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DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

STATE OF HAWAII

In the Matter of the Application of	)	DOCKET NO. SP09-403
)	
DEPARTMENT OF ENVIRONMENTAL	)	DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF	)	SERVICES, CITY AND COUNTY OF
HONOLULU	)	HONOLULU'S BRIEF IN SUPPORT OF
	)	THE LAND USE COMMISSION OF THE
To delete Condition No. 14 of Special Use	)	STATE OF HAWAII RETAINING
Permit No. 2008/SUP-2 (also referred to as	)	JURISDICTION IN DOCKET NO. SP09-403;
Land Use Commission Docket No. SP09-403)	)	DECLARATION OF TIMOTHY E.
which states as follows:	)	STEINBERGER; EXHIBITS "A - F;"
	)	CERTIFICATE OF SERVICE
"14. Municipal solid waste shall be allowed at)	
the WGSF up to July 31, 2012, provided that)	
only ash and residue from H-POWER shall be)	
allowed at the WGSF after July 31, 2012.")	

DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU'S BRIEF IN SUPPORT
OF THE LAND USE COMMISSION OF THE STATE OF
HAWAII RETAINING JURISDICTION IN DOCKET NO. SP09-403

Comes now Petitioner DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU ("ENV"), by and through its attorneys,

2012 JUL 19 P 3:53

LAND USE COMMISSION
STATE OF HAWAII

12 JUL 20 PM 2:02

DEPARTMENT OF
ENVIRONMENTAL SVCS

RECEIVED

ROBERT C. GODBEY, Corporation Counsel, and DANA VIOLA and R. BRIAN BLACK, Deputies Corporation Counsel, pursuant to the Land Use Commission of the State of Hawaii ("LUC") Order Granting Applicant's Oral Motion To File Written Briefs dated June 12, 2012.

ENV respectfully requests that the LUC retain jurisdiction in Docket No. SP09-403. There is no reason to remand this proceeding to the City and County of Honolulu Planning Commission ("Planning Commission"). The Hawaii Supreme Court only struck down one condition of ENV's Special Use Permit File No. 2008/SUP-2 ("SUP-2")—the July 31, 2012 deadline in Condition 14—because it was not supported by substantial evidence in the record. *Dept. of Env't'l Servs. v. Land Use Comm'n*, SCAP-10-0000157 (May 4, 2012).¹ The Court remanded the entire SUP-2 to the LUC to address whether Condition No. 14 was a material condition for approval of SUP-2. The Planning Commission cannot answer that question because the LUC imposed Condition No. 14, not the Planning Commission. As directed by the Hawaii Supreme Court, however, the Planning Commission has provided the LUC the record of its stayed proceeding to modify Condition No. 14 and expressly stated that it considers remand unnecessary. Remand to the Planning Commission would serve no purpose in furtherance of the Hawaii Supreme Court's decision.

In the alternative, if the LUC elects to remand Docket No. SP09-403 to the Planning Commission, ENV respectfully requests that the LUC limit the scope of the remand to the sole issue considered by the Court – the deadline, if any, for the Waimanalo Gulch Sanitary Landfill ("WGSL" or "the landfill") to accept municipal solid

¹ The opinion is attached as Exhibit "A."

waste (“MSW”).² While the Planning Commission might be in a position to begin deliberations regarding the MSW deadline if the LUC remands SUP-2—which it should not—the Planning Commission’s proceeding has been limited to that singular issue. Nothing in the Hawaii Supreme Court’s opinion should be construed to permit Intervenor on remand to revisit every aspect of SUP-2 from landfill design to cultural impact.

I. BACKGROUND

A. ENV’s Application for a SUP To Expand WGSL.

The WGSL property is located at Waimanalo Gulch, O‘ahu, Hawai‘i, Tax Map Key Nos. (1) 9-2-03: 72 and 73 (the “Property”) and consists of approximately 200 acres. A portion of the Property has been operated as a City landfill subject to a special use permit (“SUP”) since 1989. WGSL is the only permitted public MSW landfill on the island of O‘ahu and the only permitted repository for the ash and residue produced by the City’s H-POWER waste-to-energy facility.

Since 1989, as more of the Property has become needed for landfill use, additional environmental reviews and studies have been conducted, and the SUP has been extended and expanded. An SUP was necessary for the expansion of the landfill because it is located on City-owned property in the State Agricultural District. Pursuant to Hawaii Revised Statutes (“HRS”) § 205-6, certain unusual and reasonable non-agricultural uses, such as a municipal landfill, are allowed within the Agricultural District with a SUP. This case arises from ENV’s latest application for a SUP for the final expansion of WGSL by approximately 92.5 acres.

² Municipal solid waste is generally household waste. However, the landfill is also permitted to accept certain other wastes, including non-hazardous industrial waste and special waste.

1. **ENV's Application to the City Department of Planning and Permitting.**

Under HRS § 205-6, an SUP application for land area greater than fifteen acres must first be approved by the Planning Commission and then by the LUC, which may approve, modify or deny the Planning Commission's decision.

On December 3, 2008, ENV filed an application with the City Department of Planning and Permitting ("DPP") for a new SUP to supersede the then-existing SUP, to expand the 107.5-acre portion of the Property being used as a landfill by the remaining approximately 92.5 acres. ENV concurrently sought to withdraw its then-existing SUP permit for the 107.5 acres (File No. 86/SUP-5) if the new SUP permit was granted (the "Application"). DPP processed the Application, designated as SUP-2, and recommended to the Planning Commission that the Application be approved with conditions.

2. **Planning Commission Proceedings.**

After receipt of DPP's recommendation, 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. On July 31, 2009, the Planning Commission recommended approval of the Application subject to ten conditions, and further recommended approval of the withdrawal of the prior SUP for WGSL (SUP File No. 86/SUP-5) upon SUP-2 taking effect, and that all conditions previously placed on the Property under SUP File No. 86/SUP-5 would then be null and void.

The decision of the Planning Commission was set forth in its Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009 ("Planning Commission Order"). See Planning Commission Order attached hereto as Exhibit "B." The Planning Commission Order 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. The Planning Commission Order contained the following relevant Findings of Fact which were supported by citations to the record:

33. [Chief of the City Department of Environmental Services, Refuse Division] Mr. Doyle testified that the Applicant will begin in 2010 efforts to identify and develop a new landfill site to supplement WGSF.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site.

91. The proposed expansion of the landfill within the Property is needed because WGSF is a critical part of the City's overall integrated solid waste management efforts.

92. Continued availability of WGSF is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu.

94. WGSF is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER.

95. WGSF is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. The ISWMP is required by State law and approved by DOH after public comments. One theme of the ISWMP is to minimize landfill disposal.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGSF. These amounts fluctuate based on such things as recycling and the economy. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGSF each year.

97. Other items that cannot be recycled or burned at H-POWER are deposited at WGSF, such as 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.

101. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSF.

See Exhibit "B," at pgs. 8, 18-20.

The Planning Commission Order did not contain any expiration date for the SUP or any deadline to cease the acceptance of MSW at WGSF. Commissioner Kerry Komatsubara ("Komatsubara"), who authored the Planning Commission Order, explained that "[t]he term or the length of the new SUP shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of 'X' number of years." See Meeting of the Planning Commission Transcripts, July 31, 2009, attached hereto as Exhibit "C," at p. 2. Komatsubara found that ENV had "demonstrated that we need a landfill. I think it's pretty obvious; we need a landfill on this island for us to move forward...it would not be in the community's best interest if we were to close this landfill

before we find another landfill.” Id. at 3. Komatsubara further explained his reasoning as follows:

In my opinion, simply putting on a new closure date to this new SUP will not lead to the closure of the Waimanalo Gulch Sanitary Landfill. I believe that the focus should not be on picking a date. The focus should be on how do we get the City to select a new site because you’re not going to close this landfill until you find another site. I don’t think it’s in the interest of our community not to have a landfill.

So what this proposal does is, it says look, [ENV] can keep [WGSL] open until your [*sic*] full, until you’ve reached the capacity, but you have an obligation starting from next year [2010] to start looking for a new site. Now whether you take it seriously or not, that’s up to you because we have the power to call you in, and you have the obligation now to report every year on what you’re doing to find a new landfill site whether it be a replacement site or supplemental site or both. We have the right to hold a hearing at any time we feel that you are not...the applicant is not in good faith moving forward with reasonable diligence to find a new site.

...I think going down the old path of just putting a [closure] date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further...I’d rather not say it’s a certain date only to know that when we reach that date we’re going to extend it further until we find the new site. I’d rather focus on an effort to find a new site and have [ENV] come in every year and explain to us where you are in your effort to find a new site. That’s what this [order] does.

Id., at pgs. 3-4.

3. LUC Proceedings.

On August 11, 2009, the LUC received the Planning Commission Order and a portion of the record of the Planning Commission’s proceedings on the Application. On August 20, 2009, the LUC received the remaining portion of the record.

Pursuant to HRS § 205-6(e) and Hawai'i Administrative Rules ("HAR")

§ 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. At its meeting on September 24, 2009, the LUC considered the Application and received additional oral and written testimony, 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 [SUP File No. 86/SUP-5] 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.

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 of Proceedings, September 24, 2009, at 200:19-202:19, attached hereto as Exhibit "D."

The LUC 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.

Id., at 221:7-12.

On October 22, 2009, the LUC issued its written Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications ("LUC Order"). See LUC Order attached hereto as Exhibit "E." Importantly, in said order, the LUC adopted the Planning Commission Order as its own findings of fact, conclusions of law, and decision and order. 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 critical condition:

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.

See Exhibit “E,” at p. 8.

On October 29, 2009, ENV filed with the LUC a Motion for Reconsideration and a Memorandum in Support of Motion for Reconsideration (collectively “Reconsideration Motion”), pursuant to HAR §§ 15-15-70 and 15-15-84.

By written order dated December 1, 2009, the LUC denied ENV’s Reconsideration Motion.

B. Proceedings Before the Circuit Court.

On November 19, 2009, ENV filed its Notice of Appeal; Statement of the Case; Designation of Record on Appeal; Order for Certification and Transmission of Record; Exhibits “A” and “B” with the Circuit Court of the First Circuit (“Circuit Court”).

On September 21, 2010, the Circuit Court issued its Order Affirming Land Use Commission’s Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law and Decision and Order Dated October 22, 2009 with Modifications. The Order also erroneously affirmed Condition No. 14 of the LUC Order.

Final Judgment was filed on October 19, 2010, and the Notice of Entry of Judgment was filed on October 21, 2010.

C. ICA Appeal.

On November 12, 2010, ENV timely filed its Notice of Appeal and Civil Appeals Docketing Statement to the ICA relating to that portion of the Circuit Court's Order which wrongly affirmed the LUC's arbitrary and unsupported deadline of July 31, 2012 for receipt of MSW at the landfill, to cease acceptance of MSW at WGSL. Intervenor-Appellees did not appeal the circuit court's ruling.

D. New Petition.

Because ENV could not presume that the Supreme Court would resolve the MSW landfill ban before the passage of the deadline and because ENV could therefore be placed in the untenable position of having nowhere to properly dispose of certain critical wastes, on June 28, 2011, ENV filed an Application to Modify State Special Use Permit No. 2008/SUP-2 by modifying the State of Hawaii Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, dated October 22, 2009 with DPP ("2011 petition").

The 2011 petition commenced with a public hearing on October 5, 2011 and continued as a contested case hearing on January 11 and 25, 2012, February 8, 2012, March 7 and 14, 2012, April 4, 11, and 23, 2012, and May 25, 2012. However, due to the Supreme Court decision in *Dept. of Env't'l Servs. v. Land Use Comm'n*, ENV moved for the Planning Commission to dismiss the 2011 petition for lack of jurisdiction as the sole issue of the petition, Condition 14, was invalidated by the Court. Also in response to the

Supreme Court decision, the LUC sent a letter to the Planning Commission requesting that the Planning Commission consolidate the SUP-2 case and the 2011 petition and make a single recommendation consistent with the Supreme Court decision.

On May 25, 2012, the Planning Commission stayed the proceeding for 6 months in light of *Dept. of Env't'l Servs. v. Land Use Comm'n*. The Planning Commission also responded to the LUC with a letter dated May 29, 2012, in which the Planning Commission expressed its opposition to consolidating the cases. The Planning Commission explained that it had already made its decision in the SUP-2 case and that its Order pursuant to this case had not changed based upon the Supreme Court decision. The Planning Commission indicated that it would send over the record of the 2011 petition proceeding, but without having acted on the petition. See letter from the Planning Commission to the LUC, dated May 29, 2012, attached hereto as Exhibit "F."

E. Transfer To The Supreme Court.

ENV requested a transfer of its appeal from the ICA to the Supreme Court, which was granted on August 1, 2011.

F. Supreme Court Decision.

Upon consideration of the sole issue on appeal of the deadline for receipt of MSW at the landfill, the Supreme Court in *Dept. of Env't'l Servs. v. Land Use Comm'n* agreed with ENV and concluded as follows:

LUC Condition 14 is not supported by substantial evidence in the record, including the Planning Commission's Findings of Fact, conclusions of Law, and Decision and Order, which were adopted by the LUC in its Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications filed October 22, 2009.

Stated simply, the above-quoted Findings of Fact, Conclusions of Law, and Decision and Order by the Planning Commission, all expressly adopted by the LUC, do not support the restriction in Condition 14 imposing a termination date of July 31, 2012 for the deposit of MSW at WGS. To the contrary, the Planning Commission's Findings of Fact clearly demonstrate the continuing need to dispose of municipal solid waste at WGS beyond July 31, 2012. For example, the Planning Commission acknowledged Mr. Doyle's testimony that "it would take more than seven years to identify and develop a new landfill site." The Planning Commission also found that "a landfill is currently necessary for proper solid waste management," and that "WGS is the only permitted public MSW facility on the island of Oahu[.]" Moreover, the Planning Commission's Decision and Order expressly provides that MSW may be deposited at WGS's expanded site "until capacity as allowed by the State Department of Health is reached."

Dept. of Env't'l Servs. v. Land Use Comm'n, at pgs. 31-32.

The Court further found that "[b]ased upon all of the evidence in the record, it would appear that condition 14 was a material condition to the LUC's approval. . . .

Therefore, the **relevant question is whether the LUC would have reached the same conclusion (approving SUP-2) without its imposition of Condition 14.**" *Id.*, at pgs. 32, 35 (emphasis added).

II. DISCUSSION.

A. LUC Should Retain Jurisdiction As Dictated by the Supreme Court.

The LUC should retain jurisdiction over this case to comply with the Supreme Court decision in *Dept. of Env't'l Servs. v. Land Use Comm'n*. As indicated above, the Supreme Court acknowledged that it could not definitively determine, based upon a review of the facts of the case, that the LUC would have made the same decision to approve SUP-2 without imposition of Condition 14. Therefore, the singular task for the

LUC upon remand is to determine whether it would have approved SUP-2 without Condition 14. This requires a review of the **existing record** to determine if there are sufficient grounds to support the LUC's decision.

The Intervenors interpret a footnote in *Dept. of Env't'l Servs. v. Land Use Comm'n* as evidence to require remand to the Planning Commission. If the Supreme Court meant to require remand to the Planning Commission, it would have stated as much in the holding, not in a footnote. The Supreme Court only "**encourage[ed]** the LUC to consider any new testimony developed before the Planning Commission [the 2011 Planning Commission proceeding ("2011 petition")." *Id.* at 36. As referenced earlier in the decision, the Supreme Court considers public testimony given during LUC SUP proceedings to be "additional oral and written testimony received by the LUC." *Id.* at 11. The record of the 2011 petition, as with any other testimony or document submitted to the LUC, should be received and considered by the LUC.³ By considering the record – which ENV believes is consistent with the SUP-2 record and the Planning Commission Findings of Fact - the LUC could decide this case, consistent with the Court's actual directive – the determination of whether Condition 14 was a material condition for approval of SUP-2.

