. 332 (1990):

HRS Section 205-6 and Hawaii State Land Use Commission Rule 15-15-95 require automatic review by the LUC of a special permit granted for a parcel of land greater than 15 acres. **The LUC reviews the special permit based on the record developed in the planning commission proceeding and upon the memoranda and arguments before the LUC.**

Id. at 334–35 (emphasis added). Thus, according to the Supreme Court of Hawaii, the LUC’s role is appellate in nature. Under the special permit’s “appeal-like” procedure, the LUC must make its decision based on the evidence on the record.⁴

III. ARGUMENT

A. **Reconsideration of Condition No. 14 is Necessary, Because the Record is Clear That There Will Always be Material That Cannot be Combusted, Recycled, Reused, or Shipped; Therefore, a MSW Landfill Disposal Option is Required After July 31, 2012.**

Condition No. 14 of the LUC ORDER provides as follows:

14. Municipal solid waste shall be allowed at the WGSL up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGSL after July 31, 2012.

This condition, which would not allow any MSW or other waste, except for H-POWER ash and residue, to be disposed of at WGSL after July 31, 2012, is not supported by the substantial evidence in the record before the LUC, as confirmed in the PC ORDER. Therefore, it appears that the LUC may have overlooked or misunderstood certain facts established in the record, and pursuant to HAR Section 15-15-84(e) and the LUC’s inherent powers, the LUC ORDER should be reconsidered, and Condition No. 14 modified, at least with regard to specific categories of waste, as discussed below.

The record of the Planning Commission’s proceedings established the following findings of fact, as set forth in the PC ORDER. The WGSL is a critical part of the City’s overall integrated

⁴ See, e.g., Stewart v. Smith, 4 Haw. App. 185 (1983) (Court of Appeals would not consider proposed findings not shown in record); Pickering v. State, 57 Haw. 405 (1976) (Supreme Court of Hawaii would not consider evidence filed with the trial court after the entry of summary judgment, because evidence outside the trial record may neither be appended nor referred to in the appellate brief); Orso v. City and County of Honolulu, 55 Haw. 37 (1973) (Supreme Court of Hawaii would not consider matters outside the trial record, unless settled and approved by the trial court), citing, 3A Barron & Holtzoff, FEDERAL PRACTICE & PROCEDURE § 1590 (Rules ed. 1958) (states the general rule: “Matters not appearing in the record will not be considered by the court of appeals, unless the occurrence thereof is conceded by the parties. Thus a question involving evidence not in the record cannot be reviewed on appeal.”).

solid waste management efforts (see PC ORDER ¶ 91, citing PC Tr. 7/1/09 at 181:4–18), and a critical portion of Applicant’s overall Integrated Solid Waste Management Plan, which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for materials that cannot be recycled or burned for energy. See PC ORDER ¶ 95, citing PC Tr. 7/1/09 at 178:10–18; 181: 7–18. The WGSL is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER. See PC ORDER ¶ 94, citing PC Tr. 7/1/09 at 181:20–183:4.

Furthermore, Applicant is actively reducing waste volumes that are directed to the WGSL. See PC ORDER ¶ 100; see also PC Tr. 7/1/09 at 185:8–14. For example, Applicant is expanding its H-POWER plant with a third boiler, which is expected to increase the facility’s capacity by an additional 300,000 tons of MSW per year by late 2011 or early 2012. See PC ORDER ¶¶ 100, 101, citing PC Tr. 7/1/09 at 185:8–25. Applicant is also in the process of completing full implementation of its island-wide, curbside recycling program by May 2010, in addition to its program of community recycling bins. See PC ORDER ¶ 100, citing PC Tr. 7/1/09 at 186:7–13, 187:13–18. Applicant’s facility at the Sand Island Wastewater Treatment Plant turns bio-solids into fertilizer pellets, so that such material may be reused for golf course fertilizer. See PC ORDER ¶ 100, citing PC Tr. 7/1/09 at 189:5–18. Applicant’s other initiatives include a procurement of a new green waste recycling facility that will accept food waste and sewage sludge, as well as a request for technology demonstration proposals to explore alternate technologies. See PC ORDER ¶ 100, citing PC Tr. 7/1/09 at 188:22–25, 194:11–25.

