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LAND USE COMMISSION  
STATE OF HAWAII

2012 JUL 19 P 3:54

Attorney for Intervenor  
COLLEEN HANABUSA

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of the	)	LUC Docket No. SP09-403
	)	(State Special Use Permit File No.
DEPARTMENT OF ENVIRONMENTAL	)	2008/SUP-2)
SERVICES, CITY AND COUNTY OF	)	
HONOLULU	)	INTERVENOR COLLEEN
	)	HANABUSA'S MEMORANDUM
For a New Special Use Permit to	)	RE: PROCEDURAL ISSUES ARISING
Supersede Existing Special Use Permit to	)	FROM CIVIL NO. 09-1-2719-11;
Allow a 92.5-Acre Expansion and Time	)	EXHIBITS "1" and "2"; and
Extension for Waimanalo Gulch Sanitary	)	CERTIFICATE OF SERVICE
Landfill, Waimanalo Gulch, Oahu,	)	
Hawaii, Tax Map Key: 9-2-03: 72 and 73	)	
	)	
	)	

INTERVENOR COLLEEN HANABUSA'S MEMORANDUM RE: PROCEDURAL ISSUES ARISING FROM CIVIL NO. 09-1-2719-11

COMES NOW INTERVENOR COLLEEN HANABUSA,<sup>1</sup> by and through counsel undersigned, and pursuant to the Land Use Commission's Order Granting Applicant's Oral Motion to File Written Briefs, filed on July 12, 2012, does hereby submit her memorandum regarding the procedural issues arising from Civil No. 09-1-2719-11.

<sup>1</sup> Please note that the arguments set forth herein are only those of Intervenor Colleen Hanabusa and do not represent the positions of Intevenors Ko Olina Community Association or Maile Shimabukuro. The positions of those intervenors are being set forth by separate counsel.

A. Background.

The City and County of Honolulu is currently operating an illegal landfill at the Waimanalo Gulch Sanitary Landfill (“WGSL”). Prior to the application for a New Special Use Permit that was sought by the City Department of Environmental Services under Special Use Permit File No. 2008/SUP-2, the closure date that was previously set by the State Land Use Commission, was May 1, 2008, after assurances and commitments were made by then City Director of Environmental Services, Frank Doyle, that the City would close the landfill at WGSL by 2008. The deadline was extended until November 1, 2009 by the Land Use Commission, which was a modification to the extension that was granted by the City Planning Commission to operate the landfill until May 1, 2010. In December of 2008, the City filed an application for a new Special Use Permit, under Special Use Permit File No. 2008/SUP-2, that is currently before this Commission after a remand from the Hawaii Supreme Court. Since the approval process of the Special Use Permit is still pending before this Commission, there is no current effective SUP to operate the City landfill at Waimanalo Gulch. Intervenor Colleen Hanabusa is unaware of the City’s request for an emergency proclamation through the appropriate authorities during the interim, but the City should cease to use the landfill immediately or seek the necessary emergency relief. The State Department of Health should also be made aware of the issue immediately as its requirements are contingent upon an effective SUP.

As this Commission is aware, it issued an Order on October 22, 2009, in which it approved the application for SUP No. 2008/SUP-2 subject to certain conditions, one of those conditions being Condition No. 14 which provided:

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.

As this Commission certainly recalls, that condition was established by this Commission after much discussion by this Commission regarding all of the previous promises by the City Department of Environmental Services to close the landfill at Waimanalo Gulch.

Condition No. 14 of the LUC's Order was the subject of the City Department of Environmental Services' appeal to the Hawaii Supreme Court. In its decision, the Hawaii Supreme Court acknowledged this Commission's statutory authority to impose restrictive conditions on its approval of special use permits. However, in light of this Commission's simple adoption of the Planning Commission's Findings of Fact and Conclusions of Law when it issued the special condition as part of its Order on October 22, 2009, the Hawaii Supreme Court found that Condition No. 14 was inconsistent with the evidence shown in the record and not supported by the evidence. Of great importance is that the Hawaii Supreme Court further found that the LUC's approval of SUP-2 also could not stand because Condition No. 14 was a material condition to the LUC's approval.