Further, the Planning Commission made it clear with its May 29, 2012 letter to the LUC that "there is no necessity to remand the records contained in File No. 2008/SUP-2 [for consolidation with the 2011 petition]." See Exhibit "B." The Planning Commission explained that "[t]his is because the Planning Commission already made its

³ Testimony and documents received by the LUC, such as the record for the 2011 petition, cannot be the basis for additional findings of fact because the Planning Commission is the Fact Finding body. See HRS § 205-6(d) and (e) and the Rules of the Planning Commission, § 2-47. Nonetheless, if such testimony creates questions as to the validity of the proposed findings, the LUC may remand for further investigation. Under these circumstances, the LUC would need to justify the decision to remand so as to avoid acting in an arbitrary and capricious manner.

decision based on the records in File No. 2008/SUP-2 in the form of the Planning Commission's Order and previously transmitted those records including that decision to the LUC on August 10, 2009." Id. Finally, the Planning Commission definitively stated that "[t]here is no request to modify the Planning Commission's Order and it remains unchanged." Id. Clearly, the Planning Commission understands that it cannot answer the relevant question as to Condition 14's materiality because the LUC imposed the condition, not the Planning Commission. The Planning Commission has already provided the LUC the record of its stayed proceeding to modify Condition 14 and has thus already acted as directed by the Supreme Court. Remand to the Planning Commission would serve no purpose in furtherance of the Court's decision.

Further still, the LUC does not have jurisdiction to order consolidation of the SUP-2 case and the 2011 petition. Pursuant to HRS § 205-6(d) and (e) and the Rules of the Planning Commission § 2-47, the LUC only has authority to consider SUPs that have been approved by the Planning Commission. In the present case, because the Planning Commission stayed the 2011 petition without decision-making, this case is not before the LUC. The LUC has no authority to dictate that the Planning Commission take specific action in regards to the 2011 petition.

Finally, the State Office of Planning ("OP") has expressed concern that the LUC may have to consider the deadline for MSW in multiple proceedings, namely pursuant to the Supreme Court remand and thereafter from the 2011 petition. OP believes that in the interest of judicial efficiency, these proceedings should be consolidated. Such a concern is completely unwarranted. Once the LUC approves or denies SUP-2 pursuant to the Supreme Court remand, ENV intends to move for a dismissal of the 2012 petition

because that matter, which only concerned the July 31, 2012 deadline is moot. If the Planning Commission decides against dismissal for any reason, ENV will unilaterally withdraw its petition as provided by the Rules of the Planning Commission, § 2-42.⁴ See Declaration of Timothy E. Steinberger, attached hereto as Exhibit “G.”

B. If LUC Elects to Remand, Scope of Remand Should Be Limited to Sole Issue.

In the alternative, if the LUC opts to remand Docket No. SP09-403 to the Planning Commission, the remand should be limited to consideration of only evidence relating to the deadline, if any, for receipt of MSW at the landfill. As clearly established by the Supreme Court, the sole issue on appeal is Condition 14. No other condition was challenged and all other findings of the Planning Commission and the LUC remain intact. In fact, many of the findings serve as the bases for the Supreme Court invalidating Condition 14. Nothing in the Supreme Court’s opinion can be construed to enable review of every aspect of SUP-2 such that the existing findings and conclusions will be challenged. By repeatedly identifying the deadline as the sole issue on appeal and by directing the LUC to determine whether it would have granted the SUP-2 without the imposition of the deadline, the Supreme Court clearly limited the scope of the remand. See *Dept. of Env’tl Servs. v. Land Use Comm’n*, pgs. 2, 15, 24-25, 30, 32, 35. Therefore, the only way that the LUC could justify remand would be if it were to find that some gap in the existing record relating to the deadline prevents it from answering the Supreme Court’s question: would the LUC have approved the SUP without also imposing a deadline?

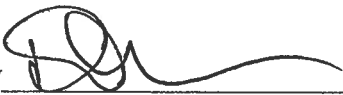
⁴ The Rules of the Planning Commission, § 2-47 provides that “[p]etitioner may withdraw its petition for a SUP at any time by filing written notice with the commission.”

III. CONCLUSION.

WHEREFORE, ENV requests that the LUC retain jurisdiction in Docket No. SP09-403 to determine whether it would have reached the same conclusion (approving SUP-2) without its imposition of Condition 14 or in the alternative limit the scope of the remand to the sole issue considered by the Supreme Court – the deadline, if any, for WGSL to receive MSW.

DATED: Honolulu, Hawaii, July19, 2012.

ROBERT C. GODBEY
Corporation Counsel

By 

DANA VIOLA
R. BRIAN BLACK
Deputies Corporation Counsel
Attorneys for Applicant
DEPARTMENT OF
ENVIRONMENTAL SERVICES, CITY
AND COUNTY OF HONOLULU

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

STATE OF HAWAII

In the Matter of the Application of)	DOCKET NO. SP09-403
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DEPARTMENT OF ENVIRONMENTAL)	DECLARATION OF TIMOTHY E.
SERVICES, CITY AND COUNTY OF)	STEINBERGER
HONOLULU)	
)	
To delete Condition No. 14 of Special Use)	
Permit No. 2008/SUP-2 (also referred to as)	
Land Use Commission Docket No. SP09-403))	
which states as follows:)	
)	
"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.")	
)	

DECLARATION OF TIMOTHY E. STEINBERGER

I, TIMOTHY E. STEINBERGER, hereby declare as follows:

1. I am the Director for the Department of Environmental Services.
2. I make this declaration based upon personal knowledge in support the Department of Environmental Services, City and County of Honolulu's Brief in Support of the Land Use Commission of the State of Hawaii Retaining Jurisdiction in Docket No. SP09-403.
3. Attached hereto as Exhibit "A" is a true and correct copy of the Hawaii Supreme Court's opinion in *Department of Environmental Services v. Land Use Comm'n, SCAP-10-0000157*, entered May 4, 2012.

4. Attached hereto as Exhibit "B" is a true and correct copy of the City and County of Honolulu, Planning Commission's ("Planning Commission's") Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009.

5. Attached hereto as Exhibit "C" is a true and correct copy of the Meeting of the Planning Commission Transcripts, July 31, 2009, pgs. 3-4.

6. Attached hereto as Exhibit "D" is a true and correct copy of Land Use Commission of the State of Hawaii ("LUC") Transcript of Proceedings, September 24, 2009, pages 200:19-202:10, 221:7-12.

7. Attached hereto as Exhibit "E" is a true and correct copy of the LUC's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, dated October 22.

8. Attached hereto as Exhibit "F" is a true and correct copy of the letter from the Planning Commission to the LUC, dated May 29, 2012.

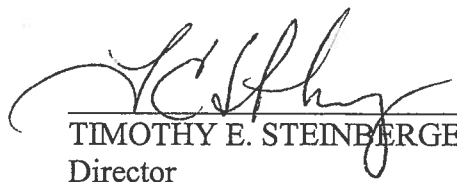
9. Once the LUC makes a decision in Docket No. SP09-403, pursuant to the remand from the Supreme Court as provided in *Department of Environmental Services v. Land Use Comm'n*, the Department of Environmental Services intends to move to dismiss its Application to Modify State Special Use Permit No. 2008/SUP-2 by modifying the State of Hawaii Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with

\\

Modifications, dated October 22, 2009. If the Planning Commission decides against dismissal of this petition, the Department of Environmental Services will unilaterally withdraw its petition pursuant to the Rules of the Planning Commission, §2-42.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING
IS TRUE AND CORRECT.

DATED: Honolulu, Hawai'i, July 19, 2012.



TIMOTHY E. STEINBERGER, P.E.
Director
Department of Environmental Services

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Supreme Court
SCAP-10-0000157
04-MAY-2012
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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU,
Petitioner/Appellant-Appellant,

vs.

LAND USE COMMISSION, STATE OF HAWAI'I; COLLEEN HANABUSA;
MAILE SHIMABUKURO; and KO OLINA COMMUNITY ASSOCIATION,
Respondents/Appellees-Appellees.

NO. SCAP-10-0000157

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 09-1-2719-11))

MAY 4, 2012

RECKTENWALD, C.J., NAKAYAMA, ACOBA, DUFFY, AND MCKENNA, JJ.

OPINION OF THE COURT BY DUFFY, J.

Petitioner-Appellant Department of Environmental
Services, City and County of Honolulu ("DES" or "City"), appeals
from the October 19, 2010 final judgment of the Circuit Court of

the First Circuit¹ (circuit court) in support of its September 21, 2010 order, which affirmed Respondent-Appellee Land Use Commission's ("LUC") October 22, 2009 "Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law and Decision and Order With Modifications" (LUC Order). We accepted DES' appeal on August 1, 2011 as a mandatory transfer pursuant to Hawai'i Revised Statutes (HRS) section 602-58(a)(1) (Supp. 2010), as this matter presents a question of imperative public importance. Oral argument was held on February 22, 2012.

This case arises from the 2008 application of DES for a special use permit (County Special Use Permit File No. 2008/SUP-2 (SUP-2)) to expand the existing Waimanalo Gulch Sanitary Landfill (WGSL). The LUC approved SUP-2 subject to, inter alia, a condition prohibiting WGSL from accepting municipal solid waste (or any other waste besides ash and residue from H-POWER) after July 31, 2012. The validity of this condition (Condition 14) is the sole issue raised by DES on appeal.

While we acknowledge the authority of the LUC to impose restrictive conditions on its approval of special use permits, we hold that Condition 14 is inconsistent with the evidence shown in

¹ The Honorable Rhonda A. Nishimura presided.

the record and not supported by substantial evidence. Accordingly, because the LUC's approval of SUP-2 was expressly given "subject to" the LUC's imposition of Condition 14, a condition which appears to be material to the LUC's approval, we vacate the circuit court's judgment affirming the LUC's approval of SUP-2, and remand this matter to the circuit court with instructions that the circuit court remand this matter to the LUC for further proceedings consistent with this opinion.

I. BACKGROUND

A. DES' Application To Expand WGSL

WGSL is located at Waimanalo Gulch, O'ahu, Hawai'i, Tax Map Key Nos. (1) 9-2-03: 72 and 73, and consists of a total of approximately 200 acres. The WGSL property is owned by the City and County of Honolulu and is classified within the state agricultural district. Since 1989, a portion of the WGSL property has been used as a landfill. WGSL is the only public landfill on Oahu permitted to receive municipal solid waste (MSW),² and the only permitted repository for the ash and residue produced by the City's H-POWER waste-to-energy facility.³ The need for additional landfill space to accommodate the volume of,

² Municipal solid waste (MSW) refers to "garbage."

³ In addition to being permitted to accept MSW and ash and residue from H-POWER, WGSL is also permitted to accept non-hazardous industrial waste, which is defined as "special waste."

inter alia, MSW, ash, and residue deposited at WGSL was the basis of DES' 2008 application for SUP-2.

The procedure for obtaining a special use permit (SUP) for an area of land within an agricultural district greater than 15 acres is set forth in Chapter 205 of the HRS. Pursuant to HRS section 205-6⁴, an application for an SUP in the City and County

⁴ HRS section 205-6 states, in pertinent part:

(a) Subject to this section, the county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. . . .

(d) Special permits for land the area of which is greater than fifteen acres or for lands designated as important agricultural lands shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.

(e) 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

continue...

of Honolulu must first be approved by the Planning Commission of the City and County of Honolulu ("Planning Commission"). HRS § 205-6(a)-(d) (Supp. 2008). Thereafter, LUC approval is required, and the LUC may approve, approve with modification, or deny the Planning Commission's decision. See HRS § 205-6(d), (e) (Supp. 2008). In accordance with HRS section 205-6, DES applied for SUP-2, seeking to expand the existing 107.5 acres of WGS� by approximately 92.5 acres. The proposed SUP would thus allow DES to utilize the entire 200-acre parcel of land as a landfill.

1. DES' Application with the City Department of Planning and Permitting

The portion of the WGS� property that operated as the City's landfill from 1989 to 2009 was subject to SUP File No. 86/SUP-5 (SUP-5). On December 3, 2008, DES filed an application for SUP-2 (to supercede then-existing SUP-5), which sought the 92.5-acre expansion of WGS�. The proposed expansion included approximately thirty-seven acres of new landfill cells, with the remaining area dedicated to landfill-associated support infrastructure. The City Department of Planning and Permitting

...continue

Hawaii rules of civil procedure.

HRS § 205-6(a), (d)-(e) (Supp. 2008) (emphasis added).

processed the application and recommended its approval to the Planning Commission, subject to a number of conditions.

2. Proceedings before the Planning Commission

On April 16, 2009, Colleen Hanabusa, Maile Shimabukuro, and Ko Olina Community Association (Intervenors-Appellees) filed a petition to intervene before the Planning Commission. The Planning Commission granted intervention on May 20, 2009.

The Planning Commission conducted a contested case hearing on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009. On July 31, 2009, the Planning Commission recommended approval of SUP-2 subject to ten conditions. The Planning Commission further recommended approval of the withdrawal of SUP-5 and the conditions therein, upon SUP-2 taking effect.

On August 4, 2009, the Planning Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order (Planning Commission's Decision and Order) (Exhibit "A"). The findings of fact that are relevant to this appeal include the following:

33. [Chief of the City Department of Environmental Services, Refuse Division] Mr. Doyle testified that [DES] will begin in 2010 efforts to identify and develop a new landfill site to supplement WGS.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site.

89. According to Joseph Whelan, as of March 16, 2009, there was approximately 12 month [sic] of landfill airspace capacity remaining in the municipal solid waste ("MSW") portion of the current SUP area, and approximately 24 months of landfill airspace capacity remaining in the ash portion of the current SUP area. See Tr. 6/24/09, 81:22-82:6, 83:1-14.

90. On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Property as the site for the City's landfill. See Exhibit "A20."

91. The proposed expansion of the landfill within the Property is needed because WGSL is a critical part of the City's overall integrated solid waste management efforts.

92. Continued availability of WGSL is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu.

94. WGSL is the only permitted public [municipal solid waste] facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER.

95. WGSL is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. The ISWMP is required by State law and approved by [the Department of Health] after public comments. One theme of the ISWMP is to minimize landfill disposal.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGSL. These amounts fluctuate based on such things as recycling and the economy. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGSL each year.

97. Other items that cannot be recycled or burned at H-POWER are deposited at WGSL, such as 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.

. . .

101. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSJ.

. . .

107. The project is consistent with the City's general plan. WGSJ is an important public facility that will provide a necessary facility to meet future population needs and accommodate growth in the region; WGSJ's eventual closure will allow the Property to be reclaimed for other public uses; and WGSJ is needed in the event of a natural disaster. See Tr. 5/22/09, 71:8-25; 72:1-25; Exhibit "A1" at pp. 8-25 through 8-28.

(Emphases added.) The Planning Commission's relevant conclusions of law include:

4. Based on the findings set forth above . . . [DES'] request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with [DES'] representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection. The Planning Commission further concludes that the same unusual conditions, trends, and needs that existed at the time the original Special Use Permit was granted continue to exist and that the land on which WGSJ is located continues to be unsuited for agricultural purposes.

5. The Planning Commission concludes that the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.

The Planning Commission's Decision and Order approved SUP-2 for the proposed expansion of WGSJ, and permitted DES' use

of the landfill "until capacity as allowed by the State Department of Health is reached[:]"

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the Decision and Order of the Planning Commission to DENY Intervenor's Motion to Dismiss Application. It is the further Decision and Order of the Planning Commission to APPROVE Applicant's Special Use Permit Application File No. 2008/SUP-2 ("2008/SUP-2"), for a new SUP for the existing and proposed expansion of WGSL, located at Tax Map Key Nos. 9-2-3: Parcels 72 and 73, totaling approximately 200.622 acres, until capacity as allowed by the State Department of Health is reached, subject to the following conditions

(Emphasis added.) The conditions required DES, inter alia, to:

(1) identify and develop with reasonable diligence -- on or before November 1, 2010 -- one or more new landfill sites to either replace or supplement WGSL and, upon selection, provide written notice to the Planning Commission for determination of whether SUP-2 should be modified or revoked; and (2) continue to use alternative waste disposal technologies in its effort to reduce the City's dependence on WGSL.

