

May 23, 2017

**BY HAND DELIVERY**

Land Use Commission  
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LAND USE COMMISSION  
STATE OF HAWAII  
2017 MAY 23 A 11:18

Re: *In re Application of Department of Environmental Services, City and County of Honolulu*, Docket No. SP09-403: Request to Settle the Proposed Form of Order Granting in Part Intervenor Ko Olina Community Association and Maile Shimabukuro's Motion to Deny and Remand

Dear Chair Aczon and Commissioners:

On May 24 and 25, 2017, the Land Use Commission ("LUC") will consider Department of Environmental Services' ("ENV") applications for a state special use permit in consolidated Docket No. SP09-403. In the same hearing, the LUC will also take up KOCA's Motion to Deny and Remand (the "**Motion**") and Alternative Motion to Deny the Application Unless Additional Conditions Are Imposed.

Discussions between KOCA and ENV have made it unnecessary for the LUC to look beyond the Motion. The parties agree that the LUC should remand the matter to the Honolulu Planning Commission ("**Planning Commission**") for further proceedings. The only matter in dispute is how to get there. To that end, Intervenor Ko Olina Community Association and Maile Shimabukuro (together, "**KOCA**") ask the LUC to settle the proposed form of order remanding to Planning Commission.

As explained in the Motion, the Planning Commission (1) violated Honolulu Planning Commission Rule § 2-75 by failing to serve a written proposed form of decision on the parties and allow the parties an opportunity to file exceptions to the proposed decision and present oral argument; (2) violated due process requirements when Planning Commission Chair Dean Hazama refused to recuse himself after repeatedly confirming that he had prejudged the outcome of the proceedings and (3)

violated the LUC's order when the it failed to transmit a single decision on the applications in the consolidated proceeding.<sup>1</sup>

As noted above, the parties agree that the matter should be remanded to the Planning Commission because the Commission failed to serve a written proposed form of decision on the parties, failed to allow the parties an opportunity to file exceptions and present oral argument on the decision and failed to transmit a single decision in the consolidated proceeding as the LUC had expressly ordered. In its papers, ENV explains these points as follows:

ENV does not object to remanding the Applications to the [Planning Commission] . . . .

. . .

For the Applications, the LUC executive director could reasonably determine that the record received from the Planning Commission does not demonstrate compliance with procedural rule § 2-75 and with the LUC's order to provide a single Findings of Fact, Conclusions of Law, and Decision and Order for the consolidated Applications, and that these are deficiencies make the record of the Planning Commission proceeding incomplete.

[I]t would be entirely appropriate for the LUC to remand the Applications to the Planning Commission to enable production of a complete record demonstrating compliance with Planning Commission Rule § 2-75 and a single order that combines the findings of fact, conclusions of law, decision and order from the 2008 and 2011 Applications into single recommended order.

ENV's Response to Motion to Deny and Remand at 2, 4, 5. Consistent with ENV's view that the admitted procedural errors render the record "incomplete," ENV proposed a stipulation under which the LUC would remand the matter without acting to approve, approve with modifications or deny the applications. Enclosed is a copy of the ENV's proposed stipulation.

KOCA disagrees with ENV's proposal to remand without first denying the applications. The Hawai'i Administrative Rules provide that

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<sup>1</sup> For purposes of the present discussion, we may put aside the question whether the Planning Commission Chair should have recused himself after forming and announcing his opinions on the applications before he or any commissioner had received the parties' respective proposed findings of fact, conclusions of law, decision and order.

within forty-five days after receipt of the county planning commission's decision and the complete record of the proceeding before the county planning commission, as determined by the executive office, **the commission shall act to approve, approve with modification or deny the application.**

HAR § 15-15-96(a) (emphasis added). The rules go on to explain that in conjunction with this mandatory "act"—to approve, approve with modification or deny the application, the

commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to the representations made by the petition. Upon determination by the commission, the petition may be remanded to the county planning commission for further proceedings.

*Id.* The power to remand is linked to the power to approve, deny or modify the application. The power to remand does not provide an independent fourth option.

The Planning Commission "record" consists of boxes of paper. We have been informed that the Planning Commission sent all of its boxes of paper to the LUC on May 3, 2017. Since the entire record was sent to the LUC, the record is complete. We cannot pretend otherwise simply because doing so would be a convenient way to get back to the Planning Commission. The Planning Commission sent the LUC everything that the Commission had. Therefore, the record is complete, and the LUC needs to "act"—to approve, approve with modification or deny the applications.