Despite Applicant’s efforts to minimize the need for a landfill, however, the continued availability of WGSL is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, to dispose of the waste that exceeds the capacity of H-POWER or

transshipment, for clean up in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped. See PC ORDER ¶ 92, citing PC Tr. 7/1/09 at 181:9–18; 182:2–4, 10–17; 197:2–22; see also PC Tr. at Tr. 7/1/09 at 181:24–5, 182:1–9; Exhibit “A1” at 1-6; Exhibit “A1” at Table 1-3, p. 7, ¶ 11; Exhibit “A23” at 4, ¶ 20.

Accordingly, based on the record of the Planning Commission’s decision, as submitted to the LUC and as set forth in the PC ORDER, Applicant requests that the LUC reconsider the LUC ORDER, and modify Condition No. 14 to allow the disposal of the following types of wastes at WGSL after July 31, 2012.

1. Disaster Debris.

Mr. Frank Doyle (“Doyle”), Chief of the ENV Refuse Division, testified that a landfill is critically necessary for the management of solid waste during natural disasters and other contingencies. See PC Tr. 7/1/09 at 197:19–22; see also Exhibit “A1” at 1-34, 1-35, 1-41. This testimony was uncontroverted. Indeed, even a witness for the Intervenors agreed that the use of WGSL for disaster debris management was appropriate. See PC Tr. 7/2/09 at 219:5–9 (Testimony of Todd K. Apo: “...just recognize that, if we have a disaster, we are going to have some trucks coming back through here [WGSL], okay, I think that’s something that’s acceptable to the community. I think it’s a rational and doable process for the city, and so that’s where my view of the solution is.”). The Planning Commission made a finding to this effect. See PC ORDER ¶ 92, citing PC Tr. 7/1/09 at 197:2–22.

However, despite this evidence, the LUC ORDER does not allow for the use of WGSL for disaster debris disposal after July 31, 2012, suggesting that perhaps the LUC may have overlooked or misunderstood the facts on the record. HAR § 15-15-84(b). Should a major disaster occur after July 31, 2012, the ability of the Applicant to properly respond to the event

and manage disaster debris could be severely compromised without the ability to utilize WGSL for the disposal of such debris.

Therefore, modification of Condition No. 14, to allow disaster debris to be disposed at WGSL after July 31, 2012, is appropriate and fully supported by substantial evidence on the record before the LUC. Conversely, to the extent Condition No. 14 does not allow for the disposal of disaster debris at WGSL after July 31, 2012, it is not supported by the evidence in the record.

2. Special Wastes.

Doyle also testified that certain items that cannot be recycled or burned at H-POWER are disposed of at WGSL. These include, but are not limited to, screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels. See PC Order ¶ 97, citing PC Tr. 7/1/09 at 180:10–21; see also PC Tr. 6/24/09 at 77:16–25, 78:1–5; Exhibit “A1” at 4-22 to 4-24; Id. at Section 9.5.10. This testimony was not controverted. Again, the Planning Commission made a finding to this effect. See PC ORDER ¶ 97, citing PC Tr. 7/1/09 at 180:10–21. Furthermore, there was evidence on the record that these special wastes cannot be shipped. See e.g. PC Tr. 6/22/09 at 55:3–17; Exhibit “A1” at 1-3 (“Transshipment is a potential alternative that can reduce the need for a municipal sanitary landfill, but cannot completely replace it[.]”); Id. at Section 9-18 (“[N]ot all waste can be shipped off-island.”). The byproduct of future alternative technologies may also include residue that must be disposed of in a landfill. See Exhibit “A1” at 1-3, 9-21. However, despite this evidence, the LUC ORDER does not allow for the disposal of special wastes at WGSL after July 31, 2012, suggesting that perhaps the LUC may have overlooked or misunderstood the facts on the record. HAR § 15-15-84(b).

Therefore, modification of Condition No. 14, to allow special wastes to be disposed at WGS� after July 31, 2012, is appropriate and fully supported by substantial evidence on the record before the LUC. Conversely, to the extent Condition No. 14 does not allow for the disposal of special waste at WGS� after July 31, 2012, it is not supported by the evidence in the record.