Significantly, the Planning Commission's Decision and Order did not designate a date on which SUP-2 would expire, nor a deadline for WGSL's acceptance of MSW. In fact, the author of the Planning Commission's Decision and Order, Commissioner Kerry Komatsubara (Commissioner Komatsubara), explained why a time limit on SUP-2 was not effective or desirable:

In my opinion, simply putting on a new closure date to [SUP-2] will not lead to the closure of [WGSL]. I believe that the focus should not be on picking a date. The focus should

be on how do we get the City to select a new site because you're not going to close this landfill until you find another site. I don't think it's in the interest of our community not to have a landfill.

. . .

So what this proposal does is, it says look, [DES] can keep [WGSL] open until [it's] full, until you've reached the capacity, but you have an obligation starting from next year [2010] to start looking for a new site. Now whether you take it seriously or not, that's up to you because we have the power to call you in, and you have the obligation now to report every year on what you're doing to find a new landfill site whether it be a replacement site or supplemental site or both. We have the right to hold a hearing at any time we feel that you are not . . . in good faith moving forward with reasonable diligence to find a new site.

. . .

I think going down the old path of just putting a [closure] date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further...I'd rather not say it's a certain date only to know that when we reach that date we're going to extend it further until we find the new site. I'd rather focus on an effort to find a new site and have [DES] come in every year and explain to us where you are in your effort to find a new site. That's what this proposal does.

Commissioner Komatsubara reiterated that "[t]he term or the length of [SUP-2] shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of "X" number of years." (Emphasis added.)

3. LUC proceedings

In accordance with HRS section 205-6(e), the complete record of proceedings before the Planning Commission was transmitted to the LUC on August 20, 2009. After reviewing DES' application and the Planning Commission Record, and receiving

additional oral and written testimony on September 24, 2009, Commissioner Reuben Wong (Commissioner Wong) made the following motion:

I'd like to move that the special use permit application before us be granted with . . . a number of conditions such as that all of the conditions that were set forth in [SUP-5] be incorporated.

That is to say, for example, conditions dealing with blasting, hours of operations, 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 [WGSL] but only up to July 31, 2012.

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 31, 2012.

Another condition would be that after July 31, 2012 only ash and residue from the [H-POWER facility] be allowed to be placed on [WGSL]. 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 council is doing with respect to the continued use of [WGSL].

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.

. . .

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 [WGSL] 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.

(Emphases added.) The LUC commissioners adopted the above motion by a five to three vote.

On October 22, 2009, the LUC issued its written Order adopting the Planning Commission's "Findings of Fact, Conclusions of Law, and Decision and Order" as its own findings, conclusions, decision and order (LUC Order) (Exhibit "B"). Significantly, the LUC Order approved DES' Application subject to certain express conditions, including Condition 14:⁵

The LUC, upon consideration of the Planning Commission's Findings of Fact, Conclusions of Law, And Decision And Order, the oral arguments of the parties and the record and files herein, and good cause existing and upon motion duly passed by the LUC,

HEREBY ORDERS that the LUC shall adopt the Planning Commission's Findings of Fact, Conclusions of Law, And Decision And Order subject to the following conditions

. . . .

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

(Emphases added.)

On October 29, 2009, DES filed a motion for reconsideration requesting, inter alia, a modification of Condition 14. DES filed its notice of appeal with the circuit

⁵ The LUC's approval of DES' Application was also made subject to: (1) the withdrawal of SUP-5, provided that the existing conditions shall be incorporated in SUP-2 to the extent that they are consistent with the LUC Order and not duplicative of any of its conditions; and (2) the conditions as recommended by the Planning Commission.

court on November 19, 2009, and the LUC denied the motion for reconsideration on December 1, 2009.

B. Circuit Court Proceedings

DES timely appealed the LUC Order pursuant to HRS section 205-6(e), and HRS section 91-14.⁶ On March 1, 2010, DES filed its opening brief with the circuit court and argued that Condition 14 was "Arbitrary and Capricious, Characterized by Abuse of Discretion, and a Clearly Unwarranted Exercise of Discretion"⁷ because the record before the Planning Commission, on which the LUC relied, established that there will always be waste material that cannot be combusted, recycled, reused or shipped. Therefore, DES argued, an option to dispose of MSW at WGSJ will continue to be necessary beyond the July 31, 2012 deadline as imposed in Condition 14.

⁶ HRS section 91-14 states, in pertinent part:

(a) Any person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter[.]

(b) [P]roceedings for review shall be instituted in the circuit court . . . within thirty days after service of a certified copy of the final decision and order of the agency[.]

HRS § 91-14(a)-(b) (1993).

⁷ HRS section 91-14(g)(6) authorizes the circuit court to modify an agency decision if it is "arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion." HRS § 91-14(g)(6) (1993).

Intervenors-Appellees filed their answering brief on April 8, 2010, and argued that the imposition of Condition 14 was within the LUC's discretion. Thereafter, the LUC filed its answering brief on April 12, 2010, and argued that (1) DES did not have standing to appeal because it was not an "aggrieved" party, and (2) DES was not precluded from requesting an extension of the July 31, 2012 closure deadline at a later time. Moreover, the LUC argued, Condition 14 was reasonable and supported by the record.

DES filed its reply on April 22, 2010, and argued that pursuant to HRS section 205-6(e), it had standing to appeal the LUC's decision: "[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 . . .".⁸ See HRS § 205-6(e) (Supp. 2008) (emphases added). In addition, DES argued that both the LUC and Intervenors-Appellees failed to rebut the assertion that Condition 14 is arbitrary and a clearly unwarranted exercise of discretion.

⁸ See also Hawai'i Administrative Rules (HAR) section 15-15-96(c), which reads: "A denial or modification of the special permit, 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." HAR § 15-15-96(C).

DES' appeal was heard on July 14, 2010, and by an order dated September 21, 2010, the circuit court: (1) determined that DES was "aggrieved" within the meaning of HRS section 91-14(a); and (2) affirmed Condition 14. Final judgment was entered on October 19, 2010, and the Notice of Entry of Judgment was filed on October 21, 2010.

C. The Instant Appeal

DES filed its notice of appeal with the ICA on November 12, 2010. Intervenor-Appellees did not appeal the circuit court's ruling. This appeal was fully briefed before the ICA when DES filed its timely application for transfer with this court on July 14, 2011. We granted this application for transfer on August 1, 2011.

In its Opening Brief, DES argues that the circuit court erred in affirming the LUC's July 31, 2012 deadline for the acceptance of MSW at WGS. As stated earlier herein, the validity of Condition 14 is the sole issue raised on appeal.⁹ DES reiterates its position that the imposition of Condition 14 is arbitrary in light of the record and findings adopted by the

⁹ DES also contends that Condition 14 could not be interpreted as a mere "permissive advisory condition" as it believed the LUC to have argued. It appears, however, that DES misinterpreted the LUC's argument because in its answering brief, the LUC clarified that it was referring to Conditions 15 and 16 as permissive advisory conditions, not Condition 14. Conditions 15 and 16 are not at issue in the present appeal.

LUC, which clearly demonstrated the continuing need to dispose of, inter alia, MSW at WGSJ beyond July 31, 2011. Moreover, DES argues, no other landfill site will be available by July 31, 2012 as both the record before the Planning Commission and the findings adopted by the LUC established that it will take more than seven years to identify and develop a new landfill site to either replace or supplement WGSJ. DES requests that this court strike "the July 31, 2012[] deadline to accept MSW at WGSJ, contained in Condition 14 of the [LUC Order], and permit the disposal of MSW at WGSJ until that site reaches capacity as set forth by the [Planning Commission's Order]."

In its Answering Brief the LUC argues that (1) DES lacks standing to appeal as an injured and "aggrieved party" because Condition 14 will not take effect until July 31, 2012,¹⁰ (2) DES is not precluded from requesting relief from Condition 14 in the future, and (3) DES has not been burdened with a threat of sanction for failure to comply with Condition 14. The LUC additionally argues that Condition 14 is supported by substantial evidence in the record as a whole.

¹⁰ As stated earlier herein, the circuit court determined that DES had standing to appeal the LUC Order as an "aggrieved" party within the meaning of HRS section 91-14(a). Neither the LUC nor the Intervenor-Appellees appealed the circuit court's judgment.

In their answering brief, Intervenor-Appellees primarily argue that HRS section 205-6(d) authorizes the LUC to impose conditions on SUPs, and that the LUC's imposition of Condition 14 was not an abuse of discretion. support of their argument that the closure date of WGS� for MSW is reasonable, and that DES was previously given notice that a closure date would eventually be imposed, Intervenor-Appellees emphasize prior commitments made by previous City administration officials in 2003 that WGS� would close by 2008. They further argue that DES should be judicially estopped from taking contrary positions under oath regarding the closure of WGS�.

In its reply brief to the LUC's answering brief, DES maintains that it is entitled to appeal Condition 14 of the LUC Order because the July 31, 2012 deadline prohibiting WGS� from accepting MSW caused it to suffer threatened, if not actual, injury. In response to Intervenor-Appellees' answering brief, DES argues that judicial estoppel does not apply to this case because the City's 2003 position that WGS� would close by May 1, 2008 was overridden by the Honolulu City Council's December 1, 2004 designation of WGS� as Oahu's municipal landfill after May 1, 2008. DES argues that both the LUC and Intervenor-Appellees failed to rebut the assertion that Condition 14 is arbitrary and

capricious. In each reply brief, DES emphasizes that Condition 14 is unsupported in the record.

III. STANDARDS OF REVIEW

A. Secondary Appeal

Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) . . . to the agency's decision.

Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc., 121 Hawai'i 16, 24, 211 P.3d 74, 82 (2009) (citations omitted).

B. Substantial Evidence

This court has defined substantial evidence as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." In Re Water Use Permit Applications, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000).

C. Judicial Review of Contested Cases

HRS section 91-14(g) (1993) provides that "[u]pon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings" Id. (emphases added).

IV. DISCUSSION

- A. Although The LUC Has Authority To Impose Restrictive Conditions In Its Approval of SUPs, The Conditions Must Be Supported By Substantial Evidence.

HRS section 205-6 governs the LUC's authority to impose restrictive conditions in its approval of SUPs and provides that:

Special permits for land the area of which is greater than fifteen acres or for lands designated as important agricultural lands shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.

HRS § 205-6(d) (Supp. 2008) (emphasis added). The statute unambiguously authorizes the LUC to impose additional restrictions in its approval of SUPs.¹¹ Id. (emphasis added); see also State v. Kahawai, 103 Hawai'i 462, 465, 83 P.3d 725, 728 (2004) ("The term 'may' is generally construed to render

¹¹ The legislative history of HRS section 205-6 provides further support that the Hawai'i Legislature intended the LUC to have such authority: the 1970 Legislature declared that the purpose of HRS section 205-6, which governs special permits, was, inter alia, "to authorize the land use commission to impose additional restrictions on special permits which allow unusual and reasonable uses on land within the agricultural and rural districts." H. Conf. Comm. Rep. No. 15, in 1970 House Journal, at 1231 (emphasis added); see also S. Stand. Comm. Rep. No. 90-70, in 1970 Senate Journal, at 1052 ("The purpose of this bill is to give the Land Use Commission explicit statutory authority to impose restrictions as may be necessary or appropriate on special permits applied for pursuant to Section 205-6, Hawaii Revised Statutes.) (emphasis added); see also S. Stand. Comm. Rep. No. 242-70, in 1970 Senate Journal, at 1123 ("The purpose of this bill is to provide the Land Use Commission the authority to impose protective restrictions on special permits which allow unusual and reasonable uses of land within the Agricultural and Rural Districts.) (emphasis added); see also H. Stand. Comm. Rep. No. 708-70, in 1970 House Journal, at 1142 ("The purpose of this bill is to authorize the Land Use Commission to impose additional restrictions, as may be necessary or appropriate, in granting approval on special permits[.]") (emphasis added).

optional, permissive, or discretionary the provision in which it is embodied; that is so at least when there is nothing in the wording, sense, or policy of the provision demanding an unusual interpretation.") (Quoting State ex rel. City of Niles v. Bernard, 53 Ohio St.2d 31, 372 N.E.2d 339, 341 (1978)).

While the LUC is authorized to impose restrictive conditions in its approval of SUPs, its decision to impose such a restriction must be supported by substantial evidence in the record. See Kinkaid v. Bd. of Review of City & County of Honolulu, 106 Hawai'i 318, 325, 104 P.3d 905, 912 (2004) (recognizing that courts are authorized to set aside administrative action that is without evidentiary support). If the LUC's decision to impose Condition 14 was unsupported by substantial evidence in the record in this case, we may "remand the case with instructions for further proceedings[.]" Save Diamond Head Waters, 121 Hawai'i at 24, 211 P.3d at 82; see also HRS § 91-14(g) (1993).

Although we have not infrequently discussed HRS section 91-14(g) in the context of determining the standard of review applicable to a decision or order of an administrative agency, the specific issue raised in this case is one of first impression: whether a restrictive condition (Condition 14)

imposed by decision or order of the agency (LUC) is supported by substantial evidence.

In the absence of such authority, this court may turn to the Administrative Procedure Act, 5 U.S.C. section 706, (the federal analog to HRS Chapter 91) for guidance. See e.g., Doe Parents No. 1 v. State Dep't of Educ., 100 Hawai'i 34, 59-60, 58 P.3d 545, 570-71 (2002). 5 U.S.C. section 706 states, in relevant part:

The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(E) unsupported by substantial evidence[.]

5 U.S.C. § 706(2)(E) (emphases added). While not definitive, federal caselaw discussing 5 U.S.C. section 706(2)(E) is helpful.

In Bustamante v. Massanari, 262 F.3d 949 (9th Cir. 2001), the Ninth Circuit Court of Appeals reversed and remanded an agency's decision that was not supported by substantial evidence. Bustamante involved the denial of a claimant's application for disability benefits and supplemental security income. Id. at 951. There, the claimant was entitled to receive benefits as long as his impairment was categorized as "severe," meaning that it "limited his ability to do basic work." Id. at 955. The evidence in the record revealed that the claimant

suffered from a personality disorder and a substance abuse addiction disorder, which resulted in moderate difficulties with activities of daily living, marked difficulties in maintaining social function, and deficiencies in concentration. Id. at 951. Nevertheless, the Administrative Law Judge (ALJ) determined that the claimant's mental impairments were not "severe," and thus, did not form the basis for disability eligibility. Id. at 952. The United States District Court for the Northern District of California affirmed the Social Security Administration's affirmation of the ALJ's decision, and in a one-line order stated that, "[the ALJ's] decision is supported by substantial evidence." Id.

The Ninth Circuit set aside the denial of disability benefits because the ALJ's decision was not supported by the evidence in the record as a whole. Id. at 956. The Court defined substantial evidence as "more than a mere scintilla but less than a preponderance." Id. at 953; see also Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001) ("When the evidence can rationally be interpreted in more than one way, the court must uphold the [agency's] decision.") (citations omitted). The Ninth Circuit concluded that the evidence in the record overwhelmingly supported that the claimant suffered from a severe mental impairment: (1) every psychiatrist or psychologist (four

total) who examined the claimant found significant mental problems; and (2) the claimant suffered from personality and substance abuse addiction disorders that resulted in "moderate difficulties with activities of daily living, marked difficulties in maintaining social function, and . . . deficiencies in concentration, persistence or pace." Bustamante, 262 F.3d at 956. In light of such evidence, the ALJ's conclusion that the claimant was capable of performing basic work activities and thus, did not suffer from a severe mental illness, was not supported by substantial evidence. Id.

Sousa v. Callahan, 143 F.3d 1240 (9th Cir. 1998), which involved the denial of a claim for disability insurance, is similarly instructive. There, the United States District Court for the Eastern District of California affirmed the Appeals Council's determination that the claimant was not disabled during the relevant time period. Id. at 1242.