What the Hawaii Supreme Court did was remand the matter to the Land Use Commission for further proceedings consistent with the Supreme Court's Opinion. The Supreme Court did not reverse this Commission's Condition No. 14 and say that the Land Use Commission could not impose such a condition. It simply instructed this Commission on remand that it needed to establish a record to adequately support the condition as it was a material condition to the LUC's approval of the Special Use Permit. This "fixing up" of the record through a remand is also essentially what this

Commission's counsel and representative requested during oral arguments before the Hawaii Supreme Court.

B. Procedural Steps for this Commission to Consider Taking.

Various positions are now being taken by the parties in this matter that includes a discussion on what should be done with respect to the proceedings that were stayed by the City Planning Commission in the City's request for a modification of Condition No. 14 of Sup No. 2008/SUP-2. Much time, effort and resources were spent in a contested case hearing before that body. The Hawaii Supreme Court even referenced the proceedings in footnote 16 of its opinion and stated that on remand it "encourage[d] the LUC to consider any new testimony developed before the Planning Commission in that case." The issue, however, is how can that record be properly considered by this Commission. The City Department of Environmental Services' request to treat the proceedings and the record thereto as "public testimony" is completely unacceptable and such a request would essentially make the entire record irrelevant for purposes of findings and conclusions by this Commission. The issue of a remand and a consolidation that was requested in a letter dated May 22, 2012 by then Land Use Commission Chair Normand Lezy to Planning Commission Chair Gayle Pingree raises some further issues. Please see a copy of Chair Lezy's May 22, 2012 correspondence that is attached hereto as Exhibit "A."

First, in reviewing the letter in response from Planning Commission Chair Gayle Pingree, PC Chair Pingree makes pretty clear that the Planning Commission is of the position that it has already ruled on the application in File No. 2008/SUP-2 and it does not intend to do anything further, especially since there has been no request to modify the

Planning Commission's Order. Please see Planning Commission Chair Pingree's letter, dated May 29, 2012, a copy of which is attached hereto as Exhibit "B."

Second, the matter of the SUP File No. 2008/Sup-2, in Civil NO. 09-1-2719-11, and the record thereto, that is currently before this Commission on remand, requires action by this Commission consistent with the Hawaii Supreme Court's decision. The LUC's counsel asked the Hawaii Supreme Court during oral arguments to remand the matter back to this Commission, essentially to establish a proper record for the imposition of Condition No. 14 by this Commission. This Commission can certainly already do that by setting forth its own Findings of Fact and Conclusions of Law to support condition No. 14 based on the record that is before it on remand. Once again, that is essentially what the LUC requested of the Hawaii Supreme Court during oral arguments through this Commission's counsel and representative before the Court. While Intervenor Colleen Hanabusa's position has always been that the landfill at Waimanalo Gulch should close completely and that still is her position (which this Commission can also do on remand), the findings and conclusions that would include coverage of the countless promises that were made by the City to close the landfill in the past, matters that are all included in the record, could adequately justify the imposition once again of Condition No. 14 by this Commission. Had this not been the intent of this Commission, its counsel and representative before the Court would not have been make such a request of the Court during oral arguments to remand the matter. That is the position of the LUC and it should now be finalized on remand with the establishment of its own findings and conclusions to support Condition No. 14 as discussed above.

Next, with respect to the record of the modification of Condition No. 14 that was stayed by the City Planning Commission, that matter should be remanded back to the Planning Commission, pursuant to HAR Section 15-15-96(a), for a decision in that matter once condition No. 14 is imposed again by this Commission after the appropriate findings of fact and conclusions of law and Order is entered by this Commission. At this point, there is nothing to modify until Condition No. 14 is established once again by this Commission. Once that is done, and unless the City is satisfied with a closure date at the end of this month, it can then seek the final decision by the Planning Commission for a modification. If the request for the modification is denied by the Planning Commission, then there is nothing for the Planning Commission to transmit to this Commission. If the request for a modification is granted by the Planning Commission, then the record of that proceeding would be transferred to this Commission pursuant to H.R.S. Section 205-6.

The City is not prejudiced because it is already operating a landfill without the proper approval and Special Use Permit and it needs to either cease operations at Waimanalo Gulch Sanitary Landfill forthwith or seek the immediate emergency relief that is required of it.

Respectfully submitted.

DATED: Honolulu, Hawaii, July 19, 2012.