3. Permit Condition to Operate H-POWER and Interim Off-Island Shipping.

Condition No. 14 allows Applicant to continue to dispose of ash and residue from H-POWER beyond July 31, 2012, which is appropriate, as the evidence on the record established that the State Department of Health (“DOH”) solid waste permit for H-POWER requires that this material be deposited at a permitted landfill. See PC ORDER ¶ 92, citing PC Tr. 7/1/09 at 181:9-18; 182:2-4, 10-17; 197:2-22. Similarly, the DOH solid waste permit for the interim off-island shipment of waste requires that a permitted waste disposal option also be in place. The uncontroverted testimony of Doyle was that this option is WGS�. See PC ORDER ¶ 92, citing PC Tr. 7/1/09 at 182:10-17; see also Exhibit “A26”

The permits’ requirement that a landfill disposal option be available for H-POWER and interim off-island shipment of waste is based on the need to ensure proper disposal of waste that is diverted from those facilities due to routine maintenance or to accommodate unanticipated closures, or because the amount of waste is in excess of the capacity of those facilities. See PC Tr. 6/24/09 at 73:20-25; see also PC Tr. 7/1/09 at 33:-17, 181:11-13; Exhibit “A1” at 9-6. This need will continue beyond July 31, 2012, and in the case of H-POWER, could represent a significant amount of waste if the entire facility were to shut down even for a few days.⁵ In order to ensure that contingencies such as routine maintenance or unanticipated closures can be

⁵ With the third boiler in operation at H-POWER, the amount of waste being diverted to landfill disposal from that facility is expected to be fairly limited. See PC Tr. 7/1/09 at 201:13-16.

properly managed, the ability to utilize WGSL for waste diversions in such instances is necessary.

Consequently, there will always be a need for an MSW landfill, even with programs that divert waste from landfill disposal. See PC ORDER ¶ 93, citing Application at 2–6; see also PC Tr. 7/1/09 at 181:9–13. However, despite the evidence on the record, the LUC ORDER does not allow for the disposal at WGSL of MSW that cannot be processed by H-POWER or the interim shipping of waste program after July 31, 2012, suggesting that perhaps the LUC may have overlooked or misunderstood the facts on the record. HAR § 15-15-84(b).

Therefore, modification of Condition No. 14, to allow MSW to be disposed at WGSL after July 31, 2012, when necessary because either H-POWER or the interim shipping of waste program are unable to fully process such waste due to routine maintenance or unanticipated closures, or because the amount of waste is in excess of the capacity of those facilities, is appropriate and fully supported on the record before the LUC. Conversely, to the extent Condition No. 14 does not allow for the disposal of MSW from H-POWER and the interim shipping program at WGSL after July 31, 2012, under the conditions discussed, it is not supported by the evidence in the record.

Consistent with the foregoing, Applicant respectfully requests that the LUC reconsider and modify Condition No. 14 of the LUC ORDER to read as follows:

14. Disposal of municipal solid waste shall be allowed at the WGSL up to July 31, 2012, provided that after July 31, 2012, only ash and residue from H-POWER, municipal solid waste that cannot be processed by H-POWER or the interim program of off-island waste shipment due to facility closures or waste in excess of capacity, special wastes, ash and residue from future alternative technologies, and disaster debris, shall be allowed to be disposed at WGSL.

As modified, Condition No. 14 would be supported by the evidence in the record.

B. Reconsideration and Deletion of Conditions 15 and 16 are Necessary, Because These Conditions are Outside the LUC's Jurisdictional Limits.

The LUC ORDER, at Condition Nos. 15 and 16, provides as follows:

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�.

Upon judicial review, the circuit court will determine whether the LUC's decision is, *inter alia*, "[i]n excess of the statutory authority or jurisdiction of the agency[.]"

HRS § 91-14(g).⁶ Conditions 15 and 16 are clearly in excess of the LUC's jurisdiction, because it would compel the legislative branch of the City and County of Honolulu to act; *i.e.*, to report and conduct hearings.

The LUC is a creature of the legislature empowered and created by HRS Chapter 205. The legislature clearly did not grant, nor could it grant, authority to direct the legislative branch of a county to act. Article XIII, Section 2 of the Constitution of the State of Hawaii, provides as follows:

Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

The LUC does not have authority to enact general laws. Therefore, the LUC cannot direct the City Council to hold hearings or report on its deliberations.

⁶ See also Patricia E. Salkin, 1 AM. LAW. ZONING § 5:25 (5th ed. 2009) ("Planning boards possess only those powers and duties that are delegated by statutes, municipal charters, or local ordinances.")