The Ninth Circuit Court of Appeals reversed and remanded the case because substantial evidence did not support the Appeals Council's decision that the claimant was not disabled. Id. at 1243. Specifically, the Ninth Circuit concluded that the Appeals Council's determination was based on the "improper rejection of lay testimony[,]" which otherwise revealed that the claimant was "unable to cope with everyday

living[,]" and that she struggled to take care of personal needs. Id. at 1243. Based largely upon such testimony, Dr. Richard Lundeen (Dr. Lundeen) ultimately concluded that "there [was] sufficient medical and lay evidence to establish with reasonable medical certainty that [the claimant] was, [at the relevant time period], suffering from [an] identifiable mental health disorder . . . [resulting in] a marked impairment of [the claimant's] psychological, social, and occupational functioning." Id. at 1244. Nevertheless, the Appeals Council rejected Dr. Lundeen's opinion because his assessment was dependent on the lay testimony it had rejected. Id.

The Ninth Circuit noted that but for the improper rejection of such lay testimony, the validity of Dr. Lundeen's opinion would not have been questioned. Without considering such relevant testimony, the Court held that the Appeals Council's determination was not supported by substantial evidence. Id. at 1244-45.

B. Our Analysis Of This Case

Having reviewed the applicable law on the LUC's authority to impose restrictive conditions in its approval of SUPs, we now turn to review the facts of this case in order to resolve the sole issue before us: whether the imposition of

Condition 14 by the LUC was supported by substantial evidence in the record as a whole. Bustamante, 262 F.3d at 953.

1. Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order

The proceedings before the Planning Commission are discussed earlier in the Background section of this opinion. Following a contested case hearing over a period of days, the Planning Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order on August 4, 2009. The findings of fact that are relevant to this appeal include the following:

33. [Chief of the City Department of Environmental Services, Refuse Division] Mr. Doyle testified that [DES] will begin in 2010 efforts to identify and develop a new landfill site to supplement WGS.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site.^[12]

89. According to Joseph Whelan, as of March 16, 2009, there was approximately 12 month [sic] of landfill airspace capacity remaining in the municipal solid waste ("MSW") portion of the current SUP area, and approximately 24 months of landfill airspace capacity remaining in the ash portion of the current SUP area. See Tr. 6/24/09, 81:22-82:6, 83:1-14.

90. On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Property as the site for the City's landfill. See Exhibit "A20."

¹² We note that this is not an actual finding of fact, but a recitation of the testimony of a witness. "Recitation of testimony is not [a] finding of [fact]." In re Doe, 96 Hawai'i 255, 259, 30 P.3d 269, 273 (App. 2001). In context of the findings of fact and conclusions of law, however, it is clear that this was intended to be a finding. We encourage courts and factfinding tribunals to properly state their findings, however, and not merely recite testimony.

91. The proposed expansion of the landfill within the Property is needed because WGSL is a critical part of the City's overall integrated solid waste management efforts.

92. Continued availability of WGSL is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu.

94. WGSL is the only permitted public [municipal solid waste] facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER.

95. WGSL is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. The ISWMP is required by State law and approved by [the Department of Health] after public comments. One theme of the ISWMP is to minimize landfill disposal.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGSL. These amounts fluctuate based on such things as recycling and the economy. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGSL each year.

97. Other items that cannot be recycled or burned at H-POWER are deposited at WGSL, such as 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.

. . .

101. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL.

. . .

107. The project is consistent with the City's general plan. WGSJ is an important public facility that will provide a necessary facility to meet future population needs and accommodate growth in the region; WGSJ's eventual closure will allow the Property to be reclaimed for other public uses; and WGSJ is needed in the event of a natural disaster. See Tr. 5/22/09, 71:8-25; 72:1-25; Exhibit "A1" at pp. 8-25 through 8-28.

(Emphases added.) The Planning Commission's conclusions of law included the following:

4. Based on the findings set forth above . . . [DES'] request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with [DES'] representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection.

5. The Planning Commission concludes that the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.

The Planning Commission's Decision and Order approved SUP-2 for the proposed expansion of WGSJ, and permitted DES' use of the landfill "until capacity as allowed by the State Department of Health is reached." Significantly, the Planning Commission's Decision and Order did not designate a date on which SUP-2 would expire, nor a deadline for WGSJ's acceptance of MSW. To the contrary, the Planning Commission's Decision and Order specifically found, inter alia, that it would take more than seven years to identify and develop a new landfill site. Indeed, it would be difficult to reconcile the foregoing findings and

conclusions with a closure date of WGSL to accept MSW prior to the identification and development of a landfill to either replace or supplement WGSL.¹³

¹³ The testimony of Frank Doyle, DES' then Chief of Refuse, was illustrative of the time-frame it will take for identifying and developing a new landfill site:

Q. I guess my question is, how long does it take for the whole process, identification of a new site, blue ribbon commission hearing, [Environmental Impact Statements], site selection, hiring the contractors, going through the procurement process, going through the protest process, building, construction and opening the doors, how long does it take?

. . . .

And the reason why I ask it that way, I want to make sure no one has the impression that, in two years, we're going to have a new landfill --

[Mr. Doyle]. No, no, absolutely not. We are looking at seven-plus [years].

Q. How long did it take the last time, for the first time on [WGSL]?

. . . .

I think it was in 1982 that the city determined the need for a new leeward area sanitary landfill. So, from 1982 -- and I thought you testified earlier that the Waimanalo Gulch opened its doors in 1989.

[Mr. Doyle]. Correct.

Q. So if it took seven years back in the 1980's, how long is it going to take today?

[Mr. Doyle]. Well, I said seven [years] twice.

Q. Okay, so your best guess is, what? Ten? Or will you stick to seven-plus?

[Mr. Doyle]. I will have to stick to seven-plus [years], because we always try to do it as quickly as we can.

continue...

2. Land Use Commission Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order With Modifications

The proceedings before the LUC are discussed earlier in the Background section of this opinion. Following receipt of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, and the record of the proceedings before the Planning Commission, the LUC held a meeting in which it received additional oral and written testimony. Testimony was presented both in favor of and in opposition to the Application of DES; as in the Planning Commission, the testimony in opposition focused on the broken promises of past City administrations to identify and develop an alternative landfill site, the cultural significance of the WGSJ site, and the deleterious effect of operating a landfill on the site.

At the meeting, Commissioner Wong made a motion to accept DES' Application, subject to the conditions imposed by the Planning Commission, but adding an additional restrictive condition: after July 31, 2012, only ash and residue from the H-POWER facility would be allowed to be deposited in WGSJ.

...continue

(Emphases added.) Notably, the minimum time frame of "seven-plus" years for identifying and developing a new landfill site was incorporated into the Planning Commission's findings, which the LUC adopted, as will be discussed later herein.

Commissioner Wong reiterated, "[t]o make that clear, what we're saying is that no more municipal rubbish, trash, that sort of thing, save and except the ash and residue that may come from the [H-POWER] plant." The Commissioners approved Wong's motion by a five to three vote.

On October 22, 2009, the LUC issued an Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order With Modifications. Significantly, and as discussed earlier herein, the LUC's approval of SUP-2 was expressly given "subject to" the LUC's imposition of several conditions:

The LUC, upon consideration of the Planning Commission's Findings of Fact, Conclusions of Law, And Decision And Order, the oral arguments of the parties and the record and files herein, and good cause existing and upon motion duly passed by the LUC,

HEREBY ORDERS that the LUC shall adopt the Planning Commission's Findings of Fact, Conclusions of Law, And Decision And Order, subject to the following conditions

(Emphasis added.)

The validity of Condition 14 is the sole issue in this case. Condition 14 imposed the following restriction:

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.

(Emphases added.)

3. The LUC's action in imposing Condition 14 is inconsistent with the evidence shown in the record and not supported by substantial evidence

LUC Condition 14 is not supported by substantial evidence in the record, including the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, which were adopted by the LUC in its Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order With Modifications filed October 22, 2009.

Stated simply, the above-quoted Findings of Fact, Conclusions of Law, and Decision and Order by the Planning Commission, all expressly adopted by the LUC, do not support the restriction in Condition 14 imposing a termination date of July 31, 2012 for the deposit of MSW at WGS�. To the contrary, the Planning Commission's Findings of Fact clearly demonstrate the continuing need to dispose of municipal solid waste at WGS� beyond July 31, 2012. For example, the Planning Commission acknowledged Mr. Doyle's testimony that "it would take more than seven years to identify and develop a new landfill site." The Planning Commission also found that "a landfill is currently necessary for proper solid waste management," and that "WGS� is the only permitted public MSW facility on the island of Oahu[.]" Moreover, the Planning Commission's Decision and Order expressly

provides that MSW may be deposited at WGS's expanded site "until capacity as allowed by the State Department of Health is reached."

Here, as in Bustamante and Sousa, the evidence in the record as a whole does not support, much less constitute "substantial evidence" for the imposition of Condition 14. Thus, Condition 14 cannot stand. See Bustamante, 262 F.3d at 956; see also Sousa 143 F.3d at 1244-45; see also In re Water Use Permit Applications, 94 Hawai'i at 119, 9 P.3d at 431.

C. Remand To The LUC For Further Proceedings Is Necessary.

The LUC's approval of SUP-2 was given "subject to" the LUC's imposition of several conditions, including Condition 14. Based upon all of the evidence in the record, it would appear that Condition 14 was a material condition to the LUC's approval. Having held that Condition 14 cannot stand because it is inconsistent with the evidence shown in the record and not supported by substantial evidence, the LUC's approval of SUP-2 also cannot stand because Condition 14 was a material condition to the LUC's approval. Consequently, this matter must be remanded to the LUC for further hearings as the LUC deems appropriate.

While we have not found a case directly on point in our jurisdiction,¹⁴ caselaw from other jurisdictions support remand to an agency in circumstances where agency action is not supported by substantial evidence. In United Jewish Ctr. v. Town of Brookfield, 827 A.2d 11 (Conn. App. Ct. 2003), a property owner's application to build on and around his property was denied by the town's wetlands commission (Commission). Id. at 13-14. The property owner sought judicial review of the Commission's denial of his application, and the trial court found that there was no evidence to support the Commission's decision. Id. at 14. In turn, the trial court remanded the case to the Commission with instructions to issue a permit to allow the property owner to build on and around his property. Id. at 14-15.

On appeal, the Commission argued, inter alia, that the trial court improperly directed it to issue the requested permit.

¹⁴ While Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 97 P.3d 372 (2004), similarly involved: (1) the judicial review of a decision by the LUC; and (2) pursuant to HRS section 91-14(g), a remand to the circuit court "with instructions to remand the case to the LUC for clarification of its findings, or for further hearings if necessary," id. at 316, 97 P.3d at 392, it is distinguishable from the present matter. There, the issue was whether substantial evidence supported the LUC's conclusion that an otherwise valid condition was violated. Id. at 314, 97 P.3d at 390. Here, the issue is whether substantial evidence in the record supports the LUC's imposition of Condition 14, which is unrelated to the question of whether Condition 14 was violated.

Id. at 20. When agency action is overturned because of insufficient findings, the Commission argued, the proper resolution is a remand for further consideration. Id. The appellate court agreed.

The Connecticut appellate court held that the case should have been remanded for further proceedings, namely, to decide whether there was evidentiary support for the issuance of the requested permit. Id. The court emphasized that further proceedings were necessary upon remand unless the only conclusion that the Commission could reasonably reach was that permit should have been issued. Id.; see also Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) ("If the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). The court reversed the trial court's judgment "as to the order directing the commission to issue the permit and . . . remanded [the case] . . . to the commission for further proceedings consistent with [its] opinion." United Jewish Ctr., 827 A.2d at 20.

Liberty v. Police & Firemen's Retirement Bd., 410 A.2d 191 (D.C. 1979), is similarly instructive. There, the Police and Firemen's Retirement and Relief Board (the Board) ordered the retirement of a patrolman from the Police Department by reason of

disability not caused or aggravated by police duties. Id. at 192. Although the Board found that family history was but one risk factor causing the patrolman's coronary artery disease, it concluded that it was the most significant factor. Id.

On appeal, the District of Columbia appellate court found that the Board's decision was not supported by substantial evidence because there was no basis in the record for an "unequivocal finding" that the patrolman's performance of police duties did not contribute to his disease. Id. at 193-94. The court stated that "[r]emand is necessary . . . if the court is in substantial doubt whether the administrative agency would have made the same ultimate finding with the erroneous findings or inferences removed from the picture." Id. at 194 (internal quotation marks omitted).

In the present case, the relevant question is whether the LUC would have reached the same conclusion (approving SUP-2) without its imposition of Condition 14. Based on the record, we cannot so conclude. Thus, we remand to the LUC for further hearings as the LUC may deem appropriate.

V. CONCLUSION

Pursuant to HRS section 91-14(g) (5)¹⁵ (1993), we vacate the circuit court's judgment affirming the LUC's approval of SUP-2, and remand this matter to the circuit court with instructions that the circuit court remand this matter to the LUC for further proceedings consistent with this opinion.¹⁶

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/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.

/s/ Sabrina S. McKenna



¹⁵ HRS section 91-14(g) (5) states, in relevant part:

(g) Upon review of the record the court may . . . remand the case with instructions for further proceedings . . . if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

. . . .

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]

HRS § 91-14(g) (5) (1993).

¹⁶ 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 that proceeding. On remand, we encourage the LUC to consider any new testimony developed before the Planning Commission in that case.

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Richard Naiwieha Wurdeman,
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Appellees Colleen Hanabusa,
Maile Shimabukuro, and
Ko Olina Community Association .

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
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.

FILE NOS. 2008/SUP-2 (RY) AND 86/SUP-5

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER

I certify that this is a full, true and
correct copy of the original document
on file with the Planning Commission,
City and County of Honolulu.

Patricia J. Kalapa
August 4, 2009
DATE

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

This matter came on for a contested case hearing before the Planning Commission, City and County of Honolulu (the "Planning Commission"), on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009 and July 8, 2009. Based on the record in this matter, including the evidence presented at the contested case hearing, the credibility of the witnesses testifying at the hearing, and 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, the Planning Commission hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. The Waimanalo Gulch Sanitary Landfill ("WGSL" or the "landfill") is located at 92-460 Farrington Highway, Honouliuli, Ewa, Oahu. See Planning Division Master Application Form included within the Special Use Permit Application filed on December 3, 2008.

EXHIBIT B

2. On November 23, 2006, the Office of Environmental Quality Control, State of Hawaii ("OEQC"), published notice in *The Environmental Notice* that the Environmental Impact Statement ("EIS") Preparation Notice for the expansion of WGSL was available for public review and comment. See Letter from David Tanoue, Director of the Department of Planning and Permitting, to Karin Holma, Chair of the Planning Commission, dated May 1, 2009 ("DPP Recommendation") at 6.

3. On October 13, 2008, the *Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii*, TMKs: (1) 9-2-003: 072 and 073, dated October 2008 ("2008 FEIS"), for the expansion of WGSL, was accepted on behalf of the Mayor by the Department of Planning and Permitting ("DPP"). Id.; Exhibit "7" to the Department of Environmental Services, City and County of Honolulu's July 6, 2009 Memorandum in Opposition to Intervenor's Motion to Dismiss the Application.

4. On October 23, 2008, OEQC published notice of the 2008 FEIS Acceptance in *The Environmental Notice*, in accordance with the Hawaii Environmental Policy Act ("HEPA"), Hawaii Revised Statutes ("HRS") Chapter 343. See DPP Recommendation at 6.

5. On December 3, 2008, the Department of Environmental Services, City and County of Honolulu ("Applicant" or "ENV"), filed a State Special Use Permit Application ("Application"), with DPP pursuant to HRS Section 205-6, and Rules of the Planning Commission, City and County of Honolulu ("RPC"), Subchapter 4, Rules Applicable to State Special Use Permits. See Application. The Application, designated as Special Use Permit Application File No. 2008/SUP-2, is for 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. The Application seeks to expand the current operating portion of the Property, approximately 107.5 acres, by approximately 92.5 acres (the "Project"). See Application at Planning Division Master Application Form and p. 1-2.

6. The Applicant concurrently seeks to withdraw its existing SUP permit for approximately 107.5 acres, Special Use Permit File No. 86/SUP-5, and the conditions imposed therein, if the Application for the new SUP permit is granted. See April 2, 2009 memorandum from Applicant to DPP; Transcript ("Tr.") 7/2/09, 20:4-10; DPP Recommendation at 3, 24.