Rather than a failure to transmit the complete record, the Planning Commission's error was a failure to follow the required procedure in reaching and issuing its recommended decision. Everyone agrees that the Planning Commission did not follow the requirements of Rule § 2-75 and did not issue a single decision in the consolidated proceeding. Those are procedural errors, and those procedural errors require denial of the applications.

Denying the applications does not mean the end of them. The current recommended decision will go away, and the applications will go back to the Planning Commission for further proceedings. In those further proceedings, the Commission will reach another recommended decision on the applications. The new recommended decision will come back to the LUC for review and action.

Consistent with the conceded errors and the applicable rules, enclosed is a proposed form of order that grants the Motion in part, denies the applications without prejudice to entry of a new recommended decision by the Planning Commission and remands the matter to the Commission. The order expressly waives the operation Hawai'i Administrative Rule § 15-15-96(b), which would ordinarily preclude the

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LUC from considering the applications again for one year. Under the circumstances, there is good cause to waive the provision pursuant to section 15-15-34(b).

The proposed form of order enables the Planning Commission to address the procedural problems that mar its recommend decision, while at the same time avoiding the risk that the applications would be deemed approved, and facilitates the LUC's future review of a new recommend decision. Accordingly, we respectfully ask that the LUC enter the enclosed order.

Intervenor Colleen Hanabusa concurs with the form of the enclosed order.

Very truly yours,



Calvert G. Chipchase

for

CADES SCHUTTE

A Limited Liability Law Partnership

Enclosures

cc: All parties

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Attorneys for Intervenors

KO OLINA COMMUNITY ASSOCIATION

and MAILE SHIMABUKURO

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

2017 MAY 23 A 11:19  
LAND USE COMMISSION  
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 Waimānalo Gulch  
Sanitary Landfill, Waimānalo Gulch,  
O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72  
And 73

DOCKET NO. SP09-403

PLANNING COMMISSION FILE NO.  
2008/SUP-2

**ORDER GRANTING IN PART  
INTERVENORS KO OLINA  
COMMUNITY ASSOCIATION AND  
MAILE SHIMABUKURO'S  
MOTION TO DENY AND REMAND**

**Hearing:**

**Date:** May 24, 2017

**Time:** 9:00 a.m.

**Place:** Airport Conference Center,  
400 Rodgers Blvd. Suite 700,  
Room #3 (in Hawaiian  
Airlines Terminal Building),  
Honolulu, HI 96819

**ORDER GRANTING IN PART INTERVENORS  
KO OLINA COMMUNITY ASSOCIATION AND MAILE  
SHIMABUKURO'S MOTION TO DENY AND REMAND**

On May 12, 2017, Intervenors Ko Olina Community Association and Maile Shimabukuro (together, “**KOCA**”) filed a Motion to Deny and Remand (the “**Motion**”). The Motion asserted, among other things, (1) that the Honolulu Planning Commission’s Findings of Fact, Conclusion of Law, and Decision and Order dated April 28, 2017 was made in violation of Honolulu Planning Commission Rule § 2-75 and (2) that the Planning Commission failed to “issue and transmit a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order” on Applicant Department of Environmental Services, City and County of Honolulu’s Application filed December 3, 2008 and Application filed June 28, 2011 (together, the “**Applications**”) as the Land Use Commission had directed in its order dated October 8, 2012.

IT IS HEREBY ORDERED that:

1. The Motion is GRANTED IN PART.
2. The Applications in this matter are denied without prejudice to entry of a single, consolidated findings of fact, conclusions of law, and decision and order by the Honolulu Planning Commission on both Applications in accordance with Honolulu Planning Commission Rule § 2-75 (the “**New Decision**”).
3. Consideration by the Land Use Commission of the New Decision on the Applications shall not be precluded by Hawai’i Administrative Rule (“**HAR**”)

§ 15-15-96(b). There is good cause for waiver of HAR § 15-15-96(b) in this instance pursuant to HAR § 15-15-34(b).

4. The Applications and the records in this matter are remanded to the Planning Commission for further proceedings pursuant to HAR § 15-15-96(a).

5. The remaining portion of the Motion concerning recusal of Planning Commission Chair Dean I. Hazama and KOCA's Motion to Deny the Applications Unless Additional Conditions are Imposed are withdrawn by KOCA without prejudice to refiling.