Even if the LUC possessed legislative authority over counties, requiring the City Council to invoke its legislative powers has no reasonable relationship to “protective restrictions” on the permitted land use allowed by the SUP. Under HRS Section 205-6, the LUC is “authorized the exercise of discretion to condition the permitted use upon ‘protective restrictions[.]’” Perry v. Planning Commission of Hawaii County, 62 Haw. 666, 682, 619 P.2d 95, 106 (1980). Such conditions will be upheld when those “conditions are imposed for the protection or benefit of neighbors to ameliorate the effects of [granting the SUP].” Id. at 681–2. It is not clear from the record how requiring the legislative branch to hold a hearing on its future land use decisions will protect neighbors or ameliorate the effects of the WGSL, particularly when considering that hearings do not mitigate the effect of the actual use permitted by the SUP. By comparison, Condition 1 of the LUC ORDER directly ensures that impacts of the permitted landfill use are mitigated by requiring that ENV complies with regulations related to “improvements involving access, storm drainage, leachate control, water, well construction, and wastewater disposal.”⁷

Moreover, if, in making his motion, the intent of Commissioner Wong was to require public hearings and accountability, Condition No. 6 of the LUC ORDER already accomplishes this objective.⁸ Condition No. 6 requires annual reports to the Planning Commission and LUC

⁷ Condition 1 of the LUC ORDER provides as follows:

1. The Applicant shall obtain all necessary approvals from the State Department of Health, Department of Transportation, Commission on Water Resource Management, and Board of Water Supply for all onsite and offsite improvements involving access, storm drainage, leachate control, water, well construction, and wastewater disposal.

⁸ Condition 6 of the LUC ORDER provides as follows:

6. The Applicant shall provide, without any prior notice, annual reports to the Planning Commission and the Land Use Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGSL’s operations, and Applicant’s compliance with the conditions imposed herein. The annual reports also shall address the Applicant’s efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The annual reports shall be submitted to the Planning Commission and Land Use Commission on June 1 of each year subsequent to the date of this Decision and Order.

regarding (1) the status of identifying and developing new landfill sites on Oahu, (2) WGSL's operations, (3) Applicant's compliance with the conditions imposed in the LUC ORDER, (4) Applicant's efforts to use alternative technologies, as appropriate, and (5) Applicant's efforts to seek beneficial re-use of stabilized, dewatered sludge. As with the 6-month reports required by the former SUP permit, public hearings can be held on the annual reports submitted by Applicant. Accordingly, a procedure for regular reporting and public hearings already exists within the LUC ORDER.⁹

For the above reasons, the LUC's decision is clearly *ultra vires*, and Condition 15 and 16 should be struck from the LUC ORDER as void.

IV. CONCLUSION

In light of the foregoing, the Applicant respectfully requests that the LUC grant the subject MOTION FOR RECONSIDERATION of the LUC ORDER, modifying Condition No. 14, and deleting Condition Nos. 15 and 16, of the LUC ORDER, as proposed herein.

DATED: Honolulu, Hawaii, October 29, 2009.

CARRIE K. S. OKINAGA
Corporation Counsel

By


GARY Y. TAKEUCHI
JESSE K. SOUKI

Deputies Corporation Counsel
Attorneys for Applicant

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY
OF HONOLULU

⁹ Under the current SUP permit, Applicant has been reporting to the LUC every 6 months and would be willing to do the same under Condition 6 of the LUC ORDER if the LUC so desires.

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Application of) DOCKET NO. SP09-403
)
DEPARTMENT OF ENVIRONMENTAL) CERTIFICATE OF SERVICE
SERVICES, CITY AND COUNTY OF)
HONOLULU)
)
For a New Special Use Permit to supersede)
Existing Special Use Permit to allow a 92.5-)
acre Expansion and Time Extension)
For Waimanalo Gulch Sanitary Landfill,)
Waimanalo Gulch, Oahu, Hawaii,)
Tax Map Key Nos. (1) 9-2-003:072 and 073)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE **DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MOTION FOR RECONSIDERATION** and **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION** was duly served by either hand-delivery or U. S. Mail, postage prepaid, by certified mail, return receipt requested, to the following on the date below, addressed as follows:

	<u>Mail</u>	<u>Delivery</u>
COLLEEN HANABUSA 220 South King Street, Suite 1230 Honolulu, Hawaii 96813	X	

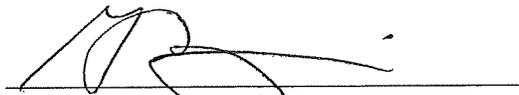
Mail

Delivery

DEPARTMENT OF PLANNING AND PERMITTING
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813

X

DATED: Honolulu, Hawai'i, October 29, 2009.



GARY Y. TAKEUCHI

JESSE K. SOUKI

Deputies Corporation Counsel

09-01760.003/96368