7. The Applicant has also filed a petition with the Land Use Commission, State of Hawaii, for a district boundary amendment to reclassify the Property from the State Agricultural District to the Urban District, which may be withdrawn if the Application is granted. See Application at p. 2-2, fn.1.

8. The Planning Commission's public hearing to consider ENV's application was scheduled for May 6, 2009. On April 3, 2009, a notice of the hearing of the matter was published in the *Honolulu Star-Bulletin*.

9. On April 16, 2009, Ko Olina Community Association ("KOCA"), Colleen Hanabusa, and Maile Shimabukuro (collectively, "Intervenors") filed a Petition to Intervene in this matter. On April 24, 2009, Applicant filed a Memorandum in Opposition to Intervenors' Petition to Intervene.

10. On May 1, 2009, DPP transmitted its report and recommendation for approval of the Application to the Planning Commission. See DPP Recommendation.

11. On May 1, 2009, the Planning Commission conducted a site visit to the Property and to the H-POWER facility.

12. At the public hearing on May 6, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii, the Planning Commission heard public testimony. The Planning Commission was also scheduled to hear argument regarding Intervenor's Petition to Intervene. At Intervenor's request, however, the Planning Commission continued the public hearing and consideration of Intervenor's Petition to Intervene to May 20, 2009.

13. On May 7, 2009, Todd K. Apo ("Apo") filed a Petition to Intervene in this matter. On May 18, 2009, Applicant filed a Memorandum in Opposition to Apo's Petition to Intervene.

14. On May 19, 2009, Intervenor's filed a Motion to Recuse Commissioner John Kaopua.

15. On May 20, 2009, the public hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. At the continued public hearing, the Planning Commission heard and granted Intervenor's Petition to Intervene. Pursuant to RPC Subchapter 5, the matter was noted as a contested case. The Planning Commission also began hearing argument regarding Apo's Petition to Intervene and continued that matter to June 10, 2009.

16. On June 5, 2009, Applicant filed a Memorandum in Opposition to Intervenor's Motion to Recuse Commissioner John Kaopua.

17. On June 10, 2009, the hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The Planning Commission heard and granted Intervenor's Motion to Recuse Commissioner John Kaopua. The Planning Commission denied Apo's Petition to Intervene on the grounds that it was untimely filed, that Apo's position regarding that Application was substantially the same as the position of

the Intervenor, and that the proceeding will be inefficient and unmanageable if Apo was allowed to intervene. See Findings of Fact, Conclusions of Law, and Order issued on July 27, 2009. Thereafter, the Planning Commission closed the public hearing on the Application.

18. On June 15, 2009, Intervenor filed their List of Witnesses, listing 42 potential witnesses including Apo. Applicant also filed its List of Witnesses, listing six potential witnesses.

19. On June 22, 2009, the contested case hearing began on the Application at Kapolei Hale, 1000 Uluohia Street, Kapolei, Hawaii. The Applicant submitted Exhibits "A1" through "A31," which were accepted into the record by the Planning Commission. See Tr. 6/22/09, 29:2-13. The Applicant presented its first two witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning, and Hari Sharma ("Sharma"), who was qualified as an expert in the field of geotechnical and geo-environmental engineering. Id. at 33:5-8; 234:7-12. Intervenor offered, and the Planning Commission received into the record, Exhibits "B1" and "B4." Id. at 81:6-11; 226:14-15.

20. On June 24, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The examination of Sharma was completed. The Applicant presented its third witness Joseph R. Whelan ("Whelan").

21. On June 29, 2009, Intervenor filed a Motion to Dismiss the Application, contending that the 2008 FEIS did not cover the entire 200.622-acre site and therefore, ENV's Application had to be dismissed.

22. On July 1, 2009, the Planning Commission resumed the contested case hearing on the Application at Kapolei Hale, 1000 Uluohia Street, Kapolei, Hawaii. The examination of

Whelan was completed. The Applicant presented its fourth and fifth witnesses: Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering, and Frank Doyle, Chief of the Division of Refuse, City and County of Honolulu. See Tr. 7/1/09, 93:2-8; 176:4-9. Applicant offered, and the Planning Commission accepted for the record, Exhibit "A32." Id. at 168:16-17.

23. On July 2, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Chambers, Third Floor, 530 South King Street, Honolulu, Hawaii. The Applicant offered no further witnesses and concluded its case-in-chief. See Tr. 7/2/09, 4:15-17. Intervenor began their case-in-chief and presented the following seven witnesses: Abbey Mayer; Josiah Hoochuli; William J. Aila, Jr.; Daniel Banchiu; Cynthia Rezendes; Maeda Timson; and Apo. The Applicant offered, and the Planning Commission received into the record, Exhibits "A33" and "A34." Id. at 32:20-25; 240:7-13. Intervenor offered, and the Planning Commission received into the record, Exhibit "B5." Id. at 185:21-23. Other documents were referenced by the Planning Commission and the parties as Exhibits "B2" through "B3." Intervenor rested their case. Id. at 279:15.

24. On July 6, 2009, Applicants filed a Memorandum in Opposition to Intervenor's Motion to Dismiss the Application.

25. On July 8, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Applicant presented David M. Shideler as a rebuttal witness, who was qualified as an expert in archaeology and historical cultural resources. See Tr. 7/8/09, 11:15-21. Applicant offered, and the Planning Commission received into the record, Exhibits "A35," "A36," and "A37." Id. at 8:25-9:5, 65:14-22, 68:6-13. Intervenor made their witness, Apo,

available for additional questions by Commissioner Beadie Dawson. The examination of Apo was completed.

26. On July 8, 2009, the Planning Commission also heard and denied Intervenor's Motion to Dismiss the Application on the grounds that the Planning Commission does not have jurisdiction to consider the sufficiency of the 2008 FEIS and that Intervenor Hanabusa had previously filed the appropriate matter contesting the sufficiency in State circuit court. The Planning Commission scheduled decision-making for the Application on July 31, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Id. at 110:15-25; 111:1-5, 20-21.

EXHIBITS AND WITNESSES

27. The Applicant offered, and the Planning Commission received into the record, Exhibits "A1" to "A37," without objection.

28. Intervenor's offered, and the Planning Commission received into the record, Exhibits "B1," "B4," and "B5," without objection.

29. The Applicant called the following witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning; Hari Sharma, who was qualified as an expert in the field of geotechnical and geo-environmental engineering; Joseph R. Whelan; Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering; Frank Doyle; and David M. Shideler, who was qualified as an expert in the field of archaeology and historical cultural resources.

30. Dr. Sharma prepared a report entitled "Engineering Report for Landfill Expansion; Waimanalo Gulch Sanitary Landfill," dated March 12, 2008, which is Exhibit "A29." See Tr. 6/22/09, 235:4-25.

31. Intervenor called the following witnesses: Abbey Mayer; Josiah Hoohuli; William Aila, Jr.; Daniel Banchiu; Cynthia Rezentes; Maeda Timson; and Todd Apo. Intervenor did not move to qualify any of these persons as expert witnesses.

32. Intervenor Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro did not testify and did not submit any written testimony during the contested case hearing.

33. Mr. Doyle testified that the Applicant will begin in 2010 efforts to identify and develop a new landfill site to supplement WGSL. See Tr. 7/1/09, 251:18-24.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site. *Id.* at 260:16-22; 261:3-22.

POST-HEARING SUBMISSIONS BY THE PARTIES

35. On July 17, 2009, Applicant filed the Department of Environmental Services, City and County of Honolulu's Post-Hearing Brief and the Department of Environmental Services, City and County of Honolulu's Proposed Findings of Fact, Conclusions of Law, and Decision and Order; and Certificate of Service.

36. On July 17, 2009, Intervenor filed the Post Hearing Brief of Intervenor, Certificate of Service and Intervenor's Ko Olina Community Association, Colleen Hanabusa and Maile Shimabukuro Proposed Findings of Fact and Conclusions of law and Decision and Order, and Certificate of Service.

37. On July 29, 2009, Applicant filed that certain Department of Environmental Services, City and County of Honolulu's (1) Response to Post-Hearing Brief of Intervenor and (2) Exceptions to Intervenor's Proposed Findings of Fact, Conclusions of Law, and Decision and Order; Declaration of Gary Y. Takeuchi; Exhibits "1" – "3"; and Certificate of Service.

38. On July 29, 2009, Intervenor filed that certain Reply Brief of Intervenor, Certificate of Service.

PROPOSAL FOR SPECIAL USE PERMIT

39. A special use permit is being sought for the continued use of the Property as a landfill. See Application at 1-1. The 107.5-acre portion of the Property currently used as a landfill is proposed to be expanded by the remaining approximately 92.5 acres. Id. Of the approximately 92.5 acres in the expansion area, approximately 37 acres will be utilized for landfill cells. See Exhibit "A1" at 3-1, 4-4, 11-1. In addition, the expansion area will 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, and a landfill gas-to-energy system and other related features. Id.; see also Application at Part I.

40. The SUP will cover the entire Property. See Application at Part I.

DESCRIPTION OF THE PROPERTY

41. The Property is owned by the City and County of Honolulu ("City") and operated by Waste Management of Hawaii, Inc ("Waste Management"). See Tr. 7/1/09, 179:4-8.

42. The state land use district designation for the Property is Agricultural District. See DPP Recommendation at 1; Application at Planning Division Master Application Form.

43. The existing City zoning district for the Property is AG-2, General Agricultural District. See Application at Planning Division Master Application Form; DPP Recommendation at 1.

44. The Ewa Development Plan recognizes the existing landfill. See Exhibit "A5"; DPP Recommendation at 1.

45. Existing uses of the property are landfill and open space. See DPP Recommendation at 2.

46. Elevations at the Property range from a low of 70 feet above mean sea level (msl) to 940 feet (msl) in the northern portion. Except for areas of fill, the steep-sloped valley contains dryland grasses and an abundance of rock outcrops. See DPP Recommendation at 8.

47. The area is fairly dry. According to an on-site rain gauge, located at the weather station, the average rainfall at WGSJ is approximately 15 inches per year. See Application at 2-27; DPP Recommendation at 9.

48. The soil found at the Property consists primarily of Rock Land (rRK) with small amounts of Stony Steep Land (rSY). See Application at 2-30.

49. According to the Agricultural Lands of Importance ("ALISH") to the State of Hawaii system, the Property is not classified as Prime Agricultural Land, Unique Agricultural Land or Important Agricultural Lands. See Figure 8-2 of Exhibit "A1."

50. The University of Hawaii Land Study Bureau overall master productivity rating for the Property is "E," which indicates very poor crop productivity potential. See Application at 2-31.

51. The Federal Emergency Management Agency, Flood Insurance Rate Map, identifies the landfill property as within "Zone D," an area in which flood hazards are undetermined, but possible. See Figure 5-9 of Exhibit "A1."

52. The Property is not located within the Special Management Area. See Figure 8-3 of Exhibit "A1."

SURROUNDING USES

53. Surrounding uses to the Property include the Hawaiian Electric Company Kahe Power Plant to the west, single-family dwellings and the Ko Olina Resort to the south, and vacant lands to the north and east. See Figure 7-3 of Exhibit "A1."

54. Farrington Highway is located south of the Property. Id.

55. The region east of Property comprises the Makaiwa Hills development, which is scheduled for development. See Tr. 6/22/09, 64:6-8; Figure 7-3 of Exhibit "A1." WGS� has been in operation since 1989. See Tr. 7/1/09, 179:9-10. In 2008, the Makaiwa Hills parcel was rezoned for single family, mixed and apartment use by Ordinance 8-26, Bill 47 (2008). See Exhibit "A36."

56. The Makaiwa Hills developer's intention, according to its Final EIS dated October-2007 (the "Makaiwa Hills EIS"), is to proceed with development from makai (south) proceeding in a mauka (north) direction, as well as proceeding from east to west. See Tr. 6/22/09, 167:6-25. The Makaiwa Hills EIS indicates that construction of the western portion of its development closest to WGS� will not proceed until 2015. Id. at 167:25-168; Exhibit "A37" at p. 4-60.

57. WGS� plans to initiate closure of the existing landfill cells in the area nearest Makaiwa Hills' proposed residences prior to 2015. See Tr. 6/22/09, 168:1-8; 188:17-25, 189:1-14. In particular, cell E2 and portions of cells E1, E3, and several other MSW cells (labeled Closure Sequence "A" in Exhibit "A12") are anticipated to be covered, capped, and closed by 2012. See Exhibit "A12"; Tr. 6/24/09, 91:7-92:1.

58. There is a ridgeline between Makaiwa Hills and WGS�. See Tr. 6/22/09, 191:12-18. The area of Makaiwa Hills nearest to WGS�'s landfill cells in the proposed

expansion area is identified as open space on the Makaiwa Hills property and will not be developed. Id. at 191:4-8; Exhibit "A11."

59. The current landfill access road proceeds up to the scalehouse, past the ash cells, veers due west to the west side of the Property, and travels up the western side of the Property and into the proposed expansion area. See Tr. 6/24/09, 89:5-16. This course takes the road away from the eastern boundary of the Property and away from Makaiwa Hills. Id.

60. Waste Management documents and responds to complaints received about the operations of WGSL. Id. at 100:9-101:3. Waste Management received and investigated six complaints in 2007, three complaints in 2008, and three complaints to date in 2009. Id. at 101:4-7.

61. Daniel Banchiu, general manager of JW Marriott, Ihilani ("Marriott"), testified for Intervenor at the July 2, 2009 hearing on the Application. See Tr. 7/2/09, 99:1-13. The Marriott operates a hotel at the Ko Olina resort. Id. at 99:21-24. He testified that he is aware of view and odor complaints from his guests but that the Marriott has not notified Waste Management about any complaints. Id. at 100:14-101:12; 110:1-10. He also testified that guests complained of views of a smokestack in the distance. On cross-examination, however, he admitted that he has never been to the landfill and that the smokestack could be located at some other facility--perhaps a facility with a smokestack. Id. at 106:1-25; 107:1-12. WGSL does not have a smokestack, but the Kahe Power Plant, which is adjacent to the Property, does. See Exhibit "A1" at p. 5-93.

STABILITY, CONTROLLED BLASTING AND BERMS

62. Pursuant to federal and state regulations governing landfills, a seismic hazard evaluation was performed to determine seismic slope stability of the landfill. See Tr. 6/22/09 at

238:21-239:5. Consistent with accepted industry practice, the Project was analyzed for a design earthquake of magnitude 7.0, with an acceleration of 0.25 G. Id. at 240:1-9.

63. Under the Resource Conservation and Recovery Act ("RCRA"), Subtitle D, Seismic Design Guidance document, the acceptable displacement of landfills due to a seismic event is 12 inches. Id. at 248:25-249:13. The seismic deformation analysis of the design for the expanded landfill showed that seismic deformations were six inches or less, meeting the seismic stability criteria. Id. at 249:14-23.

64. The use of controlled blasting at the Property, which is very common in many landfill excavations, will not affect the stability of WGSJ because the imparted energy of controlled blasting is so small and significantly less than 0.1 G. Id. at 240:12-23; 250:3-16; 253:3-7. Monitoring probes installed by the Hawaiian Electric Company near the western Property boundary to measure vibrations from controlled blasting efforts at the currently permitted landfill did not detect any measurable readings. See Tr. 6/22/09, 252:1-15.

65. In order to alleviate community concerns about controlled blasting, a blast test program will be implemented at the Property, wherein distance, velocity, and frequencies transmitted by controlled blasting will be monitored. Id. at 251:7-16; 252:16-253:2. According to Dr. Hari Sharma, if the controlled blasting affects the landfill or any of the structures nearby, adjustments will be made. Id. at 251:7-16. There are no concerns regarding stability during the blast test program itself. Id. at 251:17-19.

66. A slope stability study was also prepared for the proposed Project. Id. at 244:2-4; 250:15-17. The proposed design meets the required factors of safety of 1.3 and 1.5 for short-term and long-term conditions, respectively. Id. at 245:18-246:11.