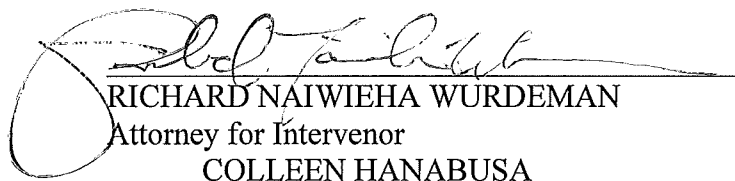
  
RICHARD NAIWIEHA WURDEMAN  
Attorney for Intervenor  
COLLEEN HANABUSA

EXHIBIT "1"

NEIL ABERCROMBIE  
Governor



RECEIVED USE COMMISSION  
STATE OF HAWAII  
BENJAMIN SARUWATARI  
Acting Executive Officer

LAND USE COMMISSION  
Department of Business, Economic Development & Tourism  
State of Hawaii

10 MAY 22 2012 JUL 19 P 3:54  
DEPT OF PLANNING  
AND PERMITTING  
CITY & COUNTY OF HONOLULU

May 22, 2012

Ms. Gayle Pingree, Chair  
Planning Commission  
City and County of Honolulu  
650 South King Street, 7<sup>th</sup> Floor  
Honolulu, Hawaii 96813

Dear Ms. Pingree:

Subject: County Special Use Permit File No. 2008/SUP-2  
LUC Docket No. SP09-403  
Waimanalo Gulch Sanitary Landfill

On behalf of the State Land Use Commission (LUC), I would like to urge the City and County of Honolulu (C&C) Planning Commission (Planning Commission) to stay its May 25, 2012, proceedings on the C&C Department of Environmental Services' (DES) current request to delete Condition No. 14 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 filed October 22, 2009 (LUC's Order), until the LUC remands File No. 2008/SUP-2 to the Planning Commission.

In its decision to remand the LUC's Order to the circuit court, the Hawaii Supreme Court (HSC) acknowledged the DES' current request to delete Condition No. 14 and encouraged "... the LUC to consider any new testimony developed before the Planning Commission in that case." To that end, I believe that the consolidation of the remand and the DES' current request would better serve the public interest and provide for a more economical disposition of both matters.

In the event the Planning Commission stays its proceedings on the DES' request, I have instructed my staff to forward the record on remand to the Planning Commission upon receipt from the circuit court so that it may consolidate the proceedings consistent with the spirit and intent of the HSC's decision.

Sincerely,

  
Norman R. Lezy  
Chair

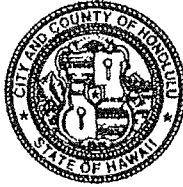


EXHIBIT "2"

PLANNING COMMISSION  
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813  
PHONE: (808) 768-8007 • FAX: (808) 527-6743

PETER B. CARLISLE  
MAYOR



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

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LAND USE COMMISSION  
STATE OF HAWAII

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

Normand R. Lezy  
May 29, 2012  
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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.

BEFORE THE LAND USE COMMISSION  
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Hawaii, Tax Map Key: 9-2-03: 72 and 73 )  
\_\_\_\_\_ )

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STATE OF HAWAII

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following party(ies) by depositing the same in the U.S. Mail, postage prepaid, addressed as follows:

Bryan Yee, Esq.  
Deputy Attorney General  
Department of the Attorney General  
State of Hawaii  
425 Queen Street  
Honolulu, Hawaii 96813

Attorney for State Office of Planning

Calvert G. Chipchase, Esq.  
Christopher T. Goodin, Esq.  
Cades Schutte, LLP  
1000 Bishop Street, Suite 1200  
Honolulu, HI 96813-4212

Attorneys for Intervenors Ko Olina Community Association and Maile Shimabukuro

Dana Viola, Esq  
Department of the Corporation Counsel  
City and County of Honolulu  
530 South King Street, Room 110  
Honolulu, HI 96813

Attorney for Applicant City Department of Environmental Services

Ian L. Sandison, Esq.  
Carlsmith Ball, LLP  
1001 Bishop Street, Suite 2200  
Honolulu, Hawaii 96813

Attorney for Schnitzer Steel Hawaii, Corp.

DATED: Honolulu, Hawaii, July 19, 2012.



RICHARD NAIWIEHA WURDEMAN