6. This order is without prejudice to any arguments that the parties have raised or may raise regarding the Applications.

DATED: Honolulu, Hawaii, \_\_\_\_\_, 2017.

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Authorized Representative of the  
Land Use Commission

APPROVED AS TO FORM:

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KAMILLA C. K. CHAN  
DANA VIOLA  
Deputy Corporation Counsel  
Attorneys for Applicant  
DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF HONOLULU

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2017 MAY 23 A 11:19  
 LAND USE COMMISSION  
 STATE OF HAWAII

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

BEFORE THE LAND USE COMMISSION  
 STATE OF HAWAII

STATE OF HAWAII

In the Matter of the Application of	)	DOCKET NO. SP09-403
	)	
DEPARTMENT OF ENVIRONMENTAL	)	STIPULATION AND ORDER TO REMAND
SERVICES, CITY AND COUNTY OF	)	COUNTY SPECIAL USE PERMIT FILE
HONOLULU	)	NO. 2008/SUP-2 TO THE CITY AND
	)	COUNTY OF HONOLULU PLANNING
For A New Special Use Permit To	)	COMMISSION; CERTIFICATE OF
Supersede Existing Special Use Permit To	)	SERVICE
Allow A 92.5-Acre Expansion And Time	)	
Extension For Waimanalo Gulch Sani-	)	
tary Landfill, Waimanalo Gulch, O`ahu,	)	
Hawai`i, Tax Map Key: 9-2-03: 72 And 73	)	
	)	
_____	)	
In the Matter of the Application of	)	
	)	
DEPARTMENT OF ENVIRONMENTAL	)	
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:	)	
	)	
<u>"14. Municipal solid waste shall be allowed at</u>	)	

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.” )  
)  
)

**STIPULATION AND ORDER TO REMAND COUNTY  
SPECIAL USE PERMIT FILE NO. 2008/SUP-2 TO THE  
CITY AND COUNTY OF HONOLULU PLANNING COMMISSION**

~~On May 12, 2017, intervenors Ko Olina Community Association and Maile Shimabukuro filed a Motion to Deny and Remand (together, “KOCA”). The motion asserted, among other things, that the Honolulu Planning Commission’s Findings of Fact, Conclusion of Law, and Decision and Order dated April 28, 2017 was made in violation of Honolulu Planning Commission Rules § 2-75. Applicant Department of Environmental Services, City and County of Honolulu, and intervenors Ko Olina Community Association and Maile Shimabukuro, Schnitzer Steel Hawaii Corp., and Colleen Hanabusa~~

~~The undersigned parties now stipulate as follows:~~

1. Pursuant to Hawai’i Administrative Rules § 15-15-96(a), Applicant Department of Environmental Services, City and County of Honolulu’s consolidated Application filed December 3, 2008 and Application filed June 28, 2011 (together, the “Consolidated Applications”) ~~are remanded solely for the limited purpose of allowing the Planning Commission to complete the record of the Consolidated Application proceeding by demonstrating compliance with procedural rule § 2-75 of the Rules of the Planning Commission~~ in this matter are denied without prejudice to entry of a subsequent findings of fact, conclusions of law, and decision and order (the “New Decision”) by the

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~~Honolulu Planning Commission in accordance with Honolulu Planning Commission Rules § 2-75.~~

~~2. Consideration by the Land Use Commission of the New Decision on the Applications shall not be precluded by Hawai'i Administrative Rules ("HAR") § 15-15-96(b). There is good cause for waiver of HAR § 15-15-96(b) in this instance pursuant to HAR § 15-15-34(b).~~

~~3. The Applications and the records in this matter are remanded to the Planning Commission for further proceedings pursuant to HAR § 15-15-96(a).~~

~~4. KOCA's pending motions are withdrawn without prejudice to refiling.~~

~~5. This Stipulation and Order is without prejudice to any arguments that the parties have raised or may raise regarding the Consolidated Applications, including the application or satisfaction of Rule § 2-75.~~

DATED: Honolulu, Hawaii, \_\_\_\_\_, 2017.

Respectfully submitted,

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DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
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ASSOCIATION and  
MAILE SHIMABUKURO

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RICHARD N. WURDEMAN  
Attorney for Intervenor  
COLLEEN HANABUSA

APPROVED AND SO ORDERED:

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Authorized Representative of the  
Land Use Commission