67. The impact of accumulated leachate on stability was also studied. According to Dr. Sharma and Richard Von Pein, even under extreme circumstances of leachate accumulation, using worst case scenarios that have never been experienced, the landfill would remain stable. See Tr. 6/24/09, 61:2-24; Tr. 7/1/09, 170:16-25, 171:1-15.

68. Whenever new cells are designed, a seismic deformation analysis and slope stability analysis must be performed to determine how the design impacts the existing cells. See Tr. 6/24/09, 9:19-23.

69. Berms are included in the design for several reasons, including for diversion of the surface water to make sure leachate is contained within the landfill and to create airspace while ensuring stability. See Tr. 6/22/09, 236:18-237:2; Tr. 6/24/09, 24:13-20; Tr. 7/1/09, 100:12-15.

70. A small Ash Toe Berm was a part of the original design for WGSL. See Tr. 7/1/09, 142:12-15; 142:21-143:3. The Ash Toe Berm was expanded in 2005 to address a small area where the factor of safety was less than 1.5. Id. at 142:17-20.

71. The El and West Berms were a part of the 2002 design for the 14.9-acre landfill expansion. Id. at 168:19-170:1; Exhibit "A32."

72. The West Berm will be extended further into the canyon under the proposed design for the expansion. See Tr. 6/22/09, 237:3-23; Tr. 6/24/09, 36:25-38:11.

STORM WATER AND LEACHATE

73. Leachate is rain water that falls on open landfill cells. See Tr. 7/1/09, 14:11. The bottom of the individual landfill cell is contoured to direct leachate to a low point ("sump") and has a multi-layered composite liner system. Id. at 15:4-13; 101:2-25; 102:1-4; Exhibit "A1" at Figure 4-3. Within the sump is a permanent riser that contains a pump, which pumps the

leachate in a hard pipe up to the surface, where it is then pumped into a tank for disposal at a wastewater treatment facility. Id. at 15:4-13, 17:12-15. The wastewater treatment facility accepts the leachate for treatment after determining it meets the requirements of the wastewater treatment facility's own permits and would not violate the Clean Water Act. Id. at 18:6-15; Tr. 6/22/09, 144:7-19, 147:2-5. Each of the leachate sumps is equipped with an automated pump that activates at a preset level below the compliance level. Id. at 105: 9-12. There is an alarm that lets Waste Management know if the pump is no longer functioning. Id. at 105:13-16. In addition, Waste Management physically monitors the sumps. Id. at 105:13-16; 16:23-17:2.

74. Drainage for the Property is intended to capture storm water and divert it around the landfill if it originates off site (surface run-on) or into the existing sedimentation basin if it originates onsite (surface run-off). Id. at 13:16-25; Tr. 6/22/09, 119:17-25. The sedimentation basin is designed to allow storm water to settle so that dissolved solids that come off the landfill can settle out in that basin. See Tr. 7/1/09, 77:21-24. The water is eventually discharged to the ocean subject to State of Hawaii Department of Health ("DOH") permitting requirements under the national pollution discharge elimination system ("NPDES"). Id. at 77:19-78:6. A third-party company takes samples to ensure compliance with certain discharge limits. Id. at 78:7-79:5. In addition, DOH inspects Waste Management's ditches and slopes. Id. at 78:7-15.

75. Leachate does not come into contact with storm water. Id. at 76:21-23. The storm water or surface water system is separate from the leachate collection system. Id. at 76:25-77: 8; 97:15-98:8.

76. Groundwater in the area of the Property is monitored for leachate contamination. Id. at 98:12-17.

GAS COLLECTION AND CONTROL SYSTEM AND EPA NOTICE OF VIOLATION

77. On April 4, 2006, the Environmental Protection Agency ("EPA") issued a Notice of Violation to WGL, which included the late installation of a landfill gas collection and control system (the "GCCS") and alleged violations of reporting requirements. Id. at 19:3-8; Appendix B, Volume II of III, of Exhibit "A1." Both issues were resolved by August 2005. Tr. 7/1/09, 19:3-8. There are currently 40 gas wells at the Property. Id. at 22:18-25.

78. The GCCS collects landfill gases that are formed from the decomposition of the waste material. The gas is burned off at the onsite flare pursuant to a DOH-issued air quality permit. Id. at 23:6-11.

79. In installing the GCCS, elevated temperatures above the EPA's standard operating temperature of 131° Fahrenheit were discovered at WGL. See Tr. 7/1/09, 112:7-10; 113:25-114:2. Waste Management has submitted a demonstration to the EPA establishing that WGL can be safely operated at higher than the standard operating temperatures. Id. at 112:11-15.

80. The EPA Notice of Violation is pending resolution of two outstanding issues that evolved from the Notice of Violation: the temperature issue and a monetary settlement. Id. at 106:2-13.

81. The EPA has not issued any notice of violation for the elevated temperatures at WGL. See Tr. 6/24/09, 21:18-22:1. There is no evidence that there has ever been, or that there is currently, a landfill fire at WGL. See Tr. 7/1/09, 108:8-14. If there was combustion at WGL, Waste Management would implement its contingency plan, including turning off the gas wells in the area of the fire, thereby depriving the combustion area of needed oxygen, which is standard procedure for handling landfill oxidation events. Id. at 107:8-25; 108:1-7.

TRAFFIC

82. A traffic impact report ("TIR") was prepared for the Project. See Tr. 6/22/09, 51:6-17; Appendix I of Exhibit "A1." The TIR analyzes the amount of existing traffic transiting Farrington Highway on both the eastbound and westbound approaches, as well as the volume of traffic entering and coming out of the Property. Id.

83. The TIR concluded that even with the expansion of the landfill, the volume of traffic would not be expected to increase dramatically. Traffic going in and out of the landfill is less than approximately one percent of the total volume of traffic in the region. See Tr. 6/22/09, 51:18-24.

ARCHAEOLOGICAL AND CULTURAL RESOURCES

84. An *Archaeological Inventory Survey, Waimānalo Gulch Landfill Expansion*, 2008 ("AIS") and a *Cultural Impact Assessment (Draft), Waimānalo Gulch Landfill Expansion*, 2008 ("CIA") were prepared for the Property. See Appendices G and H of Exhibit "A1," respectively.

85. One historic property, State Inventory of Historic Properties ("SIHP") # 50-80-12-6903, was identified by the study. See AIS (Appendix G of Exhibit "A1") at 45. SIHP# 50-80-12-6903 consists of three large upright boulders potentially utilized as trail or boundary markers. Id.

86. Applicant proposes to address SIHP# 50-80-12-6903 within a mitigation/preservation plan to be reviewed and accepted by the State Historic Preservation Division, Department of Land and Natural Resources, State of Hawaii ("SHPD"). See Tr. 6/22/09, 49:21-50:5; Exhibit "A3." Specifically, Applicant has proposed to temporarily relocate the upright stones to Battery Arizona, and return the upright stones as close as possible to their current locations after the landfill has been closed. See Tr. 6/22/09 at 49:5-20; Exhibit "A3."

87. SHPD has reviewed Applicant's proposed mitigation and determined that there is no effect to historic properties, as stated in a letter from Nancy McMahon, Deputy State Historic Preservation Officer of SHPD, to David Tanoue, Director of DPP, dated April 2, 2009. See Tr. 6/22/09, 49-20-51:1; Exhibit "A4."

88. No native Hawaiian customary and traditional rights or practices at the Property were identified. See CIA (Appendix "H" of Exhibit "A1") at 79.

PURPOSE AND NEED

89. According to Joseph Whelan, as of March 16, 2009, there was approximately 12 month of landfill airspace capacity remaining in the municipal solid waste ("MSW") portion of the current SUP area, and approximately 24 months of landfill airspace capacity remaining in the ash portion of the current SUP area. See Tr. 6/24/09, 81:22-82:6; 83:1-14.

90. On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Property as the site for the City's landfill. See Exhibit "A20."

91. The proposed expansion of the landfill within the Property is needed because WGS� is a critical part of the City's overall integrated solid waste management efforts. See Tr. 7/1/09, 181:4-8.

92. Continued availability of WGS� is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped. Id. at 181:9-18; 182:2-4, 10-17; 197:2-22.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. See Application at 2-6.

94. WGSJ is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER. Id. at 181:20-183:4.

95. WGSJ is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. Id. at 178:10-18; 181: 7-18. The ISWMP is required by State law and approved by DOH after public comments. Id. at 182:18-183: 25. One theme of the ISWMP is to minimize landfill disposal. Id. at 184:1-3.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Id. at 179:11-23. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGSJ. Id. at 179:16-17. These amounts fluctuate based on such things as recycling and the economy. Id. at 179:18-19. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGSJ each year. Id. at 179:24-25; 180:1-4.

97. Other items that cannot be recycled or burned at H-POWER are deposited at WGSJ, such as 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. Id. at 180:10-21.

98. The WGSJ Oversight Advisory Committee consists of citizens primarily from the leeward communities, who meet periodically to discuss concerns with Waste Management and the Applicant regarding WGSJ operations. Id. at 184:9-18.

99. The Community Benefits Advisory Committee advises the City on the spending of money for grants and improvements throughout the Waianae Coast. In fiscal year 2008, there

was approximately \$2 million appropriated in the City budget, and for fiscal year 2009, approximately \$2.5 million, for this program. Id. at 184:19-25, 185:1-7.

100. The City is actively reducing waste volume that is directed to the landfill. The H-POWER plant is expanding and its capacity is expected to increase by an additional 300,000 tons of MSW per year by late 2011 or early 2012. Id. at 185:8-25. The expanded H-POWER facility will be able to burn items that the current facility cannot and which are therefore currently being sent to the landfill. Id. at 186: 17-25, 187: 1-12. The City is in the process of completing the full implementation of its island-wide, curbside recycling program by May 2010. Id. at 186:7-13. The City has a program of community recycling bins to encourage schools to recycle cardboard, as well as plastic bottles and cans. Id. at 187:13-18. The City is currently in the process of procuring a new green waste recycling facility that will accept food waste and sewage sludge. Id. at 188:22-25. The City has a facility at the Sand Island Wastewater Treatment Plant that turns bio-solids into fertilizer pellets, with the goal of reusing 100 percent of the material for such uses as golf course fertilizer. Id. at 189:5-18. The City is also requesting technology demonstration proposals to explore alternate technologies. Id. at 194:11-25. ENV has looked at these technologies, like plasma arc and gasification, and to date they are not ready in the size the City needs, and are only demonstration technologies. Id. at 192:8-25; 193:1-25; 194:1-10.

101. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSF. Id. at 201:9-16. Id. at 195: 4-8.

102. In order to ensure there will be no cessation of waste disposal at the Property, construction of a new cell in the expansion area to be used when the capacity of the currently permitted cells is exhausted would need to begin on or around November 1, 2009, due to the amount of time that it takes for cell construction, liner placement, forming, etc. See Tr. 6/24/09, 84:8-20. Before construction can begin, an operating permit is required from DOH. Because the DOH operating permit can only be processed after a SUP or boundary amendment is granted, and given the time it takes to process the operating permit, the SUP or boundary amendment must be granted in August or September of 2009 so that construction can be timely started. See Tr. 6/24/09, 99:11-23.

STATE AND COUNTY LAND USE LAW AND REGULATIONS

103. The Project complies with the guidelines as established by the Planning Commission. See Tr. 6/22/09, 68:3-13; Application at 2-1 through 2-28.

104. The Project is consistent with various provisions of the Hawaii State Plan. See Tr. 6/22/09, 69:4-6; Application at 2-2 through 2-8.

105. The Project is consistent with the energy functional plan. GSL is a generator of naturally occurring methane and other landfill gases, and these gases are planned to be recovered by the City for use in the generation of electricity through a landfill gas-to-energy system. See Exhibit "A1" at p. 8-9; Tr. 6/22/09, 70:1-12.

106. The Project is consistent with the recreational functional plan. The Property will be reclaimed for other purposes that include outdoor recreation; for example, Kakaako Waterfront Park once served as a landfill in Honolulu. See Exhibit "A1" at p. 8-10; Tr. 6/22/09, 70:13-71:2.

107. The Project is consistent with the City's general plan. WGS� is an important public facility that will provide a necessary facility to meet future population needs and accommodate growth in the region; WGS�'s eventual closure will allow the Property to be reclaimed for other public uses; and WGS� is needed in the event of a natural disaster. See Tr. 6/22/09, 71:8-25; 72:1-25; Exhibit "A1" at pp. 8-25 through 8-28.

108. The Project is consistent with the Ewa Development Plan because the facilities map contained therein designates the landfill with the appropriate symbol. See Tr. 6/22/09, 73:9-74:11; Exhibit "A1" at pp. 8-28 through 8-29.

109. The Project is consistent with City zoning because a landfill is considered a "public use" under the Land Use Ordinance, and "public uses and structures" are deemed permitted uses in every City zoning district, without the need for a permit. See Application at 2-28 through 2-29; Tr. 6/22/09, 75:5-22.

110. The parties stipulated that Commissioner Rodney Kim can participate via telephone in decision making for this contested case.

PROPOSED FINDINGS OF FACT OR CONDITIONS

Any proposed findings of fact or conditions submitted by the Applicant or Intervenors that are not expressly ruled upon by the Planning Commission by adoption herein, or rejected by clearly contrary findings of fact, are hereby denied and rejected.

LABELING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law. Should any of the following Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as Findings of Fact.

CONCLUSIONS OF LAW

The Planning Commission hereby concludes as follows:

1. The Planning Commission has jurisdiction to hold public hearings and make recommendations on all proposals to adopt or amend the general plan, development plans and zoning ordinances, and to approve special use permits for unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified in accordance with the RPC. Section 6-1506(b), Revised Charter of the City and County of Honolulu 1973 (2000 Edition); Hawaii Revised Statutes Section 205-6(a).

2. Hawaii Revised Statutes Section 91-10(5) provides that:

[T]he 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 Applicant has the burden of proof to show by a preponderance of the evidence that the Application meets the provisions of Section 2-45 of the RPC.

3. The Applicant seeks a new State Special Use Permit. Chapter 2, Subchapter 4 of the RPC sets forth the rules applicable to State Special Use Permits. Section 2-45 of the RPC provides as follows:

Test to be applied. Certain "unusual and reasonable" uses within agricultural districts other than those for which the district is classified may be permitted. The following guidelines are established as guidelines in determining an "unusual and reasonable" use:

(a) Such use shall not be contrary to the objectives sought to be accomplished by the state land use law and regulations.

(b) That the desired use would not adversely affect the surrounding property.

(c) Such use would not unreasonably burden public agencies to provide public roads and streets, sewer, water, drainage and school improvements, and police and fire protection.

(d) Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established.

(e) That the land upon which the proposed use is sought is unsuited for uses permitted in the district.

4. Based on the findings set forth above, the Planning Commission concludes that the Applicant's request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection. The Planning Commission further concludes that the same unusual conditions, trends, and needs that existed at the time the original Special Use Permit was granted continue to exist and that the land on which WGSL is located continues to be unsuited for agricultural purposes.

5. The Planning Commission concludes that the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.

DECISION AND ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the Decision and Order of the Planning Commission to DENY Intervenor's Motion to Dismiss Application. It is the further Decision and Order of the Planning Commission to APPROVE Applicant's Special Use Permit Application File No. 2008/SUP-2 ("2008/SUP-2"), for a new SUP for the existing and proposed expansion of WGSL, located at Tax Map Key Nos. 9-2-3: Parcels 72 and 73, totaling approximately 200.622 acres, until capacity as allowed by the State Department of Health is reached, subject to the following conditions:

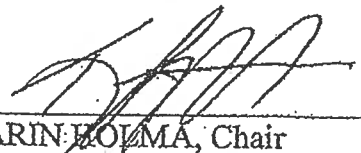
1. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 and shall determine whether modification or revocation of 2008/SUP-2 is appropriate at that time.
2. The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.
3. The Applicant shall provide, without any prior notice, annual reports to the Planning 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 on June 1 of each year subsequent to the date of this Decision and Order.

4. Closure Sequence "A" for the existing landfill cells at WGSL as shown on Exhibit "A12" must be completed, and final cover applied, by December 31, 2012.
5. WGSL shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24-hours a day.
6. The Applicant shall coordinate construction of the landfill cells in the expansion area and operation of WGSL with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.
7. The operations of the WGSL under 2008/SUP-2 shall be in compliance with the requirements of Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.
8. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.
9. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.
10. The Applicant shall notify the Planning Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2.

IT IS ALSO the Decision and Order of the Planning Commission to APPROVE the withdrawal of Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect and that all conditions previously placed on the Property under Special Use Permit File No. 86/SUP-5 shall be null and void.

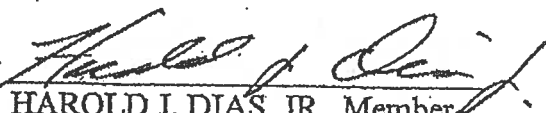
Dated at Honolulu, Hawaii, this 4th day of August, 2009.

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

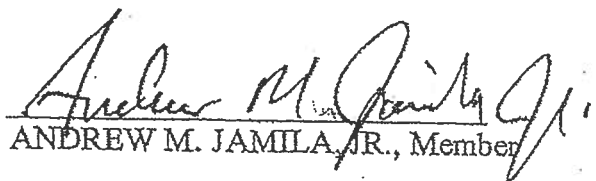
By 
KARIN HOLMA, Chair

By 
RODNEY KIM, Vice Chair

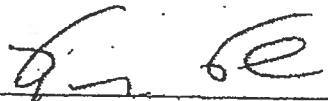
By _____
BEADIE K. DAWSON, Member


By 
HAROLD J. DIAS, JR., Member

By _____
VICKI GAYNOR, Member

By 
ANDREW M. JAMILA, JR., Member

By (RECUSED)
JOHN S. KAOPUA, III, Member

By 
KERRY M. KOMATSUBARA, Member

By 
JAMES C. PACOPAC, Member

FILE NOS. 2008/SUP-2 (RY) AND 86/SUP-5, IN THE MATTER OF THE APPLICATION
OF DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF
HONOLULU - FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND
ORDER

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
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

) FILE NO. 2008/SUP-2 (RY) AND 86/SUP-5

) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER was served upon the following by certified mail, return
receipt requested, postage prepaid, on August 4, 2009 .

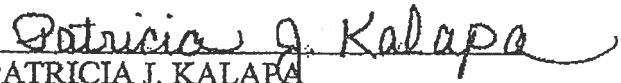
COLLEEN HANABUSA
220 South King Street, Suite 1230
Honolulu, Hawaii 96813

Attorney for Intervenors
KO OLINA COMMUNITY ASSOCIATION,
COLLEEN HANABUSA, AND MAILE SHIMABUKURO

GARY Y. TAKEUCHI, ESQ.
JESSE K. SOUKI, ESQ.
Deputies Corporation Counsel
Department of the Corporation Counsel
530 South King Street
Honolulu, Hawai'i 96813

Attorneys for Applicant
DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU

DATED: Honolulu, Hawai'i, August 4, 2009


PATRICIA J. KALAPA
Secretary-Reporter
Planning Commission

Meeting of the Planning Commission
Transcripts
July 31, 2009

The Planning Commission held a meeting on Friday, July 31, 2009, at 3:05 p.m. at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Chair Karin Holma presided.

PRESENT: Karin Holma, Chair
Rodney Kim, Vice Chair (by telephone conference call)
Beadie K. Dawson
Harold J. Dias, Jr.
Vicki Gaynor
Andrew M. Jamila, Jr.
Kerry Komatsubara
James Pacopac

RECUSED: John S. Kaopua III

COMMISSION STAFF: Patty Kalapa, Secretary-Reporter

CORPORATION COUNSEL: Winston Wong

CONTESTED CASE HEARING

EWA—STATE SPECIAL USE PERMIT APPLICATION—2008/SUP-2(RY)
AND WITHDRAWAL OF STATE SPECIAL USE PERMIT NO. 86/SUP-5(RY)
WAIMANALO GULCH SANITARY LANDFILL

LAND USE COMMISSION
STATE OF HAWAII
2009 AUG 11 P 1:55

HOLMA: I'd like to call the meeting to order. We have State Special Use Permit Application 2008/SUP-2 and withdrawal of the State Special Use Permit number 86/SUP-5, Waimanalo Gulch Sanitary Landfill. First, I want to confirm for the record that the evidentiary portion of the contested case was closed on July 8, 2009. We are here for decision making today. I want to thank all of the commissioners for all of their hard work and attending. We thank the parties for their submittals which we've all read.

What we have passed out at this point is a draft Findings of Fact or a discussion draft Findings of Fact, Conclusions of Law and Decision and Order. We are currently waiting for Commissioner Kim who is on the mainland. It's being faxed to him at this point. We're waiting for him to receive that. I ask the Commissioners to take a look at this draft.

HOLMA: It got there. We should wait ten more minutes, five more minutes? He hung up on me. He was going to pick it up. Hi Rodney, can you hear us?

KIM: Hello.

GAYNOR: Rodney.

KIM: I'm here.

GAYNOR: Can you hear us?

KIM: I can hear you.

HOLMA: Rodney, can you talk again?

GAYNOR: Can you hear us now Rodney?

KIM: Okay. Loud and clear.

HOLMA: Did you receive the fax? Rodney, did you get the fax?

KIM: I've got the fax in front of me.

HOLMA: In order to start discussion on this, we need to have a motion, so I'm going to ask for a motion to approve the applicant's Special Use Permit application file SUP 2008-2 for the new SUP permit with conditions and based on the Findings of Fact and Conclusions of Law that are stated in this draft Decision and Order.

KOMATSUBARA: I'd like to make a motion to approve the circulated draft of the Findings of Fact, Conclusions of Law and Decision and Order. I suggest that maybe the efficient way of doing this is I'll make the motion, if someone can second the motion, and then if we can enter into a discussion, then I'll explain the general terms and how it was put together in the analysis and speak in favor of the motion.

DIAS: Second.

HOLMA: Okay. Discussion.

KOMATSUBARA: This was done at 5:30 this morning. What I basically did after going through all of these days of hearings, it was my feeling that we should approve the application for a new Special Use Permit. So what I did is I followed, in essence, the draft submitted by the applicant, the Department of Environmental Services. However, I've made certain changes. I'd like to describe the proposal that is contained herein. It's really, in essence, similar to the draft put together by ENV, but not identical to the draft put together by ENV.

The best way is, perhaps, if we can go to page 24. This is the meat and the guts of the proposed Findings of Fact, Conclusions of Law and Decision and Order. The first thing that this thing does is it denies intervenors' motion to dismiss the application for the new SUP. It approves the applicant's Special Use Permit application file number 2008/SUP-2 with certain changes and conditions. The first thing that should be noted is that the new SUP covers the entire 200.622 acres which is sought by the applicant. That really is the existing 107.5 and the approximately 92.5 expansion. The term or the length of the new SUP shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of "X" number of years.

DAWSON: It's an open date, Kerry?

KOMATSUBARA: That's correct...until it reaches its capacity. I'll explain why. This is, in essence, what is being asked for by the applicant. However, the draft that I put together is different. It has different conditions, different terms that they have to comply with in order to maintain this SUP. The most important one, I think, is that the applicant must, on or before November 1, 2009...I'm sorry on or before 2010 begin to

identify and develop one or more new landfill sites that shall either replace or supplement the Waimanalo Gulch Sanitary Landfill. In addition to that, the applicant's effort to identify such sites shall be performed with reasonable diligence. But it must start to commence the process on or before November 1, 2010.

The Honolulu City Council is encouraged to work cooperatively with the applicant's effort. Upon the selection of a new site or sites, the applicant shall notify this Commission of its new selection. This Commission is obligated, at that point in time, to hold a public hearing to re-evaluate the SUP that would be granted hereunder and to determine whether a modification or a revocation of the SUP granted hereunder is appropriate at that time.

The applicant shall continue with its efforts to use alternate technologies to manage and reduce Honolulu's landfill waste. An annual report shall be provided to this Commission regarding the applicant's efforts to diligently move forward to find a new site, and also regarding the applicant's effort to find alternative technologies. That is a major change from what is included in ENV's proposal. ENV's proposal does not have this condition, nor is there any obligation for them to give us annual reports regarding the status of their effort to find a new site.

I also added in here that the operation of the landfill shall be in compliance with Section 21-5.680 of the Revised Ordinance of Honolulu to the extent that it's applicable and to all applicable rules and regulations of the Department of Health. I also added in here into this proposed draft that the enforcement of these conditions shall be pursuant to the powers granted to this Commission under its rules, including the issuance of an order to show cause why the new SUP granted hereunder should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein this Decision and Order.

In addition, this new SUP, upon its taking effect, the existing SUP shall be withdrawn. In essence, that's the description of what this proposal is. It's similar to what ENV has proposed, but it's not identical. Now I'd like to explain how I came up with this draft and what the thought process behind it is.

First of all, for me, I believe that the applicant has met its burden of proof to show by preponderance of the evidence that the application for a new SUP meets the requirements of Section 2-45 of our Rules. Section 2-45 allows unusual and reasonable uses within the agricultural district, and they list five guidelines to make this determination. I believe the applicant has met these guidelines, and the granting of a Special Use Permit is appropriate and in compliance with the law.

I think perhaps a very common sense approach to this whole thing...I found and I believe that they've demonstrated that we need a landfill. I think it's pretty obvious; we need a landfill on this island for us to move forward. This community...it would not be in the community's best interest if we were to close this landfill before we find another landfill. The existing SUP which terminates on November 1 of this year, in my opinion, the answer is not to terminate that or to allow that existing SUP to lapse until we have a new SUP in place. Although there's been discussion regarding new technologies, shipping, etc., I think it's pretty clear that these solutions will not be on board by November 1 of this year. It seemed to be that it's not only reasonable, but it's necessary for us to continue with the operations of the Waimanalo Gulch Sanitary Landfill.

The intervenors have complained about the fairness of having Oahu's only landfill being located in their back yards since the mid 1980s. They alleged that they have been misled many times that the gulch would be closed, and they point to the numerous times when the expiration dates of the previous SUPs were extended. To me, clearly simply having a specified end date certain on the previous SUPs has not resulted in the closure of the Waimanalo Gulch. We have been down this road many times. I

think it's been extended three or four times. In my opinion, simply putting on a new closure date to this new SUP will not lead to the closure of the Waimanalo Gulch Sanitary Landfill. I believe that the focus should not be on picking a date. The focus should be on how do we get the City to select a new site because you're not going to close this landfill until you find another site. I don't think it's in the interest of our community not to have a landfill. That is the problem. I don't know if there is going to be a totally workable solution, but how do you get the City to select a new site? That's the...before they used to say \$64,000 and I guess that's not worth much now, but that's the big question here.

I went through the rules of our Commission and our responsibilities. First of all, I think it's very clear that it's not our Commission's responsibility to select a new site for the landfill. Really what we're doing in this process is merely to, in essence, do a land use process evaluation of a permit. Now, surely we can through the granting or denial of a permit add conditions so on and so forth, but we do not have the power to, for example, impose a fine or levy sanctions if the conditions are not met. The only power we really have is the power to revoke under our rules. But then we come back to the same question. If our only power is to revoke, how meaningful is it when everyone knows that we still need this landfill because, you know, we're not going to throw the baby out with the bath water. That's the biggest problem.

What I've tried to do in drafting this proposal is to try to change the focus, so rather than picking a date certain like it was done before, you know, you can pick a date fifteen years out and in the fourteenth year people start reporting and focusing upon whether you're going to close this landfill. If you don't have a new landfill site ready, then you just extend it another five years. That's what happened in the past.

So what this proposal does is, it says look, you can keep it open until your full, until you've reached the capacity, but you have an obligation starting from next year to start looking for a new site. Now whether you take it seriously or not, that's up to you because we have the power to call you in, and you have the obligation now to report every year on what you're doing to find a new landfill site whether it be a replacement site or supplemental site or both. We have the right to hold a hearing at any time we feel that you are not...the applicant is not in good faith moving forward with reasonable diligence to find a new site.

This, in essence, is our attempt to keep the applicant true to its representation in the hearing that it will begin in 2010 its effort to identify and develop a supplemental landfill site on Oahu. The problem still remains how to enforce this condition, how to enforce this promise. This is my good faith effort as to how to answer the question. I don't know if there's ever going to be a simple answer, but I think going down the old path of just putting a date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further. I can understand why people feel that they have been deceived because this keeps on being extended. I personally don't want to go down that road. I'd rather not say it's a certain date only to know that when we reach that date we're going to extend it further until we find the new site. I'd rather focus on an effort to find a new site and have the applicant come in every year and explain to us where you are in your effort to find a new site. That's what this proposal does.

DAWSON: I want to thank Kerry for the work that he has put into this proposal on his own without any encouragement from anywhere else. This is a difficult decision and I'm very, very grateful to you. I think that what you have proposed could be a great solution, the beginning of a solution, but I think that there are some refinements that need to be put in there. First of all...and this is addressed to our Commission. We have

ADJOURNMENT

The meeting adjourned at 4:25 p.m.

I certify that the foregoing is a true and correct transcription of the proceedings, prepared to the best of my ability, of the hearing held on July 31, 2009.

Patricia J. Kalapa
PATRICIA J. KALAPA, Secretary-Reporter
August 5, 2009
Date

1 view and make argument to you. It's entirely
2 appropriate.

3 MR. MAYER: I would just like to add that
4 all of the information I provided in my testimony was
5 cited into the record below.

6 And as my attorney said, I did not expand
7 the factual basis or attempt to provide any new
8 testimony or set of facts for your consideration, only
9 argument as to the question of the appropriateness of
10 the record and the decision before you.

11 CHAIRMAN PILTZ: Commissioner Wong, do you
12 have a comment?

13 COMMISSIONER WONG: I'd like to make a
14 motion at the right time.

15 CHAIRMAN PILTZ: Okay. I'm waiting for that
16 comment.

17 COMMISSIONER WONG: Okay.

18 CHAIRMAN PILTZ: Please do.

19 COMMISSIONER WONG: Mr. Chairman, I'd like
20 to move that the special use permit application before
21 us be granted with a number, a number of conditions
22 such as that all of the conditions that were set forth
23 in the '86 SUP be incorporated.

24 That is to say, for example, conditions
25 dealing with blasting, with hours of operation,

1 building a berm -- and I believe there are 19 of them,
2 that we ultimately ended up with 19; subject also to
3 the condition that solid waste be allowed at the
4 Waimanalo Gulch but only up to July 31, 2012.

5 Let me comment momentarily. I think the
6 record indicates that the third burner would be built
7 by around the end of 2011 but fully operational by
8 July 31st, 2012.

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

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

23 Those reports shall also include what
24 funding arrangements are being considered by the city
25 council and the City Administration to fulfill

1 whatever position they plan to report on.

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

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

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

20 COMMISSIONER TEVES: Mr. Chairman, I second
21 the motion.

22 CHAIRMAN PILTZ: We have a motion on the
23 floor by Commissioner Wong seconded by Commissioner
24 Teves. Discussion? Commissioner Lezy.

25 COMMISSIONER LEZY: Thank you, Chair. With

1 the people on the Leeward Coast, nevertheless I stand
2 by the motion and ask the support of my fellow
3 Commissioners. Thank you.

4 CHAIRMAN PILTZ: Thank you, Commissioner
5 Wong. Any other comments? Seeing none, then will the
6 executive officer call the roll.

7 MR. DAVIDSON: Thank you, Chair. It's a
8 motion to approve SPO9-403 with all of the conditions
9 recommended by Commissioner Wong, the exact verbiage
10 of which will be taken from the transcript for
11 purposes of the Order. So I won't try to summarize
12 them here.

13 Commissioner Wong?

14 COMMISSIONER WONG: Yes.

15 MR. DAVIDSON: Commissioner Teves?

16 COMMISSIONER TEVES: Yes.

17 MR. DAVIDSON: Commissioner Contrades?

18 COMMISSIONER CONTRADES: Yes.

19 MR. DAVIDSON: Commissioner Judge?

20 COMMISSIONER JUDGE: No.

21 MR. DAVIDSON: Commissioner Chock?

22 COMMISSIONER CHOCK: No.

23 MR. DAVIDSON: Commissioner Kanuha?

24 COMMISSIONER KANUHA: Yes.

25 MR. DAVIDSON: Commissioner Lezy?



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Application Of The	)	DOCKET NO. SP09-403
)	
DEPARTMENT OF ENVIRONMENTAL	)	ORDER ADOPTING THE CITY
SERVICES, CITY AND COUNTY OF	)	AND COUNTY OF HONOLULU
HONOLULU	)	PLANNING COMMISSION'S
	)	FINDINGS OF FACT,
For A New Special Use Permit To	)	CONCLUSIONS OF LAW, AND
Supersede Existing Special Use Permit To	)	DECISION AND ORDER WITH
Allow A 92.5-Acre Expansion And Time	)	MODIFICATIONS
Extension For Waimānalo Gulch Sanitary)	
Landfill, Waimānalo Gulch, O'ahu,)	
Hawai'i, Tax Map Key: 9-2-03: 72 And 73)	
_____)	

ORDER ADOPTING THE CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER WITH
MODIFICATIONS

On July 31, 2009, the City and County of Honolulu Planning Commission ("Planning Commission") met at the City Council Committee Meeting Room, Second Floor, in Honolulu, Hawai'i, to consider a new special use permit application ("Application") filed by the Department of Environmental Services, City and County of Honolulu ("Applicant"), to supersede the existing special use permit to allow a 92.5-acre expansion and time extension for the

existing Waimānalo Gulch Sanitary Landfill ("WGSL") located at Waimānalo Gulch, O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72 and 73 ("Property").

After due deliberation and consideration of the record in this matter, the Planning Commission recommended approval of the Application (County Special Use Permit File No. 2008/SUP-2), subject to ten conditions, and further recommended approval of the withdrawal of County Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect, and that all conditions previously placed on the Property under County Special Use Permit File No. 86/SUP-5 shall be null and void.

On August 11, 2009, the Land Use Commission ("LUC") received the decision and a portion of the record of the Planning Commission's proceedings on the Application.

On August 20, 2009, the LUC received the remaining portion of the record.

On September 10, 2009, the Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro ("Intervenors") filed a Motion To Intervene.¹

¹ At the September 24, 2009 meeting the LUC recognized Ms. Hanabusa, Ms. Shimabukuro and the Ko Olina Community Association as intervenors in the LUC's proceeding based upon their intervenor status before the Planning Commission and therefore denied the Motion to Intervene as moot.

On September 17, 2009, the Applicant filed a Memorandum In Opposition To Intervenor Ko Olina Community Association, Colleen Hanabusa, And Maile Shimabukuro's Motion To Intervene.

On September 21, 2009, Intervenor filed a Motion To Deny Petition.

On September 23, 2009, the Applicant filed a Memorandum In Opposition To Intervenor Ko Olina Community Association, Colleen Hanabusa And Maile Shimabukuro's Motion To Deny Petition.

On September 24, 2009, the LUC conducted a meeting on the Application in the Kaua'i Meeting Room, Sheraton Waikiki Hotel, in Honolulu, Hawai'i. Gary Y. Takeuchi, Esq., and Jesse K. Souki, Esq., appeared on behalf of the Applicant. Colleen Hanabusa, Esq.; Ken Williams; and Maile Shimabukuro were present on behalf of the Intervenor. Bryan C. Yee, Esq., and Abbey Mayer were also present on behalf of the State Office of Planning, and Don Kitaoka, Esq., and Robert Bannister were present on behalf of the Department of Planning and Permitting.² At the meeting, both the Applicant and Intervenor provided

² Pursuant to section 92-3, HRS, the LUC heard public testimony from Fred Dodge; William Aila, Jr.; City Council Chair Todd Apo; Mel Kahele; Abbey Mayer; and Robert Bannister. The LUC also received written testimony from Ka'eo Gouveia; Nobuko Maria Mori; Ali Mahmoodi; Laura Kay Rand; Mario Beekes; Lorita Nordlum; Paulette Dibibar; Clara Batongbacal; Elizabeth Dunne; Kalena Hew Len; Kamaki Kanahele; Ralph F. Harris; James C. Banigan III; Greg Nichols; Howard Perry, Jr.; and Michael Nelson. At the meeting, the LUC denied Intervenor's Motion To Deny Petition.

oral argument in support of their respective positions on the Application.

Following discussion, a motion was made and seconded to grant 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 additional conditions: municipal solid waste shall be allowed at the WGSF up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGSF after July 31, 2012; the Honolulu City Council through the City Administration shall report to the public every three months on their efforts regarding the continued use of the WGSF, including any funding arrangements that are being considered by the City Council and the City Administration; and 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 WGSF. By a vote of 5 ayes, 3 nays, and 1 absent, the motion carried.

The LUC, upon consideration of the Planning Commission's Findings Of Fact, Conclusions Of Law, And Decision And Order, the oral

-arguments of the parties and the record and files herein, and good cause existing and upon motion duly passed by the LUC,

HEREBY ORDERS that the LUC shall adopt the Planning Commission's Findings Of Fact, Conclusions Of Law, And Decision And Order as its own Findings Of Fact, Conclusions Of Law, And Decision And Order, subject to the following conditions:

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.

2. In accordance with Chapter 11-60.1 "Air Pollution Control," Hawai'i Administrative Rules, the Applicant shall be responsible for ensuring that effective dust control measures during all phases of development, construction, and operation of the landfill expansion are provided to minimize or prevent any visible dust emission from impacting surrounding areas. The Applicant shall develop a dust control management plan that identifies and addresses all activities that have a potential to generate fugitive dust.

3. That the City and County of Honolulu shall indemnify and hold harmless the State of Hawai'i and all of its agencies and/or employees for

any lawsuit or legal action relating to any groundwater contamination and noise and odor pollution relative to the operation of the landfill.

4. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSF. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 (SP09-403) and shall determine whether modification or revocation of 2008/SUP-2 (SP09-403) is appropriate at that time. The Planning Commission shall make a recommendation to the Land Use Commission.

5. The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.

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 WGS�'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.

7. Closure Sequence "A" for the existing landfill cells at WGS� as shown on Exhibit "A12" must be completed, and final cover applied, by December 31, 2012.

8. WGS� shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24 hours a day.

9. The Applicant shall coordinate construction of the landfill cells in the expansion area and operation of WGS� with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.

10. The operations of the WGSJ under 2008/SUP-2 (SP09-403) shall be in compliance with the requirements of Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.

11. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

12. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 (SP09-403) shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 (SP09-403) should not be revoked if the Planning Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.

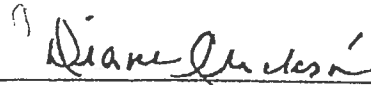
13. The Applicant shall notify the Planning Commission and Land Use Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2 (SP09-403).

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

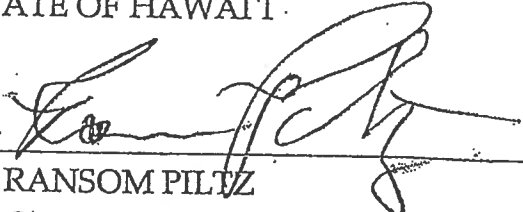
15. The Honolulu City Council through the City Administration shall report to the public every three months on the efforts of the City Council and the City Administration in regard to the continued use of the WGSL, including any funding arrangements that are being considered by the City Council and the 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 WGSL.

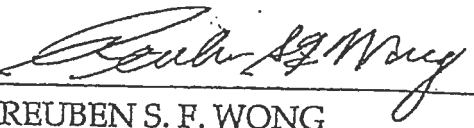
APPROVED AS TO FORM


Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAII

By 
RANSOM PILTZ
Chairperson and Commissioner

By (Excused)
VLADIMIR PAUL DEVENS
Vice-Chairperson and Commissioner

By 
REUBEN S. F. WONG
Vice-Chairperson and Commissioner

By (Nay)
KYLE CHOCK
Commissioner

By Thomas Contrades
THOMAS CONTRADES
Commissioner

By (Nay)
LISA M. JUDGE
Commissioner

By Duane Kanuha
DUANE KANUHA
Commissioner

By (Nay)
NORMAND LEZY
Commissioner

Filed and effective on:

October 22, 2009

Certified by:

By Nicholas W. Teves, Jr.
NICHOLAS W. TEVES, JR.
Commissioner

Orlando Davidsion
ORLANDO DAVIDSION
Executive Officer



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In The Matter Of The Application Of The	)	DOCKET NO. SP09-403
)	
DEPARTMENT OF ENVIRONMENTAL	)	ORDER ADOPTING THE CITY
SERVICES, CITY AND COUNTY OF	)	AND COUNTY OF HONOLULU
HONOLULU	)	PLANNING COMMISSION'S
	)	FINDINGS OF FACT,
For A New Special Use Permit To	)	CONCLUSIONS OF LAW, AND
Supersede Existing Special Use Permit To	)	DECISION AND ORDER WITH
Allow A 92.5-Acre Expansion And Time	)	MODIFICATIONS
Extension For Waimānalo Gulch Sanitary)	
Landfill, Waimānalo Gulch, O'ahu,)	
Hawai'i, Tax Map Key: 9-2-03: 72 And 73)	
_____)	

ORDER ADOPTING THE CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER WITH
MODIFICATIONS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order Adopting the City and County of Honolulu Planning Commission's Finding of Fact, Conclusions of Law and Decision and Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

DEL. Abbey Seth Mayer, Director
 Office of Planning
 P. O. Box 2359
 Honolulu, Hawaii 96804-2359

Docket No. SP09-403 Department of Environmental Services, City and County of Honolulu
Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact,
Conclusions of Law, and Decision and Order With Modifications

EL

Bryan Yee, Esq.
Deputy Attorney General
Hale Auhau, Third Floor
425 Queen Street
Honolulu, Hawaii 96813

REGULAR MAIL David Tanoue, Director
Department of Planning and Permitting
City and County of Honolulu
650 South King Street
Honolulu, Hawaii 96813


REGULAR MAIL Carrie Okinaga, Esq.
Corporation Counsel
City & County of Honolulu
530 South King Street
Honolulu, Hawaii 96813

CERT. Gary Takeuchi, Esq.
Jesse Souki, Esq.
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, HI 96813

CERT. Department of Environmental Services
City & County of Honolulu
1000 Uluohia Street, 3rd Floor
Kapolei, Hawaii 96707

CERT. COLLEEN HANABUSA, Esq.
220 So. King St., Suite 1230
Honolulu, Hawaii 96813

Dated: October 22, 2009, Honolulu, Hawaii.


Orlando Davidson, Executive Officer



BEFORE THE LAND USE COMMISSION


OF THE STATE OF HAWAII

In The Matter Of The Application Of The	)	DOCKET NO. SP09-403
)	
DEPARTMENT OF ENVIRONMENTAL	)	ORDER ADOPTING THE CITY
SERVICES, CITY AND COUNTY OF	)	AND COUNTY OF HONOLULU
HONOLULU	)	PLANNING COMMISSION'S
	)	FINDINGS OF FACT,
For A New Special Use Permit To	)	CONCLUSIONS OF LAW, AND
Supersede Existing Special Use Permit To	)	DECISION AND ORDER WITH
Allow A 92.5-Acre Expansion And Time	)	MODIFICATIONS
Extension For Waimānalo Gulch Sanitary)	
Landfill, Waimānalo Gulch, O'ahu,)	
Hawai'i, Tax Map Key: 9-2-03: 72 And 73)	
_____)	

ORDER ADOPTING THE CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER WITH
MODIFICATIONS

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawaii.

October 22 2009 by


Executive Officer

Orlando Davidson, Executive Officer

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8007 • FAX: (808) 527-8743

PETER B. CARLISLE
MAYOR



'12 MAY 30 A11:37

GAYLE PINGREE, Chair
KA'IULANI K. SODARO, Vice-Chair
CORD ANDERSON
BEADIE K. DAWSON
KARIN HOLMA
RODNEY KIM
JAMES C. PACOPAC
ARTHUR B. TOLENTINO
DANIEL S. M. YOUNG

May 29, 2012

Normand R. Lezy, Chair
Land Use Commission
State of Hawaii
P.O. Box 2359
Honolulu, Hawaii 96804

Dear Mr. Lezy:

Re: Ewa – State Special Use Permit File No. 2008/SUP-2
Also referred to as LUC Docket No. SP09-403
Waimanalo Gulch Sanitary Landfill

This letter is in response to your letter dated May 22, 2012, on behalf of the State Land Use Commission ("LUC"), urging the City's Planning Commission ("Planning Commission") to stay its May 25, 2012, proceedings on the Department of Environmental Services, City and County of Honolulu's current Application to Modify the Special Use Permit No. 2008/SUP-2 by Modifying the Land Use Commission's Order Adopting City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009 ("ENV's Current Application"), until the LUC remands the records contained in File No. 2008/SUP-2 to the Planning Commission.

On May 25, 2012, the Planning Commission decided that a six-month stay of its proceedings on ENV's Current Application is warranted pending the LUC's decision after remand from circuit court on the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009 ("Planning Commission's Order"), as directed by the Hawaii Supreme Court in the case of Department of Environmental Services v. Land Use Commission, SCAP-10-0000157, entered May 4, 2012, or a future request to the Planning Commission by any party. There is no necessity to remand the records contained in File No. 2008/SUP-2 so that they may be consolidated with the record in ENV's Current Application. This is because the Planning Commission already made its decision based on the records in File No. 2008/SUP-2 in the form of the Planning Commission's Order and previously transmitted

EXHIBIT F

Normand R. Lezy
May 29, 2012
Page 2

those records including that decision to the LUC on August 10, 2009. There is no request to modify the Planning Commission's Order and it remains unchanged.

For similar reasons, there is no necessity to instruct your staff to forward the records in File No. 2008/SUP-2 from the LUC to the Planning Commission for the purpose of consolidation in the event the Planning Commission stays its proceedings on ENV's Current Application at ENV's request.

As an exception to the stay, the Planning Commission will transmit to you as soon as possible, under separate cover, a copy of the record that relates to ENV's Current Application for the LUC's consideration. In the opinion in the above-mentioned case, the Hawaii Supreme Court noted that the LUC could consider such record in further LUC proceedings consistent with the opinion.

Very truly yours,



GAYLE PINGREE
Chair

GP:li

cc: Dana Viola, Deputy Corporation Counsel
Ian L. Sandison, Esq.
Calvert G. Chipchase, Esq.

12-03497/228153

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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)	
)	
To delete Condition No. 14 of Special Use)	
Permit No. 2008/SUP-2 (also referred to as)	
Land Use Commission Docket No. SP09-403))	
which states as follows:)	
)	
"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.")	
_____)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE **DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S BRIEF IN SUPPORT OF THE LAND USE COMMISSION OF THE STATE OF HAWAII RETAINING JURISDICTION IN DOCKET NO. SP09-403; DECLARATION OF TIMOTHY E. STEINBERGER; EXHIBITS "A – F"** 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:

Mail

Delivery

IAN L. SANDISON
DEAN H. ROBB
TIM LUI-KWAN
Carlsmith Ball LLP
American Savings Bank Tower
1001 Bishop Street, Suite 2200
Honolulu, Hawaii 96813

X

CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

X

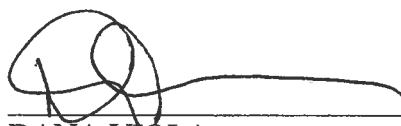
DEPARTMENT OF PLANNING
AND PERMITTING
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813

X

DEPARTMENT OF ENVIRONMENTAL
SERVICES
1000 Uluohia Street, Suite 308
Kapolei, Hawaii 96707

X

DATED: Honolulu, Hawai'i, July 19, 2012.



DANA VIOLA
R. BRIAN BLACK
Deputies Corporation Counsel

09-06880/235862